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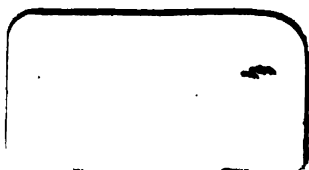
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**D. W. F. McDONALD**

**SOLICITOR**

**VANCOUVER, B.C.**



7663.  
FORMS  
OF  
JUDGMENTS AND ORDERS

IN THE  
HIGH COURT OF JUSTICE  
AND  
COURT OF APPEAL,

*HAVING ESPECIAL REFERENCE TO THE CHANCERY DIVISION,*

WITH  
PRACTICAL NOTES.

BY THE LATE  
HON. SIR H. W. SETON,  
SOMETIME ONE OF THE JUDGES OF THE SUPREME COURT OF CALCUTTA.

THE FIFTH EDITION  
BY  
CECIL C. M. DALE, ESQ.,  
OF LINCOLN'S INN, BARRISTER-AT-LAW,  
AND  
W. CLOWES, ESQ.,  
A REGISTRAR OF THE SUPREME COURT OF JUDICATURE.

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**D. W. F. McDONALD**

SOLICITOR

**VANCOUVER, B.C.**

TO THE

**RIGHT HONOURABLE HARDINGE STANLEY,**

**LORD HALSBURY,**

**LORD HIGH CHANCELLOR OF GREAT BRITAIN,**

THE

**Fifth Edition**

*OF THE FOLLOWING WORK*

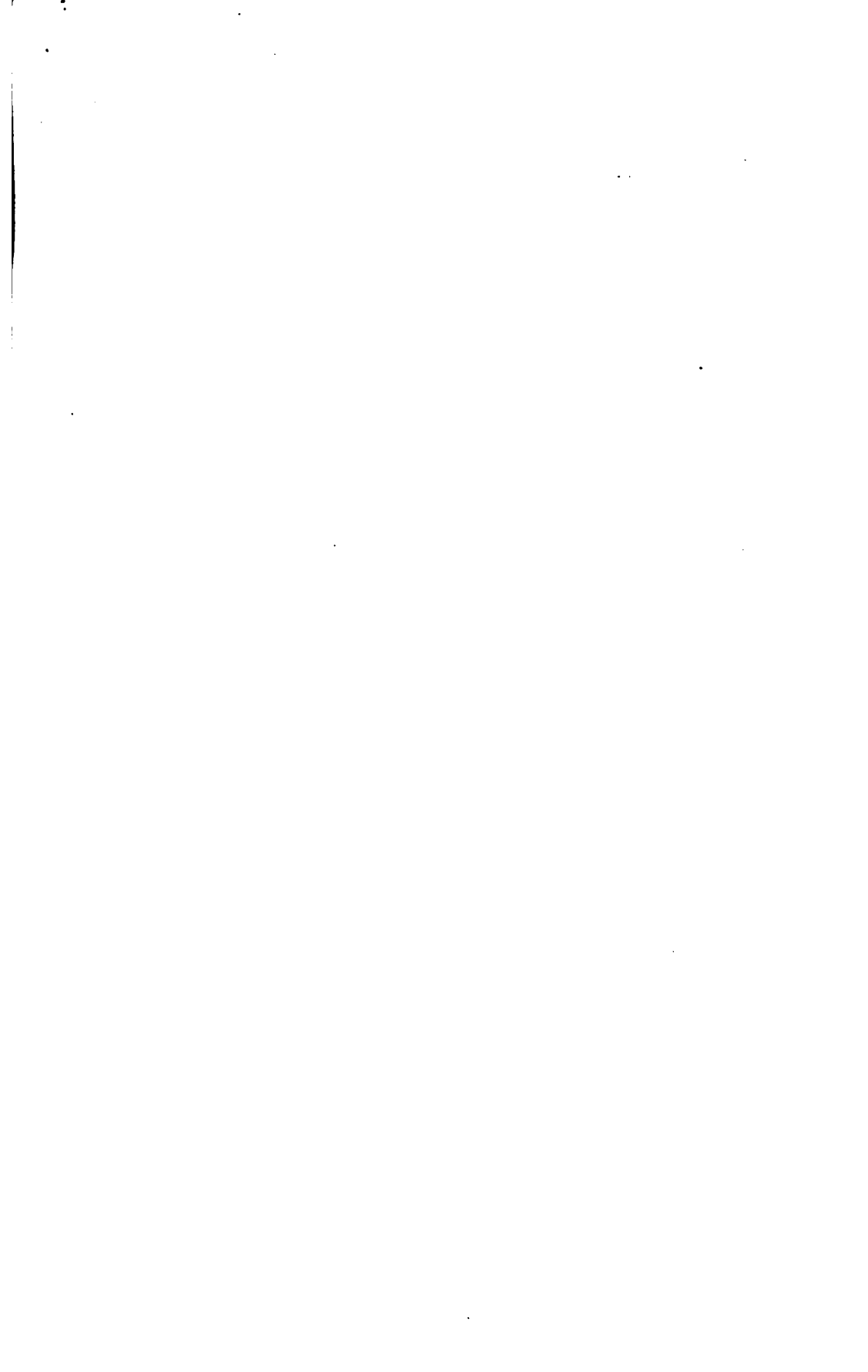
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**MOST RESPECTFULLY INSCRIBED.**

**D. W. F. McDONALD**

SOLICITOR

**VANCOUVER, B.C.**



## PREFACE TO VOL. I.

---

IN commending to the favourable consideration of the profession the first volume of the fifth Edition of "Seton" on Judgments, the Editors venture to think that no apology is needed for the appearance of the work. Since the fourth Edition was published in 1877 and 1879, there has been the usual accession to the stream of legal authority, the Statute Law has undergone important changes, and, in consequence of the numerous and extensive alterations which have been made in the Rules and Orders of the Supreme Court, that Edition has ceased to afford those facilities of reference which are so essential in a work of this kind.

In the present Edition the Editors, while preserving the main divisions of the subject matter with which those who consult "Seton" are familiar, have endeavoured to adopt such an arrangement of the several parts as would be most convenient and intelligible to the profession generally. With this view they have placed the Chapters in an order corresponding, as nearly as may be, with the normal and ordinary course of procedure in an action. This method of arrangement has rendered it practicable to bring together in the present volume those portions of the work which bear more particularly on the practice of the Courts.

The selection of the Forms of Judgments and Orders has received the special attention of the Editors. While they have not consciously omitted from the present Edition any Forms contained in the preceding Edition which appeared to be of permanent value, they have found it necessary to add a large number of Forms of recent date, and, in choosing these, the preference has been accorded to those which were known to be in constant use as models.

In the preparation of the notes, similar principles have been adhered to. Pressure of space has rendered it necessary to exclude



such matter as might fairly be regarded as out of date, but nothing has been omitted without careful consideration, and all the cases reported down to August, 1891, which were deemed to be of practical utility, have been referred to.

In order to make the present Volume more immediately useful, an index has been added which, it is confidently hoped, will merit and receive as much approval as did that of the fourth Edition. And to this index a table of the principal Rules and Orders referred to in the Volume has been prefixed. When the second Volume, which is in a forward state of preparation, is published, a similar index and table for the whole Work will be substituted.

In referring to the series of the authorized Law Reports which was concluded in the year 1890, the cases decided in the Court of Appeal have been distinguished by the use of the abbreviations "Ch. Div.," "Q. B. Div.," and "P. Div.," in lieu of "Ch. D.," "Q. B. D.," and "P. D."; and in referring to the reports of such cases in the current series of the Law Reports, the letters "C. A." have been inserted for the like purpose of distinction.

The revision and preparation of the notes throughout the Work (with the exception of Chapters XII., XIV., and XVI., which relate more particularly to matters under the immediate cognizance of the Registrars), and the collection and selection of the points of law which it was deemed right to notice, have been the special charge of Mr. Dale, while Mr. Clowes has undertaken the duty of collecting and preparing the Forms for the press, and has also prepared the notes in the three Chapters above referred to. Each of the Editors, however, has throughout assisted the other to the utmost of his ability, and they, therefore, accept a joint responsibility.

In several Sections in the Chapter on "Injunctions," the Editors have gladly availed themselves of very useful work done by the late Mr. F. G. A. Williams, and their thanks are due to Mr. Eastwick of the Chancery Bar (who has carefully perused the greater portion of the proof-sheets), and to Mr. Ashton Cross of the Chancery Bar, for many suggestions of great value.

In the collection and preparation of the Forms, Mr. Clowes has derived great assistance from Mr. W. E. Church of the Registrar's Office who has spared no pains in searching the Records of the

Court, in testing the accuracy of the numerous references to them contained in this Volume, and in verifying the precise wording of those Forms which it has been considered useful to insert.

The Editors desire to express their grateful acknowledgments to Mr. Charles Burney, the Chief Clerk, for many important suggestions made after perusing the proofs of Chapters XVIII. and XIX., and to Mr. Henry Skipper Ryland, the Taxing Master, for similar services rendered with respect to Chapter XVII. They are also indebted to Mr. Carrington and Mr. Lavie, Chancery Registrars, for many valuable Forms, notes, and suggestions.

Although the Editors have done their utmost to maintain the high reputation of "Seton," they cannot but be apprehensive, having regard to the extensive character of the Work and the arduous labour which it involves, that faults both of omission and of commission will be found. They trust, however, that that kind consideration which has, on previous occasions, been so freely accorded to the work of former Editors, may now be justly extended to their own.

C. C. M. D.  
W. C.

LINCOLN'S INN,  
*September, 1891.*



## EQUITY JUDGES FROM 1660.

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### HOLDERS OF THE GREAT SEAL.

1660	June 1	L.C.	Edward, Lord Hyde, afterwards Earl of Clarendon.
1667	Aug. 31	L.K.	Sir Orlando Bridgeman, Bart.
1672	Nov. 17	L.C.	Anthony, E. of Shaftesbury.
1673	Nov. 9	L.K.	Sir Heneage Finch, aft. Lord Finch.
1675	Dec. 19	L.C.	The same, aft. E. of Nottingham.
1682	Dec. 20	L.K.	Sir Francis North, aft. Lord Guilford.
1685	Sept. 28	L.C.	George, Lord Jeffreys.
1689	Mar. 4	L. Commrs.	Sir J. Maynard, K.A.S., Anthony Keck, William Rawlinson, S.L.
1690	May 14	L. Commrs.	Sir John Trevor, Sir W. Rawlinson, Sir George Hutchins.
1693	Mar. 23	L.K.	Sir John Somers.
1697	April 22	L.C.	John, Lord Somers.
1700	April 27	L. Commrs.	Sir John Holt, C.J., Sir George Treby, C.J., Sir Edward Ward, C.B.
—	May 21	L.K.	Sir Nathan Wright, K.S.
1705	Oct. 11	L.K.	William Cowper, Q.C.
1707	May 4	L.C.	William, Lord Cowper.
1710	Sept. 26	L. Commrs.	Sir Thomas Trevor, C.J., Tracy, J., Scrope, B. of Exch. Scotland.
—	Oct. 19	L.K.	Sir Simon Harcourt, aft. Lord Harcourt.
1713	April 7	L.C.	S., Lord Harcourt, aft. Visct. Harcourt.
1714	Sept. 21	L.C.	W., Lord Cowper, aft. E. Cowper.
1718	April 18	L. Commrs.	Tracy, J., Pratt, J., Montague, B.
—	May 12	L.C.	Thos., Ld. Parker, aft. E. of Macclesfield.
1725	Jan. 7	L. Commrs.	Sir J. Jekyll, M.R., Sir Jeffery Gilbert, B., Sir Robert Raymond, C.J.
—	June 1	L.C.	Peter, Lord King.
1733	Nov. 29	L.C.	Charles, Lord Talbot.

1737	Feb. 21	L.C.	Philip, Lord, aft. E. of Hardwicke.
1756	Nov. 19	L. Commrs.	Sir J. Willes, C.J., Smythe, B., Wilmot, J.
1757	June 30	L.K.	Sir Robert Henley, aft. Lord Henley.
1761	Jan. 16	L.C.	The same, aft. E. of Northington.
1766	July 30	L.C.	Charles, Lord Camden, aft E. Camden.
1770	Jan. 17	L.C.	Hon. Charles Yorke.
—	Jan. 21	L. Commrs.	Smythe, B., Ashton, J., Hn. H. Bathurst, J.
1771	Jan. 23	L.C.	Hon. H. Lord Apsley, aft. E. Bathurst.
1778	June 3	L.C.	Edward, Lord Thurlow.
1783	April 9	L. Commrs.	Alex., Ld. Loughborough, C.J., Ash- urst, J., Hotham, B.
—	Dec. 23	L.C.	Edward, Lord Thurlow.
1792	June 15	L. Commrs.	Sir J. Eyre, C.B., Ashurst, J., Wil- son, J.
1793	Jan. 28	L.C.	A., Ld. Loughborough, aft. E. of Ross- lyn.
1801	April 14	L.C.	John, Lord Eldon.
1806	Feb. 7	L.C.	Thomas, Lord Erskine.
1807	April 1	L.C.	John, Lord Eldon, aft. E. of Eldon.
1827	May 2	L.C.	John Singleton, Lord Lyndhurst.
1830	Nov. 22	L.C.	Henry, Lord Brougham and Vaux.
1834	Nov. 22	L.C.	John Singleton, Lord Lyndhurst.
1835	April 23	L. Commrs.	Sir C. C. Pepys, M.R., Sir L. Shadwell, V.-C. of E., Bosanquet, J.
1836	Jan. 16	L.C.	Charles Christopher, Lord Cottenham.
1841	Sept. 3	L.C.	John Singleton, Lord Lyndhurst.
1846	July 6	L.C.	C. C., Ld. Cottenham, aft. E. Cottenham.
1850	June 19	L. Commrs.	Henry, Lord Langdale, M.R., Sir L. Shadwell, V.-C. of E., Rolfe, B.
—	July 15	L.C.	Thomas, Lord Truro.
1852	Feb. 27	L.C.	Edward Burtenshaw, Lord St. Leonards.
—	Dec. 28	L.C.	Robert Monsey, Lord Cranworth.
1858	Feb. 26	L.C.	Frederick, Lord Chelmsford.
1859	June 18	L.C.	John, Lord Campbell.
1861	June 26	L.C.	Richard, Lord Westbury.
1865	July 7	L.C.	Robert Monsey, Lord Cranworth.
1866	July 6	L.C.	Frederick, Lord Chelmsford.
1868	Feb. 29	L.C.	Hugh Mac Calmont, Lord Cairns.
—	Dec. 9	L.C.	William Page, Lord Hatherley.
1872	Oct. 15	L.C.	Roundell, Lord Selborne.
1874	Feb. 21	L.C.	Hugh Mac Calmont, Lord Cairns.
1880	April 28	L.C.	Roundell, Lord Selborne.
1885	June 25	L.C.	Hardinge Stanley Giffard, Lord Hals- bury.
1886	Feb. 6.	L.C.	Farrer Herschell, Lord Herschell.
—	Aug. 4	L.C.	LORD HALSBURY.

MASTERS OF THE ROLLS.

1660	June	1	John, Lord Colepepper.
—	Nov.	3	Sir Harbottle Grimston.
1685	Jan.	—	Sir John Churchill.
—	Oct.	20	Sir John Trevor.
1689	Mar.	13	Henry Powle, Esq.
1693	Jan.	13	Sir John Trevor.
1717	July	13	Sir Joseph Jekyll.
1738	Oct.	9	Hon. John Verney.
1741	Nov.	5	William Fortescue, Esq.
1750	Jan.	11	Sir John Strange.
1754	May	29	Sir Thomas Clarke.
1764	Dec.	4	Sir Thomas Sewell.
1784	Mar.	30	Sir Lloyd Kenyon, aft. Lord Kenyon.
1788	June	4	Sir Richard Pepper Arden, aft. Lord Alvanley.
1801	May	27	Sir William Grant.
1818	Jan.	6	Sir Thomas Plumer.
1824	April	5	Robert, Lord Gifford.
1826	Sept.	14	Sir John Singleton Copley, aft. Lord Lyndhurst.
1827	May	3	Sir John Leach.
1834	Sept.	29	Sir Charles Christopher Pepys, aft. E. of Cottenham.
1836	Jan.	19	Henry, Lord Langdale.
1851	Mar.	28	Sir John Romilly, aft. Lord Romilly. (Resigned March, 1873.)
1873	Aug.	29	Sir George Jessel.
1883	April	3	SIR WILLIAM BALIOL BRETT, aft. LORD ESHER.

LORDS JUSTICES OF APPEAL IN CHANCERY.

1851	Oct.	8	Sir J. L. Knight-Bruce. Robert M., Lord Cranworth.
1852	Dec.	28	Sir G. J. Turner.
1866	Oct.	29	Sir Hugh Cairns, aft. Lord Cairns.
1867	July	22	Sir John Rolt. (Resigned Feb. 1868.)
1868	Feb.	8	Sir Charles Jasper Selwyn. (d. 11 Aug., 1869.)
—	Mar.	5	Sir William Page Wood, aft. Lord Hatherley.
—	Dec.	21	Sir George Markham Giffard. (d. 13 July, 1870.)
1870	July	2	Sir William Milbourne James.
—	Aug.	9	Sir George Mellish.

COURT OF APPEAL.

*Ex-Officio Judges.*

THE LORD CHANCELLOR.

THE LORD CHIEF JUSTICE OF ENGLAND.

THE MASTER OF THE ROLLS.

THE PRESIDENT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

COURT OF APPEAL.—*Ordinary Judges (Justices of Appeal).*

1870	July 2	The Lord Justice Sir W. M. James. (d. 7 June, 1881.)
—	Aug. 9	The Lord Justice Sir G. Mellish. (d. 12 June, 1877.)
1875	Oct. 29	Sir Richard Baggallay. (Resigned 30 Nov., 1885.)
1876	Oct. 27	Sir Geo. Wm. Wilshire Bramwell. (Resigned Oct. 1881.)
—	Oct. 27	SIR WILLIAM BALIOL BRETT. (Lord Esher.)
—	Oct. 27	Sir Richard Paul Amphlett. (Resigned Nov. 1877.)
1877	June 28	Sir Henry Cotton. (Resigned Oct. 1890.)
—	Nov. 2	Sir Alfred Henry Thesiger. (d. 20 Oct. 1888.)
1880	Nov. 5	Sir Robert Lush.
1881	Aug. 27	Sir George Jessel. (d. 21 Mar., 1883.)
—	Oct. 27	SIR NATHANIEL LINDLEY.
1882	Jan. 17	Sir John Holker. (Resigned 17 Jan., 1882.)
—	May —	SIR CHARLES SYNGE CHRISTOPHER BOWEN.
—	Oct. —	SIR EDWARD FRY.
1885	Dec. 1	SIR HENRY CHARLES LOPES.
1890	Nov. 14	SIR EDWARD EBENEZER KAY.

## VICE-CHANCELLORS.

1813	April 14	V.-C. of E.	Sir Thomas Plumer.
1818	Jan. 13	V.-C. of E.	Sir John Leach.
1827	May 4	V.-C. of E.	Sir Anthony Hart.
—	Nov. 1	V.-C. of E.	Sir Lancelot Shadwell.
1841	Oct. —	V.-C. K.-B.	Sir James Lewis Knight-Bruce.
—	—	V.-C. W.	Sir James Wigram.
1850	—	V.-C. Ld. C.	Sir Robt. M. Rolfe, aft. Lord Cranworth.
1851	April 7	V.-C. T.	Sir George James Turner.
—	Oct. —	V.-C. K.	Sir Richard Torin Kindersley. (Resigd. Nov. 1866.)
—	—	V.-C. P.	Sir James Parker. (d. 13 Aug., 1852.)
1852	Oct. —	V.-C. S.	Sir John Stuart. (Resigned April 1871.)
1853	Jan. —	V.-C. W.	Sir William Page Wood (aft. Lord Hatherley).
1866	Dec. 1	V.-C. M.	Sir Richard Malins.
1868	Mar. 5	V.-C. G.	Sir George Markham Giffard.
1869	Jan. 1	V.-C. J.	Sir William Milbourn James.
1870	July 4	V.-C. B.	Sir James Bacon. (Resigned 10 Nov. 1886.)
1871	April 19	V.-C. W.	Sir John Wickens. (d. 23 Oct. 1873.)
1873	Nov. 11	V.-C. H.	Sir Charles Hall. (Resigned Oct. 1882.)



JUDGES OF THE CHANCERY DIVISION.

1877	April 24	Sir Edward Fry. (Appointed L. J. Oct. 1882.)
1881	Mar. 30	Sir Edward Ebenezer Kay. (Appointed L. J. Nov. 1890.)
—	Aug. 27	Sir Joseph William Chitty.
1882	Nov. 1	Sir Ford North.
—	Oct. —	Sir John Pearson. (d. 13 May, 1886.)
1886	May 20	Sir James Stirling.
—	Oct. 11	Sir Arthur Kekewich.
1887	Oct. 17	Sir Robert Romer.

TABLE SHOWING THE SUCCESSION OF THE VICE-CHANCELLORS  
AND OF THE JUSTICES OF THE HIGH COURT IN EACH COURT.

Sir Geo. Jessel, M.R.	Sir T. Plumer, V.-C. of E.	Sir J. L. Knight- Bruce.	Sir J. Wigram. Sir G. J. Turner.
Sir J. W. Chitty.	Sir J. Leach, V.-C. of E.	Sir J. Parker. Sir J. Stuart.	Sir W. P. Wood. Sir G. M. Giffard.
	Sir A. Hart, V.-C. of E.	Sir J. Wickens. Sir C. Hall.	Sir W. M. James. Sir J. Bacon.
	Sir L. Shadwell, V.-C. of E.	Sir E. E. Kay. Sir J. Stirling.	Sir E. E. Kay (since Nov. 1886). Sir A. Kekewich.
	Sir R. M. Rolfe.		
	Sir R. T. Kindersley.		
	Sir R. Malins.		
	Sir E. Fry.		
	Sir John Pearson.		
	Sir Ford North.		

JUSTICES OF THE HIGH COURT OF JUSTICE, APPOINTED UNDER  
40 & 41 VICT. c. 9, FOR THE HEARING ONLY OF ACTIONS.

Sir E. Fry.	Sir J. Stirling.
Sir E. E. Kay.	Sir A. Kekewich.
Sir J. Pearson.	Sir R. Romer.
Sir Ford North.	



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# FORMS OF JUDGMENTS AND ORDERS.

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## INTRODUCTION.

### OF JUDGMENTS AND ORDERS GENERALLY.

UNDER the concurrent but, to some extent, conflicting systems of Law and Equity, as administered previously to the Judicature Acts, the forms of judgments at Common Law and of decrees in Chancery differed widely. Judgments at Common Law were uniform, simple, and invariable, and being limited by the form of the writ in the action to the recovery of land, goods, or money, could not conveniently be moulded so as to meet cases in which conditions were to be imposed or various interests dealt with. Decrees in Chancery, from the more comprehensive nature of the relief given, the number of the parties often interested, the various claims asserted, circumstances to be dealt with, and questions to be finally determined, were necessarily more complicated. But notwithstanding the greater pliability of equitable jurisdiction and procedure, the forms of the decrees and orders by which the Court gave effect to its determinations were generally well established and, for the most part, uniform. Upon this ground they have been frequently referred to as regulating the practice and elucidating the law and procedure of the Court.

The great utility of consulting them, and the advantages of adhering to the settled and well understood forms and language of decrees, have been repeatedly adverted to by some of the most eminent Judges in Equity: see *Marriott v. The Anchor Reversionary Co.*, 3 D. F. & J. 177; *Sherwin v. Shakspear*, 5 D. M. & G. 534; *Mills v. Slater*, 8 Ves. 303; *Cricket v. Dolby*, 3 Ves. 13; *Willan v. Willan*, 19 Ves. 593; *Holland v. Prior*, 1 M. & K. 246; *Blackford v. Davis*, 4 Ch. 304, at p. 308; *Rees v. Metropolitan Board of Works*, 14 Ch. D. 372, 374.

Under the Judicature Acts, 1873 and 1875 (36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77), the same jurisdiction to pronounce judgments and orders—in which terms, unless there is anything in the subject or context repugnant thereto, are to be included decrees and rules (36 & 37 Vict. c. 66, s. 100)—in such form as may be required for doing justice

between the parties, and determining all questions raised, has been conferred upon every branch of the Supreme Court; the result being that although, for the more convenient despatch of business, some kinds of litigation are assigned to particular divisions, law and equity are now administered in every branch of the Court. And having regard to the direction that in all cases of conflict or variance between the rules of Equity and of Common Law, the rules of Equity shall prevail—Judicature Act, 1873, s. 25 (11)—it is apprehended that the Forms contained in this work have lost no portion of their value and importance, but have rather become more generally applicable than heretofore.

Since the Judicature Acts, the expression “decree,” having lost its distinctive meaning, has been superseded in use by the more comprehensive word “judgment;” but is still properly and usefully retained in reference to the pre-existing procedure.

The following classes of business have been assigned to the Chancery Division of the High Court by the Judicature Act, 1873, s. 34, viz. :—

(1.) All causes and matters pending in the Court of Chancery at the commencement of the Acts.

(2.) All causes and matters to be commenced after the commencement of the Acts, under any Act of Parliament by which exclusive jurisdiction in respect to such causes, &c., has been given to the Court of Chancery, or to any Judge thereof, except County Court appeals. Under this head are included proceedings under the Lunacy Regulation Acts (the jurisdiction in respect of lunatics of the Lords Justices of Appeal in Chancery at the commencement of the Acts being reserved to them by the Judicature Act, 1875, s. 7); and under the Solicitors Acts, the Trustee and Trustee Relief Acts, the Leases and Sales Acts, the Lands Clauses Acts, and the various Acts more particularly noticed in the course of this work.

(3.) All causes and matters for the administration of the estates of deceased persons; dissolution of partnerships, or taking partnership or other accounts; redemption or foreclosure of mortgages; raising portions or other charges on land; sale and distribution of the proceeds of property subject to any lien or charge; execution of trusts, charitable or private; rectification, or setting aside, or cancelling of deeds or other written instruments; specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; partition and sale of real estates; wardship of infants and the care of infants' estates.

By the Judicature Act, 1873, s. 100, “cause” includes any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceedings by the Crown (which, by s. 34, are assigned to the Queen’s Bench Division).

“Suit” includes action; “action” means a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court, but not a criminal proceeding by the Crown; and “matter” includes every proceeding in the Court not in a cause. An



originating summons under O. LV. 3, has been held to be an action: *In re Fawcitt, Galland v. Burton*, 30 Ch. D. 231; *Gee v. Bell*, 35 Ch. D. 160.

In judgments in Equity, the final working out of the particular question to be determined, or further consideration generally, is frequently adjourned. It is in many cases necessary, before the rights of the parties can be finally determined, to make inquiries as to facts, or parties, to take accounts between the parties, or take the accounts of the estate to be administered, or to get in the personal estate, and sell the real estate. In such cases the usual course has been to direct that the further consideration of the cause be adjourned; and when the inquiries have been answered, or the accounts taken, and the Chief Clerk's certificate showing the result of such inquiries or accounts has been filed, the cause is brought on again. The further hearing was formerly termed the hearing upon further directions, or, after proceedings directed at law, the hearing upon the equity reserved. Now the direction is, "that the further consideration of the action be adjourned." And O. XXXVI. 21, directs that the cause when set down again be set down "for further consideration."

The Judicature Act, 1875, distinguishes between final and interlocutory judgments by providing (s. 12) that where the subject-matter of an appeal is a final order, decree, or judgment, the appeal shall be heard before not less than three Judges of the Court of Appeal, and when it is an interlocutory order, &c., before not less than two Judges of such Court; any doubt as to what judgments, &c., are final, and what interlocutory, to be determined by the Court of Appeal. The effect of this enactment is considered in Chap. XXXVI., "APPEALS."

#### REFERENCE TO RECORD.

By O. LXI. 19, every judgment, order, certificate, petition or document made, presented or used in any cause or matter, shall be distinguished by having plainly written or stamped on the first page thereof the year, the letter, and the number by which the cause or matter is distinguished in the books kept at the Central Office.

The year referred to is the year of the issue of the writ or originating summons; the letter is the initial letter of the first plaintiff's surname; and the number is the consecutive number in the Central Office books for the year.

#### REFERENCE TO REGISTRAR'S BOOKS.

The references lettered A. and B., followed by a numeral, which occur constantly in the following pages after the names of cases referred to, apply to the entries in the Registrars' books A. and B., kept in the Record Department of the Central Office. Judgments and orders are entered according to the names of the plaintiffs or the titles of the matters. The books marked A. contain the entries from A. to K. inclusive, and those marked B. contain the rest. The legal year

began with Michaelmas Term, so that in decrees and orders previous to the change of style in the year 1752, when the year commenced on the 25th of March (see the 24 Geo. 2, c. 23), the date of the year of our Lord in the decree or order does not correspond with that of the book, except in Michaelmas and Hilary Terms; and since the change of style in that year, down to the year 1860, the date does not so correspond, except from the 2nd November to the 31st December. From the 1st January to the 1st November the date of the book is one year earlier than that of the decree or order.

By a letter from the L. C. to the senior Registrar, dated 19th November, 1859, Reg. Lib. 1859, B. 1, his Lordship authorized "a supplementary book to be made, marked 1859, to contain the orders made from the 2nd November up to the 31st December, 1859, and that from and after the 1st January, 1860, all orders dated during the current year should be entered in a book or books to be marked with that year." Since then the dates of the decrees, judgments and orders correspond with the dates of the books in which they are entered.

The Registrars' Books and Court Minute Books, prior to the year 1870, have been transferred to the Public Record Office, Rolls House; those of later date are kept at the Central Office and the Registrars' Offices.

Provision is made by O. xli. 1—3, for the entry of judgments by the proper officer in a book to be kept for the purpose, and that the entry of the judgment shall be dated, and the judgment take effect as on the day on which it is pronounced: see *post*, Chap. XVI., "ENTRY OF JUDGMENT." In the Chancery Division the Registrar is the proper officer. The entry of orders and judgments, final or interlocutory, in the District Registries established by the Judicature Act, 1873, ss. 60—66, is regulated by O. xxxv.

#### GENERAL FORM AND ARRANGEMENT OF JUDGMENTS AND ORDERS.

In point of form, a judgment or order of the Court, as ultimately drawn up, consists usually of two parts: one, preliminary or introductory, and the other containing the actual adjudication or pronouncement of the Court.

The function of the first or preliminary part of the order is to show the circumstances attending the making of it. Accordingly, in this part is stated briefly the form of the application to the Court, who are the parties appearing, and any consents, waivers or undertakings given by them (*a*), and reference is made to the evidence adduced before the Court upon which the order is based: *v. inf.* Chap. XV. These are matters with which the Registrars of the Court are specially conver-

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(*a*) It is, however, to be observed that where a consent, waiver, undertaking, or admission relates only to a particular part of the judgment or order, it should be inserted so as immediately to precede that part, as otherwise it might be considered that the entire judgment or order was grounded on such consent, &c.

sant, and this part of the order (in the preparation of which care and accuracy are of the utmost importance) is under their special supervision.

Judgments and orders in the Chancery Division are, in their second or substantive part, of so varied and often complex a character that no specific rules as to the arrangement of them can be given. There is, however, a generally defined natural order of clauses which is usefully adopted. Thus, any declarations made by the Court as to the rights of the parties naturally precede the accounts and inquiries which are directed in order to ascertain the nature or extent of such rights, or to give effect to them, and these again are followed by consequential directions or specific adjudications *inter partes*, as for the recovery of money or land, delivery of property, directing the performance of or abstention from any act, any sale, conveyance or other dealing with property, or the lodgment in Court or payment out of funds, and taxation and payment of costs. Where accounts or inquiries are directed, the order concludes by making provision for the further consideration by the Court of any part of the subject-matter which may, on the result of such accounts or inquiries, require such consideration.

Formerly the decree contained statements of the pleadings; anciently they were interwoven with the directions; more recently the entire statement was placed first, and the ordering part afterwards. Several general orders have been issued, with the view to shorten the recitals in decrees and orders: see Sand. 236, 568. And at the present time the practice of reciting in judgments or orders any facts proved in the evidence has altogether fallen into disuse as unnecessary, except in cases of contempt of Court, or in a limited class of circumstances in which it may be thought expedient.

Judgments and orders are drawn up without regard to punctuation, the separate clauses being indicated by the use of capital letters (*b*), and it must be understood that the punctuation in the forms given in this work has no official significance, but is introduced merely for the assistance of the reader.

As the names of the parties to an action or other proceeding sufficiently appear in the title of the judgment or order, it is usual in the body of the order to refer to them simply as plaintiff, defendant, or otherwise, as the case may be, without naming them; but where the order directs payment by one party to another of any sum of money, or the performance of any act which may be enforced by attachment, it is essential to insert the names both of the party to perform the act, and, in cases of payment of money, of the party to receive payment.

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(*b*) The advantage of this practice is, that it necessitates careful wording of the clauses, and tends to prevent ambiguity and mistake, or the possibility of the order being tampered with. If punctuation were permitted, a looser style of drafting would probably prevail, and though the duties of the Registrars might be simplified, their utility would be diminished.

In their preliminary stage, judgments or orders (or rather the second or substantive part of them) are ordinarily drawn up in "minutes," *i. e.*, in a compendious form, eschewing details, and indicating the nature of the directions given by the Court. These minutes are subsequently expanded, under the supervision of the Registrar (*v. inf.* Chap. XV.), into the complete order.

In the ensuing pages, the material contents of judgments and orders are given sometimes in minute form, and sometimes in the completer form. The difference between the two species of forms will, however, be readily understood on reference to the forms given in Chap. XII., and a comparison of them with other forms throughout the work in which the mandatory part of the order begins with the word "Let."

All orders dealing with funds in Court which are to be acted on by the Paymaster are printed with a Schedule exhibiting the several transactions he is to carry out. The specimen forms of directions which are commonly inserted in "Lodgment and Payment Schedules," given in Chap. XVI., afford an illustration of the requirements of that which is technically designated a "money" order.

## CHAPTER I.

## INSTITUTION OF PROCEEDINGS.

By the Jud. Act, 1873, s. 100, action is defined to mean "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court."

By O. II. 1, every action in the High Court is to be commenced by writ of summons; but by O. LV. 3, 5a, provision is made for the commencement of certain proceedings (as to which *v. inf.* Chap. XVIII., "CHAMBERS") by originating summons, and such proceedings have been held to be "actions" (for the purposes of motions: *Gee v. Bell*, 35 Ch. D. 100; and appeals: *Re Fawcitt*, 30 Ch. Div. 231).

A summons under O. LV. 1, 2, 13, and 13a, or otherwise under any statutory jurisdiction (though in fact a summons originating proceedings), is, for the purposes of appealing, not an action, but a summons in "a matter not being an action" within the meaning of O. LVIII. 9: *Re Baillie*, 4 Ch. D. 785; *Re Blyth*, 13 Ch. D. 416; *Re Arbenz*, 35 Ch. D. 257.

O. II. 4, which prescribes "that no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without leave of the Court or a Judge," is given effect to by regulations adopted at Chambers, under which the Judge's leave to issue the writ is inscribed thereon and no order is drawn up: *Stigand v. S.*, 19 Ch. D. 460.

Where the application is made at the same time as the application for leave to serve, an affidavit is necessary (O. XI. 2, 4), and it is to be entitled as follows: "In the matter of the Judicature Acts of 1873—1884, In the matter of an intended action between A. B. Plt, and C. D. and others Defts." See *Young v. Brassey*, 1 Ch. D. 278.

### 1. Order to renew Writ—O. VIII. 1; LXIV. 7.

UPON the application &c., It is ordered that the writ issued in this action on the — day of — be, on or before &c., renewed against the Defts P. and M. for (six) months from the date of such renewal; And the costs of this application are to be costs in this action.—*Bateman v. Kenrick*, M. R. at Chambers, 3 May, 1877, A. 913.

The order may be obtained in Chambers *ex parte*, and need not be drawn up unless other directions made at the same time render it necessary, but a memorandum under O. LII. 14, may be obtained from a registrar, master, or chief clerk.

### 2. Joinder of other Claims with Claim for Recovery of Land—

#### O. XVIII. 2.

UPON motion [or the application], &c., who alleged that the Plts have a cause of action in respect of the conveyance of certain trust property of &c., vested in the Deft, and a cause of action in respect of the delivery up of possession of &c., This Court doth order that the Plts be at

liberty to join the said causes of action.—*Manisty v. Kenealy*, V.-C. H., 11 Jan. 1876, B. 25; 24 W. R. 918; *Leach v. Jay*, M. R. at Chambers, 16 Feb. 1877, B. 308.

An action for relief, which could formerly only have been given by the Court of Chancery, cannot be maintained if the subject-matter is below the value of 10*l.*, the old rule in this respect being still in force: *Westbury Sanitary Authority v. Meredith*, 30 Ch. Div. 387.

The issue of a writ of summons not being a judicial act, the Court will inquire at what period of the day the writ was issued: *Clarke v. Bradlaugh*, 8 Q. B. Div. 63; and see *Warne v. Lawrence*, 34 W. R. 452.

As to the computation of time generally, see *In re Railway Sleepers Supply Co.*, 29 Ch. D. 204.

O. VIII. 1, as to renewal of writs, applies to writs issued before the Jud. Acts: *Hume v. Somerton*, 25 Q. B. D. 239.

The Court or a Judge is empowered by O. LXIV. 7, to enlarge the time for renewing a writ of summons: *Re Jones, Eyre v. Cox*, 25 W. R. 303; but enlargement will not be granted so as to revive a claim barred by the Statutes of Limitation: *Doyle v. Kaufman*, 3 Q. B. D. 7; *Hewett v. Barr*, (1891) 1 Q. B. (C. A.) 98; unless, perhaps, under exceptional circumstances: *S. C.*, per Kay, L. J.; but where the original writ had been renewed, time for issue of a concurrent writ was enlarged, though the operation of the statutes might be thereby affected: *Smalpage v. Tonge*, 17 Q. B. Div. 644.

By O. XVIII. 2, no cause of action is, unless with leave of the Court or a Judge, to be joined with an action for the recovery of land, except claims for mesne profits, or arrears of rent, &c., or damages for breach of any contract under which the premises are held, or for injury to the premises. But an action for foreclosure or redemption, and delivery of possession, is not (since December, 1885), to be deemed an action for the recovery of land.

By "action for the recovery of land" is meant an action to recover possession of land, not an action merely to establish title: *Gledhill v. Hunter*, 14 Ch. D. 492; not following *Whetstone v. Dewis*, 1 Ch. D. 99; but where possession is claimed, a claim for a declaration of title, not involving a new cause of action, may be joined without leave: *Ibid.* Claims for declaration of title, that a lease was granted by mistake, for recovery of rents and profits, a receiver and possession, were held to be one action for recovery of land: *Ibid.*

The rule applies to a counter-claim for the recovery of land: *Compton v. Preston*, 21 Ch. D. 138.

Leave has been granted to join a claim for delivery of a title deed: *Cook v. Enchmarch*, 2 Ch. D. 111; and, under special circumstances, a claim for admon: *Kitching v. K.*, 24 W. R. 901.

Claims for recovery of possession for breach of covenant, and for injunction to restrain future breaches, cannot be joined without leave: *Hambling v. Wallani*, W. N. (89) 133.

A writ claiming quiet possession and an injunction restraining interference with such possession is not within the rule: *Kendrick v. Roberts*, 30 W. R. 365.

Leave to join causes of action should be obtained before the writ is issued: *Pilcher v. Hinds*, 11 Ch. Div. 905; *Clark v. Wray*, 31 Ch. D. 68; but see *Wilmott v. Freehold House, &c. Co.*, 51 L. T. N.S. 552; *Rushbrooke v. Farley*, 54 L. J. Ch. 1079. Where leave has not been obtained, appearance by the other party, with knowledge of the irregularity, is a "fresh step" within O. LXX. 2, and a waiver: *Mulckern v. Doerks*, 53 L. J. Q. B. 526.

## CHAPTER II.

## SERVICE OF WRIT AND PROCEEDINGS.

1. *Order for substituted Service of Writ*—O. IX. 2; x.; LXVII. 6.

UPON the application of &c., and upon reading an affidavit &c., It is ordered that service of the writ of summons issued in this action on the — day of —, by leaving a copy thereof, together with a copy of this order, at the place of business of the Deft H., situate at &c. [and, *if so*, at his place of residence situate at &c.], be deemed good service of the said writ upon the said Deft H.

For orders for substituted service in the case of an absconding Deft within the jurisdiction, see *Cook v. Dey*, V.-C. H., 16 Feb. 1876, A. 227, 2 Ch. D. 218; by advertisement *ex jur.*, *Hartley v. Dilke*, V.-C. M., 19 Dec. 1876, A. 2081; 35 L. T. N.S. 706; *Wolverhampton, &c. Banking Co. v. Bond*, 29 W. R. 599.

A Deft, failing to appear after substituted service, cannot claim as of right to be allowed to defend: *Watt v. Barnett*, 3 Q. B. D. 363.

2. *The Like—at each of several Leasehold Houses.*

UPON motion &c., Let service of the writ of summons issued in this action, by leaving a copy thereof, together with a copy of this order, at each of the said leasehold houses, be deemed good service on the Deft, and the Plt is within fourteen days from the date of this order to cause a copy of the said writ, and of this order, to be inserted in the *London Gazette* and the *Times* newspaper.—*Crane v. Jullion*, V.-C. Hall, 17 Feb. 1876, A. 260; S. C., 2 Ch. D. 220.

This order first directs a proper person to be appointed to receive rents &c., of certain leasehold houses (describing them), and then proceeds as above.

3. *The Like—on Deft's Solicitors in a former Matter.*

UPON the application of the Plts, and upon hearing &c., and upon reading an affidavit &c., It is ordered that service of the writ of summons issued in this action on &c., together with a copy of this order, on A. and B., of the firm of Messrs. — & Co., of —, solicitors, or one of them, be deemed good service of the said writ of summons upon the Deft O.

For like order for service on Deft's wife, see *Palmer v. P.*, V.-C. H. at Chambers, 7 Dec. 1878, B. 2076; and for like order for service upon the

managing clerk and upon the solicitors of a Deft in India, with six weeks for appearance, see *Armitage v. Fitzwilliam*, W. N. (75) 238.

*4. Substituted Service of Writ by Means of Advertisements and through the Post—O. IX. 2.*

UPON the application of the Plt &c., and upon reading &c., It is ordered that the publication by advertisement, in the form set forth in the Schedule hereto, of the writ of summons issued in this action on the — day of —, and of this order, twice in the — and once in the — newspapers, and the sending a copy of the said writ of summons, and a copy of this order, through the post-office prepaid, in a registered envelope addressed to each of the above-named Defts, to the following addresses, that is to say, as to the Deft H. to &c., and as to the Defts E. and M. to &c., be deemed good service of the said writ on the said Defts respectively.

SCHEDULE.

To A. B., of &c.

Take notice that on the — day of — a writ of summons was issued in the action of *A. v. B.*, 1890, A. 316, which claimed [*set out indorsement of writ*]; And take notice that by an order dated &c., It was ordered that the service of the said writ of summons, by leaving a copy thereof, together with a copy of the said order, at the office of Messrs. X., situate at &c., and the sending a copy of the said writ and a copy of the said order in a registered letter addressed to you to the care of &c., at &c., and by publication of this notice once in the *London Gazette* and once in the *Times* and once in the *Daily News* newspapers, should be deemed good service of the said writ of summons upon you; And take notice that in default of your causing an appearance to be entered for you at the Central Office, Royal Courts of Justice, London, within eight days after the last of such advertisements, the Plt may proceed in the said action, and judgment may be given in your absence.

*Form of Advertisement of Originating Summons.*

SCHEDULE.

To A. B., of &c.

Take notice that on the — day of — an originating summons was issued in the action of *B. v. P.*, 1887, B. 3508, and was re-amended on the — day of —, 1887; That by such summons as re-amended A. P. and yourself, as executrix of your late husband, F. C., were required to attend at the Chambers of the Judge upon the application of the Plt R. B.; That the security by deposit of &c., and the charge by an order dated &c., made in an action of *B. v. P.*, 1885, B. 4606, created in favour of the Plt on 500 shares of the Deft A. P. in The &c. Co. might be enforced by sale of the said shares or by foreclosure; And that all consequential directions might be given.

And take notice that by an order of Mr. Justice S., dated &c., It



was ordered that the service of the said summons by leaving the same, together with a copy of the said order, at the office of Messrs. G., solrs, situate at &c., and the sending a copy of the said re-amended originating summons and a copy of the said order in a registered letter addressed to you to the care of &c., at &c., and by publication of this notice once in the *London Gazette*, once in the *Times*, and once in the *Daily News* newspapers, should be deemed good service of the said re-amended originating summons upon you.

And take notice, that Mr. Justice S., the Judge to whom the said action is assigned, has fixed Tuesday, the — day of —, at 11.30, as the time at which the said A. P. and you are to attend at his Chambers in the Royal Courts of Justice upon such application; And that if you do not then attend either in person or by your solr such order will be made and proceedings taken as the Judge may think just and expedient; And before you can be heard in Chambers you must enter an appearance at the Central Office in the Royal Courts of Justice, London, and give notice of such appearance.—*Bowman v. Pleydell*, Stirling, J., 29 July, 1887, A. 2221.

And see form B. S. C., App. K., No. 21.

When leave is given at Chambers to issue a writ for service out of the jurisdiction, the leave to serve notice thereof, and the necessary directions as to such service, are at the same time inscribed on the writ: see *Stigand v. S.*, 19 Ch. D. 460.

#### 5. Leave to serve Writ or Notice out of the Jurisdiction—O. XI. 2, 4, 6.

UPON the application of &c., who alleged that, pursuant to leave granted on &c., the Plt has issued a writ of summons against the above-named Deft, and that he has a good cause of action against the said Deft, in respect of certain premises situate at &c., and that the said Deft is [or is not] a British subject, and is resident, or may probably be found at —, in the (kingdom) of —, as by the affidavit of &c. appears, and upon reading the said affidavit, It is ordered that the Plt be at liberty to serve the said writ [or, if not a British subject, notice of the said writ], together with a copy of this order, on the Deft —, at — or elsewhere in the said kingdom of —; and the time within which the Deft is to cause an appearance to be entered to the said writ is to be — days from such service.—See *Pattison v. Stockwell*, V.-C. M. at Chambers, 15 June, 1878, B. 1202.

For table, as settled by the Registrars, of times to be limited for entering appearance after service out of the jurisdiction of writ or notice of writ, see Ann. Pr.

As a general rule double the time ordinarily taken to reach the Deft's place of residence is allowed for appearing.

For order where defendant, *ex jur.* had been added in the District Registry, see *Re Chambers, Hutchinson v. Town*, 19 Jan. 1883, A. 382.

#### 6. Leave to serve Writ in Scotland or Ireland.

UPON the application of &c. [usual allegation that Deft is a British subject, and resident in Scotland or Ireland], and it appearing to the

Judge that there is no convenient remedy in Scotland [*or Ireland*], *or* that although there is a concurrent remedy in Scotland [*or Ireland*], yet taking into consideration the comparative cost and convenience of proceedings in England or in Scotland [*or Ireland*] (under the provisions of the statutes establishing or regulating the Sheriffs' Courts or Small Debts Courts in Scotland *or* in Ireland under the Civil Bill Courts), it will be for the benefit of all parties that this action should proceed in this Court, Let the Plt be at liberty to serve the said writ, together with a copy of this order, on the Deft at &c.; And the time within which the Deft is to cause an appearance to be entered to the said writ is to be — days from such service.

The words in round brackets are to be used only in actions for small demands.

#### *7. Notice of Proceedings to be served Abroad.*

UPON motion &c. by counsel for A. B. & Co., who alleged that C. D., who is to be served with notice of motion for an order directing the Comptroller-General of Patents, Designs, and Trade Marks, to proceed in due course with the above-mentioned application for registration &c., is resident at &c., Let notice of the proceedings for registration of the trade mark, No. &c., be sent by post in a registered letter to the said C. D. at &c., And let the said motion stand over until &c., in order that C. D. may appear and apply to be heard on the said motion should he think fit.—*Re Bancroft, &c. Trade Mark*, Stirling, J., 16 Dec. 1887, A. 1809.

#### *8. Order for Service on Infant Deft—O. IX. 4.*

UPON the application [*or upon motion*] &c., It is ordered that service of the writ of summons in this action by delivering a copy thereof, together with a copy of this order, to the Deft B., who is an infant of the age of — years and upwards, be deemed good service on the said infant.

#### *9. Service effected on Infant Deft to be deemed good Service— O. IX. 4.*

UPON the application [*or upon motion*] &c., and it appearing by the affidavit of &c. that a copy of the writ of summons in this action was, on the — day of —, delivered to the Deft B., who is an infant of the age of — years and upwards, It is ordered that the service of the said writ so effected be deemed good service on the said infant Deft, and that a copy of this order be forthwith served on the said infant Deft, and the time for entering an appearance is to be eight days after such service.

#### *10. Leave to issue Notice of Claim to be indemnified—O. XVI. 48.*

UPON the application of the Defts H. and E., and upon hearing the solrs for the applicants and for the Plts, and upon reading the writ

issued in this action on &c., the statement of claim and the statement of defence of the Deft F., It is ordered that the Defts H. and E. be at liberty to issue a notice claiming to be indemnified by T. and E., pursuant to O. xvi. 48, of the Rules of the Supreme Court: *Fothergill v. Hankey*, V.-C. M. at Chambers, 17 Dec. 1877, A. 2138.

For subsequent order allowing T. to defend the action, see *inf.* Chap. III., Form 3.

For order giving leave to a third party to serve notice on other persons, see *Williams v. Vane*, Fry, J., 28 W. R. 276, 812; and that Plt will not be ordered to pay the costs of third and fourth parties, *S. C.*, H. L. 32 W. R. 617.

### 11. *Substituted Service of Petition.*

UPON motion &c., by counsel for A. &c. [*petitioners*], and upon reading &c. [*evidence of grounds of application*], This Court doth order that service of the petition on the — day of —, preferred unto this Court by the said —, having the order of this Court thereon, that all parties should attend the Court on the said petition, on the — day of —, by delivering a copy thereof, together with a copy of this order, to &c., at &c. [*state mode of service to be adopted*], be deemed good service of the said petition on C. &c. [*respondents*] in the petition named.

### 12. *Petition to stand over, with Leave to amend by adding Respondent and to effect substituted Service on him.*

THE petition of A. &c. standing this day in the paper for hearing, and the Petr by his counsel applying for leave to amend the said petition by adding B. as a party respondent thereto, and upon reading an affidavit of &c. [*grounds of application for substituted service*], This Court doth order that the said petition be amended accordingly; And it is ordered that the said petition do stand over till the — day of —; And it is ordered that service of the said petition as so amended, by leaving a copy thereof, together with a copy of this order, with &c., at &c., be deemed good service upon the said B.

### 13. *Petition to stand over, with Leave to serve New Parties out of the Jurisdiction.*

THE petition of A. &c. standing this day in the paper for hearing, and the Petr by his counsel applying for leave to amend the said petition by adding B. as a party respondent thereto, and it appearing by the affidavit of &c., filed &c., that the said B. is now resident at — in the (kingdom) of —, and upon reading the said affidavit, This Court doth order that the said petition be amended accordingly; And it is ordered that the hearing thereof stand over until the — day of —.

A day must be fixed which will allow a sufficient interval before the day to which the petition is adjourned.

As to service of petition out of the jurisdiction, see notes, *inf.* p. 20.

In *Re British Imperial Co.*, V.-C. H., 15 May, 1877, A. 83, 5 Ch. D. 749, leave was given to serve a summons in a winding-up matter out of the jurisdiction, and a time was fixed for appearance as on the like service of a writ of summons. See also *Hunter v. Brooke*, V.-C. H. at Chambers, 16 Feb. 1875, A. 223.

14. *Leave to serve Writ issued in the Chancery of the County Palatine of Lancaster out of the Jurisdiction of that Court*—17 & 18 V. c. 82, s. 8.

UPON motion &c. by counsel for the Plt, who alleged that the Plt, on the — day of —, pursuant to leave granted, issued a writ of summons out of the Court of Chancery of the County Palatine of Lancaster against the Defts P., B., and C., and that the said Defts P. and B. reside at — in the county of —, and that the said Deft C. resides at B. in the county of —, both of which places are out of the jurisdiction of the said Court, as by the affidavit &c. appears, and upon reading the said affidavit, This Court doth order that the Plts be at liberty to serve a copy of the said writ, together with a copy of this order, upon the said Defts P. and B. at — aforesaid, and upon the said Deft C. at — aforesaid, or elsewhere in England; and the time within which the said Defts are to appear to the said writ is to be eight days after service on them respectively.— See *Bostock v. Pearson*, C. A., 29 Jan. 1879, B. 177; *Thorn v. Taylor*, C. A., 9 Nov. 1888, B. 1324.

Leave must first be obtained from the Vice-Chancellor of the Palatine Court to issue the writ for service *ex jur.*: *Walker v. Dodds*, 37 Ch. Div. 188.

15. *Service of Order of Palatine Court out of the Jurisdiction of that Court.*

UPON motion &c. by counsel for the Plt, who alleged that, by an order dated &c., made in the Chancery of the County Palatine of Lancaster, It was ordered &c., that the said A. B. resides at &c. out of the jurisdiction of the said Court, Let the Plt be at liberty to serve the said order dated &c., together with a copy of this order, upon the said A. B., at &c.—*Re Grant, Wales v. Jeffreys*, C. A., 23 Dec. 1886, A. 1768.

These orders, Forms 14 and 15, are obtained from the Court of Appeal under Jud. Act, 1873, s. 18 (2), by which are transferred all jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine.

NOTES.

SERVICE GENERALLY.

Service must be personal, unless substituted or other service has been ordered under O. IX. 2, except in the cases mentioned in rr. 3, 6, 7, 8, and 9 of that order.

The original writ need not be produced unless demanded, but if not shown on demand, the proceedings under it may be set aside: *Phillipson v. Emanuel*, 56 L. T. N.S. 858.

A writ of summons, though specially indorsed, is not a pleading within O. LXIV. 11, and may be served at any hour of the day: *Murray v. Stephenson*, 19 Q. B. D. 60.

Under r. 3, "when husband and wife are both defendants to the action they shall both be served, unless the Court or a Judge shall otherwise order."

For order dispensing with service on a husband, see *Whitley v. Honeywell*, 24 W. R. 851.

As to service by filing in default of appearance, see *inf.* Chap. XII.

Service of notice of motion for leave to issue writ of attachment against a party who has not appeared, in a case where personal service is not required, may be made by filing same pursuant to O. LXVII. 4: *Re Morris, Morris v. Fowler*, 44 Ch. D. 161.

In the case of change of solicitors, O. VII. 3, provides that until notice of the change is filed, and a copy served and left in chambers, the former solicitor shall be considered the solicitor of the party until the final conclusion of the cause or matter, whether in the High Court or the Court of Appeal. As to whether the authority of the solicitor on the record continues until the time for appealing has expired, *quære*: see *De La Pole v. Dick*, 29 Ch. Div. 351.

By O. IX. 4, in case of an infant Deft, service on the father or guardian, or, if none, upon the person with whom the infant resides, or under whose care he is, is, unless the Court or a Judge otherwise orders, to be deemed good service; provided that the Court or Judge may order that service made or to be made on the infant shall be deemed good. As to service on lunatic or *non compos*, see O. IX. 5, which rule applies to an admon action commenced by originating summons: *Re Pepper, P. v. P.*, 32 W. R. 765; 53 L. J. Ch. 1054; 50 L. T. N.S. 580.

When, as in urgent cases, it is desired to serve notice of motion on a Deft before appearance the leave of the Court must be obtained. No order need be drawn up giving this leave, but the initials of the registrar in Court to the indorsement on the brief will be sufficient to show that leave has been obtained.

#### SERVICE ON PARTNERS.

By O. XLVIII. 5, where persons are sued as partners in the name of their firm under r. 1, "the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having, at the time of service, the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary; provided that in the case of a co-partnership which has been dissolved to the knowledge of the Plt before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable."

By r. 4, "where a writ is issued against a firm, and is served as directed by r. 3, every person upon whom it is served shall be informed, by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters. In default of such notice, the person served shall be deemed to be served as a partner."

If the person to be served is a lunatic or of unsound mind, service should be under O. IX. 5: *Fore Street Warehouse Co. v. Durrant*, 10 Q. B. D. 471.

By O. IX. 8, in the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. The rule further provides as to service on the inhabitants of a hundred, county of city, or town, or franchise,

liberty, city, town, or place not being part of a hundred, or other like district. But where statutory provision is made for service on any corporation, or body corporate or incorporate, the writ is to be served as provided by the statute.

A foreign corporation, carrying on business in this country, has (as distinguished from a private partnership, see *Russell v. Cambefort*, 23 Q. B. Div. 526) a legal existence here, and may be served in the same manner as an English corporation aggregate: *Haggin v. Comptoir D'Escompte de Paris*, 23 Q. B. Div. 519; *Newby v. Von Oppen*, L. R. 7 Q. B. 293. Thus service on the head officer at the English place of business of such a corporation, where a principal part of their business is carried on, is good within the rule: *Ibid.*; *secus*, where the corporation has no office in this country, but merely an agent: *Nutter v. Messageries Maritimes*, 54 L. J. Q. B. 527; and see *Jones v. Scottish Accident Insurance Co.*, 17 Q. B. D. 421; where, however, the Companies Act, 1862 (25 & 26 V. c. 89), applied, as in the case of a limited co. having its registered office in Scotland, service at the registered office was necessary: *Watkins v. Scottish Imperial Insurance Co.*, 23 Q. B. D. 285; and see *Wood v. Anderston Foundry Co.*, 36 W. R. 918.

Where a special contract was entered into between an English and a foreign co., whereby an agent in London was specially appointed to accept service of any process arising under the contract, service according to the contract, though not a service within the rules, was held good: *Tharsis Sulphur, &c. Co. v. Société des Metaux*, 58 L. J. Q. B. 435; 60 L. T. N.S. 924; 38 W. R. 78; and generally as to a contract to accept service of a writ, see *S. C.*, and *Copin v. Adamson*, 1 Ex. Div. 17, 19; *Vallee v. Dumergue*, 4 Exch. Rep. 290.

A foreign Sovereign or State cannot be served with a writ or other process of our Courts: *Strousberg v. Republic of Costa Rica*, 29 W. R. 125; and see *Sloman v. Government of New Zealand*, 1 C. P. Div. 563.

Where judgment by default against a firm was duly signed, a partner who had appeared subsequently, but within eight days after service of the writ on him, was entitled to have the judgment set aside: *Alden v. Beckley*, 25 Q. B. D. 643.

#### SUBSTITUTED SERVICE.

By O. ix. 2, if it appear to the Court or a Judge that the Plt is from any cause unable to effect prompt personal service, the Court may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may seem just. Every application for such substituted service must be supported by an affidavit setting forth the grounds upon which the application is made: O. x. Such applications are to be brought before the Judge in person: O. lv. 15.

When substituted service is effected, the order for such service must be produced. If service is by post, the copy writ and order are (unless the order otherwise direct) to be deemed to be served on the day following the day on which a prepaid letter containing the copies shall have been posted: P. M. R. 17.

The rule must not be resorted to as a mode of evading the rules as to service out of the jurisdiction: *Re Urquhart, sup.*; *Fry v. Moore*, 23 Q. B. Div. 395. An order for substituted service of a writ issued in general form without leave against a person who was out of the jurisdiction, was held not a nullity, but an irregularity which might be waived by conduct of Deft: *Wilding v. Bean*, (1891) 1 Q. B. (C. A.) 100, following *Fry v. Moore*, 23 Q. B. Div. 395; citing *Field v. Bennett*, 56 L. J. Q. B. 89, and *Hillyard v. Smyth*, 36 W. R. 7.

Substituted service will not be ordered unless reasonable ground is shown for supposing that it will come to the notice of the person to be served: *Furber v. King*, 29 W. R. 535; *Re Slade, S. v. Hulme*, 30 W. R. 28; and can only be directed when there is some person or body corporate on whom there could be original service: *Sloman v. New Zealand Government*, 1 C. P. Div. 563.

The Court of Appeal has jurisdiction to order substituted service of a notice of appeal: *Exp. Warburg, In re Whalley*, 24 Ch. Div. 364.

Substituted service of a subpoena to name a solicitor has been ordered: *Hamilton v. Thomas*, W. N. (83) 31.

## SERVICE OUT OF THE JURISDICTION.

## Writ of Summons.

O. XI. 1 specifies (under seven heads (a) to (g)) the cases in which service out of the jurisdiction of a writ of summons or notice thereof may be allowed, and such specification is exhaustive: *Re Eager*, *Eager v. Johnstone*, 22 Ch. Div. 86.

The order forms a complete code, applicable to all cases when 'anything like jurisdiction over the person is sought to be exercised, and indicates when service out of the jurisdiction can, and cannot be effected: *Re Busfield*, *Whaley v. Busfield*, 32 Ch. Div. 123; and see *In re Anglo-African Steamship Co.*, 32 Ch. Div. 348.

A writ against Defts, one or some of whom appear to be out of the jurisdiction, may be issued without an order for service having been first obtained, but must be specially sealed with a notification on (and as part of) the writ, that it is not for service out of the jurisdiction without order: P. M. R.

The application for leave to serve out of the jurisdiction is made in Chambers, but must be brought before the Judge in person: O. IV. 15.

The Court will exercise discretion as to allowing the service, and will consider evidence as to the merits: *Société Générale de Paris v. Dreyfus*, 29 Ch. D. 239.

As to the form of the writ, or notice of writ, see O. II. 5, and R. S. C. Appx. A., Part I., Forms 5—10.

A copy of a writ issued for service out of the jurisdiction has been ordered to be served by substitution on a person within the jurisdiction: *Ford v. Shephard*, 34 W. R. 63; 53 L. T. N.S. 564.

Leave for issue of a concurrent writ under O. VI. 1, 2, for service out of the jurisdiction may be ordered, although the original writ was issued for service within the jurisdiction, and has been renewed, and although there is only one Deft to the action: *Smalpage v. Tonge*, 17 Q. B. Div. 644.

For a history of the changes in the law as to service out of the jurisdiction, see *Lenders v. Anderson*, 12 Q. B. D. 56.

The cases specified in O. XI. 1, are whenever—

- “(a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or
- (b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (d) The action is for the admon of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or
- (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or
- (f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
- (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.”

An action for non-payment of rent under a lease was held not to be for enforcement of a contract “affecting land” within r. 1 (b): *Agnew v. Usher*, 14 Q. B. D. 78; *secus*, an action by outgoing tenant to recover compensation for tenant right according to the custom of the country: *Kaye v. Sutherland*, 20 Q. B. D. 147; and, *semble*, the clause is not to be limited to cases where specific performance of some contract, &c. is sought: *Ibid.*

An insurance co., whose registered office was in Scotland, but which had agencies and an office within the jurisdiction, was held not to be domiciled or ordinarily resident within the jurisdiction within r. 1 (c): *Jones v. Scottish Accident Insurance Co.*, 17 Q. B. D. 421; but see *Haggis v. Comp-toir d'Escompte de Paris*, 23 Q. B. Div. 519; and *Russell v. Cambefort*, 23 Q. B. Div. 526, 528; *sup.* p. 16.

A contract by English engine makers for sale of machinery, to be erected in the Isle of Man for a co. carrying on business there, was held a contract to be performed by payment in this country, so that non-payment by the co. was a breach within the jurisdiction within r. 1 (e): *Robey & Co. v. Snaefell Mining Co.*, 20 Q. B. D. 152; but see *Bell v. Antwerp Line*, (1891) 1 Q. B. (C. A.) 103. Where the contract was by a foreigner to ship goods at a foreign port, and the goods when shipped were at the buyer's risk, a breach by the seller was not a breach within the jurisdiction: *Wanke v. Wingren*, 58 L. J. Q. B. 519; and *cf. Bree v. Marescaux*, 7 Q. B. Div. 434. A contract may be within the clause though it does not expressly state that it is to be performed within the jurisdiction: *Reynolds v. Coleman*, 36 Ch. Div. 453; provided there is, by necessary implication, an indication to that effect: *Bell v. Antwerp Line*, *sup.*

The concluding words of clause (e) constitute an express exception, and are not merely referential to r. 2. There is, therefore, no power to allow service out of the jurisdiction where the Deft is domiciled or ordinarily resident in Scotland or Ireland: *Lenders v. Anderson*, 12 Q. B. D. 50.

In reference to service under r. 1 (f), the practicability of enforcing the injunction if granted is to be considered. In an action for an injunction to restrain Deft from sending libels to Plt, order for service out of the jurisdiction was upheld, Deft not showing that he never came within the jurisdiction: *Tozier v. Hawkins*, 15 Q. B. Div. 680. In an action to restrain infringement of trade mark, where Deft was resident in Scotland, and it would be inconvenient to enforce the injunction merely against his agents, the leave was refused: *Marshall v. Marshall*, 38 Ch. Div. 330; and see *Kinahan v. K.*, 45 Ch. D. 78; *secus*, where Defts were a co. having a registered office in Scotland, but branches in this country, and an injunction could be enforced by sequestration against their property: *Re Burland's Trade Mark; Burland v. Broxburn Oil Co.*, 41 Ch. D. 542. In order to bring a case within the clause it is not necessary that an injunction should be the only relief sought: *Lisbon-Berlin Gold Fields, Limited v. Heddle*, 52 L. T. N.S. 796.

Where the Scotch Courts had already to some extent seisin of the case, an order for service on executrices there was discharged: *Re De Penny, De P. v. Christie*, (1891) 2 Ch. 63.

Where an injunction was sought to restrain dealing with a fund, and a French Court, in an action between the parties, had decided that the Deft was entitled to control of the fund, the Court refused the leave to serve, regarding the judgment as evidence that the Plt had not a probable cause of action: *Société Générale de Paris v. Dreyfus*, 37 Ch. Div. 215.

In an action to enforce the trusts of a deed against real estate in Trinidad, the Court, acting on the opinion of a barrister practising there that the real estate was bound by the deed, gave leave to serve the writ on one of the legal owners who was resident there: *Jenney v. Mackintosh*, 33 Ch. D. 595.

The question whether a person out of the jurisdiction is a "necessary or proper" party within clause (g) must depend on the consideration whether, supposing he and the person duly served within the jurisdiction had been within the jurisdiction, they would both have been proper parties: *Massey v. Heynes*, 21 Q. B. Div. 330. Thus, in an action against London agents of foreign principals for breach of warranty of authority, the foreign principals are proper parties: *Ibid.*

It must (*semble*) be shown that there is a substantial Deft within the jurisdiction: *Yorkshire Tannery v. Eglinton Chemical Co.*, 54 L. J. Ch. 81; as the Court must see that British subjects are not unreasonably and *malà fide* sued in order to make a case against foreigners: *Massey v. Heynes*, *sup.*

By O. XI. 2, if it appears that there may be a concurrent remedy in Scotland or Ireland, the Court or Judge is to have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the Deft or person sought to be served.

Where an action was brought against Scotch trustees of a Scotch property, held upon the trusts of a Scotch settlement, for improperly withholding



maintenance, leave was refused on grounds of convenience: *Cresswell v. Parker*, 11 Ch. Div. 601; and as to the principles on which the Court acts in considering the question of convenience, see *Exp. McPhail*, 12 Ch. D. 632.

Leave to issue a writ and serve in Ireland was refused when the comparative cost and convenience were in favour of proceeding there: *Tottenham v. Barry*, 12 Ch. D. 797; and see *Harvey v. Dougherty*, 56 L. T. N.S. 322; *Kinahan v. Kinahan*, *sup.*, where the Judge in Court discharged an order, made in Chambers *ex parte*, for service *ex jur.*

By O. XI. 4, the application for leave to serve a Deft is to be supported by affidavit or other evidence, stating that in the belief of the deponent the Plt has a good cause of action, and showing in what place or country the Deft "is, or probably may be found" (see *Seagrove v. Parks*, (1891) 1 Q. B. 551), and whether he is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this order.

It must be shown that there is a good cause of action within the order: *Fowler v. Barstow*, 20 Ch. Div. 240; *Great Australian, &c. Co. v. Martin*, 5 Ch. D. 1; and for service in Scotland or Ireland there must be evidence for enabling the Judge to exercise his discretion: *Tottenham v. Barry*, 12 Ch. D. 797.

By O. XI. 5, any order giving leave to effect such service, or give such notice, shall limit a time after such service or notice within which such Deft is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served, or the notice given.

By O. XI. 6, when the Deft is neither a British subject, nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. The requirement is imperative: see *Fowler v. Barstow*, 20 Ch. Div. 240, 245. Therefore, where the writ, instead of notice of it, was served, the order for service and judgment in default of appearance grounded on it were set aside on the application of the Deft: *Hewitson v. Fabre*, 21 Q. B. D. 6. Whether, however, such an irregularity might not, under O. LXX. 2, be cured by appearance of Deft, *quære*: *Ibid.* (Wills, J.). The rule applies to foreign corporations as well as individuals: *Scott v. Royal Wax, &c. Co.*, 1 Q. B. D. 404. For form of notice, see R. S. C. Appx. A. Part I. Form 9.

Where sole Deft in Palatine Court is resident out of the jurisdiction of that Court, leave to serve the writ upon him out of the jurisdiction will only be granted, if at all, under very special circumstances: *Re Watmough, Sergenson v. Beloe*, 24 Ch. Div. 280.

Having regard to Chancery of Lancaster Rules, 1884, O. II. 4; O. XII. 1, 7, leave of the Palatine Court must be obtained for issue of writ out of jurisdiction before application to Court of Appeal, under 17 & 18 V. c. 82, s. 8, for leave to serve out of the jurisdiction of the Palatine and within that of the High Court: *Walker v. Dodds*, 37 Ch. Div. 188.

On application to set aside service against one Deft, an order for transfer to the High Court was made, but the other Defts were held necessary parties to the application: *Phipps v. Tod*, C. A. 10 Nov. 1886.

### Other Proceedings.

The Court cannot, under O. XI. 1, order service of an originating summons out of the jurisdiction: *In re Busfield, Whaley v. B.*, 32 Ch. Div. 123; the rule applying in terms only to writ of summons, and service out of the jurisdiction not being a power inherent in the Court: *Ibid.*; *Re Anglo-African Steamship Co.*, 32 Ch. Div. 348.

By O. LXVII. 5, where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication, is required by the rules, or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons.

This rule "deals merely with the mode of effecting personal service, and is only applicable where personal service can be effectually made, and was not intended to introduce, in the case of all documents requiring personal service, an extraordinary power of service out of the jurisdiction, which is by another

rule given in terms confining it to a writ of summons:" Cotton, L. J., *In re Busfield, Whaley v. B.*, 32 Ch. Div. 131.

Thus, leave will not be given to serve out of the jurisdiction an order for calls made in a winding-up: *In re Anglo-African Steamship Co.*, 32 Ch. Div. 348; nor a summons for taxation of costs: *Exp. Brandon, Re Bouron*, 54 L. T. N.S. 128; nor for appointment of a receiver by way of equitable execution: *Weldon v. Gounod*, 15 Q. B. D. 622.

But a distinction (not very clearly defined) has been drawn between a notice to found proceedings to enforce payment, and one which merely gives information to persons as to the course of procedure, and is no infringement of the jurisdiction of the foreign Court: *In re Nathan, Newman & Co.*, 35 Ch. Div. 1, where service *ex jur.* of notice to settle list of contributories in winding-up, under Orders of 1862, r. 30, was held good.

Leave to issue an interpleader summons for service out of the jurisdiction was granted, as the Court could bar the claim of the foreigner refusing to submit himself to the jurisdiction: *Credits Gerundeuse, Lim. v. Van Weede*, 12 Q. B. D. 171; which case may, "perhaps, be supported" (see *Re Busfield, sup.*) on the ground that the object of service was only to give notice of a proceeding affecting rights. *Re Bonelli's Electric Telegraph Co.*, 18 Eq. 655; *Re General International Agency*, 16 L. T. N.S. 725; and *Slaney's Trusts*, 10 Ch. 275, must, it seems, be referred to the same principle. The practice cannot be regarded as settled. *Re Baron Liebig's Cocoa, &c. Co.*, 59 L. T. N.S. 315, is reported as giving leave for service out of the jurisdiction of a summons in a winding-up for payment of a fund out of Court, but the order on the record (1888, A. 729) only gives leave to give notice of such a summons. This case purports to follow *Re Nathan, Newman & Co.*, 35 Ch. Div. 1, but the order as drawn up in that case (1887, B. 149) does not bear out the report.

So as to service of petition out of jurisdiction, the cases are far from clear. In *Re Ruddiman*, 12 Feb. 1887, leave was given to serve out of the jurisdiction a petition under the Trustee Relief Act; and see *Re Gordon's Settlement*, W. N. (87) 192. But in *Re Jellard*, 39 Ch. Div. 424, North, J., declined to follow the last case, and held that there is no jurisdiction to allow a petition under the Trustee Relief Act for payment out of Court to be so served.

In *Colls v. Robins*, 55 L. T. N.S. 479, Kay, J., gave liberty to serve a petition for payment out of Court upon parties out of the jurisdiction, observing that the exor being before the Court the petition was rather in the nature of a notice than of a process. In the case of a petition for revocation of a patent, ample notice having been given to the respondent who was out of the jurisdiction, North, J., made an order *nisi* that unless the respondent should on or before a specified day, appear and show cause to the contrary (in which case, it was said, it would be open to him to dispute the jurisdiction) the petition should be tried with *viva voce* evidence, and set down in the list of witness actions: *Re Drummond's Patent*, 43 Ch. D. 80.

It has been held that a third party notice may be served out of the jurisdiction under O. XI. 1 (e), by virtue of the provision in O. XVI. 48, that a copy of such notice shall be "served according to the rules relating to the service of writs of summons:" *Dubout v. Macpherson*, 23 Q. B. D. 340, citing *Swansea Shipping Co. v. Duncan*, 1 Q. B. Div. 644; but see *Re Busfield, Whaley v. B.*, *sup.*, as to the meaning of these words.

#### AFFIDAVIT OF SERVICE.

The affidavit of service of the writ must state when, where, and how, and by whom service was effected: O. LXVII. 9. It must show the day on which the indorsement of service was made on the writ, and that such indorsement was made within three days at most after service: O. IX. 15; O. XIII. 1; and this latter rule has been held to apply to admon actions commenced by originating summons: *Re Pepper, P. v. P.*, 32 W. R. 765; 50 L. T. N.S. 580; 53 L. J. Ch. 1054.

The affidavit of service cannot be dispensed with, even though the process server by foreign law cannot make the affidavit required by O. XIII. 2: *Ford v. Miescke*, 16 Q. B. D. 57. In *Hastings v. Hurley*, 16 Ch. D. 734, the Court extended the time for indorsing a writ which had been served abroad, but required a fresh affidavit of service.

## DISCHARGE OF ORDER FOR SERVICE.

By O. XII. 30, a Deft before appearing is to be at liberty, without obtaining an order to enter or entering a conditional appearance, to serve notice of motion to set aside the service, or to discharge the order authorizing such service.

Where a Deft who objected to service instead of moving to discharge the order appeared by counsel on a motion for injunction, filed affidavits, and argued the case on the merits, he was precluded from taking such objection: *Boyle v. Sacker*, 39 Ch. Div. 249; O. LXX. 2.

An order for service out of jurisdiction, made upon untrue affidavits, will be discharged, as *uberrima fides* ought to be observed by the party applying for such service: *Republic of Peru v. Dreyfus*, 55 L. T. N.S. 802.

The application under r. 30 must be promptly made. After lapse of a year it was held too late to raise objection to an order, on the ground that the affidavit did not fairly state the case: *Reynolds v. Coleman*, 36 Ch. Div. 453.

On moving to discharge, Deft is entitled to go into evidence to show that the case is not within O. XI., but should not go into merits unnecessarily: *Fowler v. Barstow*, 20 Ch. Div. 240.

## THIRD PARTY PROCEDURE.

When a Deft claims to be entitled to contribution or indemnity over against any person not a party to the action, he may by leave issue a notice to that effect, sealed as a writ of summons, stating the nature of the claim. A copy of the notice is to be filed, and the notice is to be served within the time limited for delivering his defence: O. XVI. 48. By O. XVI. 55, the procedure is made applicable between co-Defts. It is not applicable to proceedings by originating summons: *Re Wilson, A. G. v. Woodall*, 45 Ch. D. 266.

Form of third party notice is given, R. S. C., Appx. B., No. 1.

Notice to co-Deft, under r. 55, may issue without leave, but the co-Deft may move to discharge the service: *Towse v. Loveridge*, 25 Ch. D. 76.

The application for leave must be made promptly; in general within time for delivering defence, but, at latest, before pleadings closed: *Birmingham and District Land Co. v. L. & N. W. Rail. Co.*, W. N. (87) 102; 56 L. T. N.S. 702.

The application should be made on notice to the Plt: *Wye Valley Rail. Co. v. Hawes*, 16 Ch. Div. 489; see *Edison and Swan Electric Co. v. Holland*, 33 Ch. D. 497.

As to whether a third party can bring in a fourth, see *Witham v. Vane*, 49 L. J. Ch. 242; *Walker v. Balfour*, 25 W. R. 511.

The leave will not be given where the effect would be to materially embarrass the Plt: *Wye Valley Rail. Co. v. Hawes*, 16 Ch. Div. 489.

In giving the leave the Court will not consider whether the claim to contribution or indemnity is valid, but only whether it is *bona fide*, and if established will result in contribution or indemnity: *Carshore v. N. E. Rail. Co.*, 29 Ch. Div. 344; *Edison & Swan Electric Co. v. Holland*, 33 Ch. D. 497.

But the procedure under the Rules of 1883 is strictly limited to claims to "contribution or indemnity." A right to indemnity, arising as it does from contract, express or implied, is quite distinct from a right to damages, which arises in consequence of a breach of contract previously made: see *Birmingham, &c. Land Co. v. L. & N. W. Rail. Co.*, 34 Ch. Div. 261. A covenant by sub-lessee to repair, though following terms of covenant by lessee with original lessor, does not confer on the lessee a right to "contribution or indemnity" within O. XVI. 48, in respect of breaches of the covenant by him with the lessor: *Pontifex v. Foord*, 12 Q. B. D. 151; nor is a claim by sub-lessee that he was induced by lessee to commit breach of covenant, and that lessee had given a covenant for quiet enjoyment, a claim for contribution or indemnity: *Tritton v. Bankart*, 56 L. J. Ch. 629. But a contract by a sub-lessee to perform the covenants in the original lease is a contract of indemnity: *Hornby v. Cardwell*, 8 Q. B. Div. 329.

A claim by a purchaser that he was induced to buy by misrepresentation of auctioneer that purchase-money might remain on mortgage, is not a claim to indemnity: *Cotton v. Bennett*, 26 Ch. D. 161; nor can a warranty of sea-

worthiness be treated as a contract to indemnify against loss arising from unseaworthiness: *Speller v. Bristol Steam Navigation Co.*, 13 Q. B. Div. 96.

Under the usual suing and labouing clause in a marine policy, being a contract to pay the assured expenses which he might incur, but not to indemnify him against claims by others against him, the underwriters could not be brought in as third parties: *Johnston v. Salvage Association*, 19 Q. B. Div. 458.

But in an action against a railway co. to reinstate name of Plt as owner of stock transferred on a forged transfer, the co. were entitled to serve a third party notice upon the transferee: *Carshore v. N. E. Rail. Co.*, 29 Ch. Div. 344.

The procedure applies where the indemnity is given after action brought: *Edison and Swan Electric Co. v. Holland*, 33 Ch. D. 497.

## CHAPTER III.

## APPEARANCE AND LEAVE TO DEFEND.

—◆—

1. *Appearance set aside on ground that Address is Illusory or Fictitious—O. XII. 12.*

UPON motion &c., by counsel for the Plt, and upon reading &c., Let the appearance entered by the Deft be set aside, on the ground that the address for service contained in the memorandum of appearance is illusory or fictitious ; And Let notice of this order be given to the Deft by sending a copy of this order in a registered letter to such address.—*Edell v. Cave*, V.-C. Bacon, 12 Dec. 1884, A. 1716 ; S. C., 54 L. J. Ch. 308.

For a like order made at Chambers, see *Goulter v. Pearce*, Chitty, J., 4 May, 1872, A. 1017.

2. *Leave to a Person in Possession, not being a Deft, to appear and defend an Action for Recovery of Land—O. XII. 25.*

UPON the application of the N. Building Co., and upon hearing the solicitors for the applicants, and upon reading an affidavit of &c., filed &c., whereby it appears that the applicants are in possession of the land and premises sought to be recovered in this action by themselves or their tenants, It is ordered that the applicants, the said N. Building Co., be at liberty to appear and defend this action.—*Hartley v. Blackmore*, V.-C. M. at Chambers, 7 March, 1876, A. 358.

3. *Third Party served with Notice of Claim for Indemnity to defend—Directions under O. XVI. 52.*

THE application of the Deft H. for directions consequent upon S., the person served with a third party notice, filed &c., pursuant to the order dated &c., having appeared to such notice, which upon hearing &c., was adjourned to be heard in Court, coming on this day accordingly, and upon hearing counsel for the applicant, and for the Plts, and for the said S., and upon reading the said notice and order, and the said S. not admitting any liability to indemnify the Deft in respect of the Plts' claim, This Court doth order that the said S. be at liberty to appear at the trial of this action, and take such part as the Judge shall direct, and be bound by the result of the trial ; And it is ordered that the question of the liability of the said S. to

indemnify the Deft be tried at the trial of this action, but subsequent thereto. Costs of application reserved.—*Coles v. Civil Service Supply Assoc.*, 26 Ch. D. 529; *Barlow v. L. & N. W. Ry. Co.*, 38 Ch. D. 144.

See Chap. II., Form 11, for previous order for leave to issue the notice.

#### 4. *Leave for a Deft to appear after Judgment.*

UPON the application of the Deft, and upon hearing &c., and the applicant by his solicitor submitting to be bound by the judgment in this action and the proceedings under such judgment, as if he had duly appeared in this action, It is by consent ordered that the applicant be at liberty, notwithstanding the said judgment, to enter an appearance to the writ of summons issued on &c. in this action.—See *Ameyl v. Davies*, M. R. at Chambers, 2 July, 1878, A. 1294; *Re Brown's Estate*, *Brown v. Drew*, M. R. at Chambers, 16 April, 1877, A. 798.

#### 5. *Leave to Deft to defend on paying a Sum into Court—*

O. XIV. 6.

UPON the application of the Plt &c. for liberty to sign final judgment for the amount indorsed upon the writ of summons issued in this action on the — day of —, together with interest and costs, to be taxed &c., It is ordered that upon the Deft within (one week) paying the sum of £— into Court to the credit of this action &c. in the manner provided by r. 31 of the S. C. F. R., the Deft be at liberty to defend this action: But in default of such payment being made, It is ordered that the Plt P. be at liberty to sign judgment for £— and his costs of this action.

For like order, see *Winnall v. Browne*, M. R. at Chambers, 12 April, 1877, B. 967.

#### 6. *Deft allowed to defend, after Judgment by Default, on payment of Costs.*

UPON motion &c. by counsel for the Deft, and upon hearing counsel for the Plt: Let the judgment dated &c. be discharged. And Let the Deft pay to the Plt his costs of this action subsequent to the delivery of the statement of claim, and up to and including his costs of this motion, such costs to be taxed &c. Plt to deliver statement of claim within fourteen days. *Williams v. Brisco*, Hall, V.-C., 19 May, 1881, B. 1003.

#### NOTES.

##### APPEARANCE.

O. XII. 8, prescribes the mode of entering an appearance.

The memorandum of entering an appearance, which is to be in accordance with R. S. C. Appx. A., Part II., Form 2, is to contain the Deft's address for service: O. XII. 10; and if such address is illusory or fictitious the appearance may be set aside: r. 12. For cases in which this jurisdiction has been exercised, see *A. v. B.*, W. N. (83) 174; *Edell v. Cave*, 33 W. R. 208; 54 L. J. Ch. 308.

By O. XII. 25, a person not named as a Deft in a writ of summons for the recovery of land may by leave appear and defend on filing an affidavit showing that he is in possession of the land either by himself or by his tenant.

Formerly, where the Deft was advised that service of the writ upon him was irregular, he waived the defect if he entered an appearance with the Record and Writ Clerks in the ordinary manner; his proper course was to obtain leave on motion, or on petition of course, to enter a conditional appearance with the Registrar, and then to move to discharge the service and appearance: *Maclean v. Dawson*, 4 D. & J. 154; Dan. 353.

But now see O. XII. 30, *sup.* p. 21. The Court refused to set aside writ on the ground that Deft, who had entered a conditional appearance, was not the person really intended to be sued: *Zuccato v. Young*, W. N. (90) 55.

By O. XLVIII. 5, where persons are sued as partners in the name of their firm, they are to appear individually in their own names; but all subsequent proceedings are, nevertheless, to continue in the name of the firm.

By O. XLVIII. 6, where a writ is served under r. 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a member of the firm sued; and by r. 7, a person sued as a partner may enter an appearance, under protest, denying that he is a partner, but such appearance shall not preclude the Plt from otherwise serving the firm and obtaining judgment against the firm in default of appearance, if no partner has entered an appearance in the ordinary form. As to the effect of appearance by "R., sued as R. & Co.," and subsequent proceedings against R. only, see *Munster v. Cox*, 10 App. Cas. 680; S. C., 11 Q. B. Div. 435.

Where a person has been informed that he has been made Deft, he may before actual service appear "gratis": Dan. 350. But a person not a party named as Deft to a counter-claim cannot so appear, but must wait until he is served with defence, under O. XXI. 12: *Fraser v. Cooper, Hall & Co.*, 23 Ch. D. 685.

#### APPEARANCE BY THIRD PARTY.

By O. XVI. 49, a third party who desires to dispute the Plt's claim against the Deft is to enter an appearance within eight days, and in default of his doing so shall be deemed to admit the validity of the judgment obtained against the Deft, whether by consent or otherwise, and his own liability to contribute or indemnify as the case may be, as claimed by the notice. After eight days he may apply for leave to appear, and leave may be given upon terms.

By r. 52, if a third party appears pursuant to the third party notice, the Deft giving the notice may apply to the Court or a Judge for directions, and the Court or Judge may, if satisfied that there is a question proper to be tried as to the liability of the third party, order such question, as between the third party and the Deft giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the Deft giving the notice against the third party.

And by r. 53, the Court or a Judge, upon the hearing of the application mentioned in r. 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just.

#### APPEARANCE AFTER JUDGMENT.

A Deft against whom judgment in default and on substituted service had been obtained, was allowed to defend on payment of all costs subsequent to the statement of claim: *Williams v. Brisco*, 29 W. R. 713. Form 6, *sup.*

#### LEAVE TO DEFEND.

Where there is a question of account (*ex. gr.*, action by mortgagee in possession for mortgage debt), Deft ought, except under very special circumstances, to have leave to defend without any payment into Court: *Wallingford v. The Mutual Society*, 5 App. Cas. 685. In such case judgment should be signed as security only for what should be found due on the account, without power to issue execution except by leave of Court, Deft being required as a condition to consent to the immediate taking of such account.

## CHAPTER IV.

## SECURITY FOR COSTS.

1. *Plt to give security for Costs by Bond—O. LXV. 7.*

UPON the application &c., who alleged that the Deft A. has entered an appearance in this action, and the Plt in the writ of summons styles himself of — in the (kingdom) of —, out of the jurisdiction of this Court [*or, if application made on special grounds, omit allegation, and add, and upon hearing &c., and upon reading &c.*], This Court doth order that the Plt do procure some sufficient person on his behalf to give security, according to the course of the Court, to the Deft A., in the penalty of £100, conditioned to answer costs in case any costs shall be awarded to be paid by the Plt, and in the meantime the Plt is not [*if there are other Defts besides the party moving, as against the Deft A.*] to take any further proceedings in this action.

2. *The Like—by Payment into Court.*

UPON the application of the Deft, who alleged [Form 1], It is ordered that the Plt do give security to answer costs, in case any costs shall be awarded to be paid by him in this action, and for that purpose the Plt B. is to be at liberty to lodge the sum of £— in Court as directed in the schedule hereto: And in the meantime, until such lodgment is made and notice thereof given to the Deft's solr, the Plt is not to take any further proceedings in this action. [Add schedule directing lodgment in Court to account of "security for costs of Deft A."]

For like order for security for past and future costs, see *Massey v. Allen*, 12 Ch. D. 807; 28 W. R. 243; V.-O. H., 3 July, 1879, B. 1524.

3. *Plt to state Residence in Writ, and if Abroad to give Security for Costs, either by Bond, or by Payment into Court.*

UPON the application of the Deft &c., and upon hearing &c., and upon reading &c., It is ordered that the Plt do amend his writ of summons issued in this action by inserting the actual place of residence of the Plt; And if such amendment shall not be made on or before &c., It is ordered that the Plt do not take any further proceedings in this action until such amendment shall have been made; And if on such amend-



ment being made it shall appear that the Plt's actual residence is out of the jurisdiction of this Court, It is ordered that the Plt K. do procure some sufficient person on his behalf to give security, according to the course of this Court, by bond to the Deft H. in the penal sum of £—, conditioned to answer costs in case any costs shall be awarded to be paid by the Plt; but the Plt is to be at liberty, instead of giving such security, to lodge in Court, as directed in the schedule hereto, the sum of £—; And it is ordered that until such security is given, or lodgment made, and notice thereof given to the Deft's solr, the Plt do not take any further proceedings in this action against the Deft; And this order is to be without prejudice to the right of the Deft to apply hereafter for further security, as he may be advised; And the costs of the Plt and of the Deft of this application are to be costs in this action. [Add schedule directing lodgment of £— in Court to account of "security for costs of Deft H., and for investment and accumulation." ]—See *Kenny v. Hollings*, V.-C. M. at Chambers, 16 Feb. 1877, A. 308.

For order for fresh security in the place of a bankrupt, see *Transatl. Co. v. Pietroni*, V.-C. W., 2 Nov. 1861, B. 2115.

For order for Plt within ten days to give security in room of, or in addition to, proposed sureties, not solvent, or the suit to be dismissed, see *Cliffe v. Wilkinson*, V.-C., 13 Dec. 1830, A. 257.

For order for Plts, a limited co., to give security for costs under 25 & 26 V. c. 89, s. 69, see *Northampton Coal, &c. Co. v. Midland Waggon Co.*, C. A., 16 Jan. 1878, B. 87, 7 Ch. D. 500; Buckley, 152-3 (3rd ed.).

An order for security to be given by a Plt out of the jurisdiction was discharged on his coming within the jurisdiction: *Mathews v. Chichester*, 30 Beav. 135.

For order to put bond in suit, see *Bainbrigge v. Moss*, V.-C. W., 9 Jan. 1857, A. 283, S. C. 3 Jur. (N.S.) 107.

#### 4. Petitioner to give Security for Costs.

THE petition of A. of [description from petition], on the — day of — preferred &c., coming on this day to be heard before this Court in the presence of counsel for the Petr, and for [respondents], upon hearing counsel for B. [respondent], This Court doth order that the Petr do procure some sufficient person on his behalf to give security according to the course of this Court, by bond to the respondent B., in the penalty of (£40), conditioned to answer costs, in case any shall be awarded to be paid by the Petr; And it is ordered that the said petition do stand over until such security shall have been given.—*Re Dolman*, 15 Jur. 1095; see *Knierim v. Schmauss*, V.-C. S., 6 June, 1862, A. 1100.

For an order for an applicant by summons to give security, see *Re Crockford's, &c. Co.*, 12 Nov. 1875, A. 2857.

A shareholder out of the jurisdiction opposing a winding-up petition will not be required to give security for costs: *Re Percy, &c. Iron Mining Co.*, 2 Ch. D. 531; but a petitioner abroad may be ordered to give security: *Re Home Assurance Co.*, W. N. (71) 137; or a petitioner becoming bankrupt: *Re Carta Para Co.*, 30 W. R. 117.

#### NOTES.

By O. LXV. 6, in any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times and in such manner and form, as the Court or a Judge shall direct.

In every case the security may be allowed to be given by payment of a sum of money into Court.

A petitioner in an action to which he was not a party (*Atkins v. Cooke*, 3 Drew. 694; 26 L. J. Ch. 353; 5 W. R. 381), was ordered to give security to the extent of £40.

By r. 6 (a) (overruling *Redondo v. Chaytor*, 4 Q. B. Div. 453; and *Ebrard v. Gassier*, 28 Ch. Div. 232), a Plt ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction.

By r. 7, where a bond is to be given as security for costs, it shall, unless the Court or a Judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court.

The application for security to be given should be by summons in Chambers: *Vale v. Oppert*, 22 W. R. 629; 5 Ch. D. 633.

The bond of an officer in the army is sufficient security though he is abroad on service: *Miller v. Hales*, 17 Eq. 430.

The Court has discretion to direct security for costs to be given at any stage of the action: *Martano v. Mann*, 14 Ch. Div. 419; and in a proper case will do so even after notice of trial: *Lydney Iron Co. v. Bird*, 23 Ch. D. 358; and the security is not necessarily confined to future costs: *Massey v. Allen*, 12 Ch. D. 807; *Brocklebank v. Lynn Steamship Co.*, 3 C. P. D. 365.

Where money paid into Court for security for costs was paid out to Deft's solr on dismissal of action with costs, the Court of Appeal, on reversing the dismissal, could not order the solr to refund: *Lydney and Wigpool Iron Co. v. Bird*, 33 Ch. Div. 85.

Where insolvent Plt was suing on behalf of his solicitor, and past costs were estimated at £70 and future at £50, security to the amount of £200 was ordered, but reduced by Court of Appeal to £100: *Wilmott v. Freehold House Property Co.*, 56 L. T. N.S. 742; 33 W. R. 554. But in special cases a larger amount than £100 has been ordered; *ex. gr.*, where Plts were a foreign republic having no property in this country: *Republic of Costa Rica v. Erlanger*, 3 Ch. Div. 62. The jurisdiction being discretionary the Court of Appeal is reluctant to interfere: *Wilmott v. Freehold House Property Co.*, *supra*.

Entry of appearance requiring a statement of claim has been held not a waiver of Deft's right to security from Plt out of jurisdiction: *Tellet v. Lalor*, 8 L. R. Ir. 8; *Charlesworth v. Clayton*, 10 L. R. Ir. 357; *Heil v. Lazenby*, 12 L. R. Ir. 75.

Defts, if in position of Plts (*Smith v. Hammond*, 6 Sim. 10), may be ordered to give security, but not a Plt in a cross-suit: *Morg. & W.* 18; *Dan.* 81.

In interpleader the rule that Deft cannot be compelled to give security for costs does not apply: *Tomlinson v. Land and Finance Co.*, 14 Q. B. Div. 539; but the question whether a party is to be regarded as a Plt must be determined by the merits, not by the form of the issue: *Rhodes v. Dawson*, 16 Q. B. Div. 548. A foreigner made Plt in an interpleader issue merely for convenience will not be ordered to give security: *Belmonte v. Aynard*, 4 C. P. D. 221.

Deft who counter-claimed was treated as Plt, and ordered to give security for costs of counter-claim: *Sykes v. Sacerdoti*, 15 Q. B. Div. 423; *secus*, where claim and counter-claim arose out of same transaction: *Mapleson v. Masini*, 5 Q. B. D. 144. And where Plt was a foreigner residing out of the jurisdiction, Deft admitting the cause of action and setting up counter-claim founded on a distinct claim, was not entitled to security: *Winterfield v. Bradnum*, 3 Q. B. Div. 324.

And a person who seeks to intervene and be made Deft, in order to claim property in dispute, may be ordered to give security: *Apollinaris Co. v. Wilson*, 31 Ch. Div. 632.

Security will not be required from a foreigner having substantial property in this country: *Redondo v. Chaytor*, 4 Q. B. Div. 453, 457; *Hamburgher v. Pecting*, 30 W. R. 769; *Re Apollinaris Co.*, 63 L. T. N.S. 502; 39 W. R. 309; and see *Re Howe Machine Co.*, 41 Ch. D. 118. As to what is sufficient evidence of the existence of such property, see *Ebrard v. Gassier*, 28 Ch. Div. 232.

Co-plt residing abroad was not ordered to give security, the liability to costs in a joint action not being limited by the separate interests of the co-plts: *D'Hormusgee v. Grey*, 10 Q. B. D. 13; citing *Umfreville v. Johnson*, L. R. 10 Ch. 580.

## INSOLVENCY OR POVERTY.

As a general rule, poverty is no bar to a litigant except (1) in the case of an appellant, because he has had the benefit of a decision (*v. inf.* Chap. XXXVI., "APPEALS"), and (2) where an insolvent person sues as a "nominal Plt," i.e., one who, not himself having good cause of action, allows his name to be used for the benefit of someone else: *Cowell v. Taylor*, 31 Ch. Div. 34; *Re Carta Para Gold Mining Co.*, 19 Ch. D. 457; *Denston v. Ashton*, L. R. 4 Q. B. 590; and see *Mayor of Hastings v. Ivall*, 9 Ch. 785.

A trustee in bankruptcy, though suing in his official name, and in insolvent circumstances, is not a "nominal Plt": *Pooley's Trustee v. Whetham*, 28 Ch. Div. 37; *Cowell v. Taylor*, *supra*.

And insolvency coupled with the appointment of a receiver of assets is not a sufficient ground for ordering security: *Rhodes v. Dawson*, 16 Q. B. Div. 548; *Dartmouth Harbour Commrs. v. Mayor of Dartmouth*, 34 W. R. 774. And an undischarged bankrupt suing for arrears of rent of premises demised by him subsequently to the bankruptcy, was not a nominal Plt, as he would be benefited even though the money were assets: *Cook v. Whellock*, 24 Q. B. Div. 658.

A petitioner for winding-up, who had given a business address at which he could not be found, and whose solr was unable to state his private address, was ordered to give security: *Re Sturgis Syndicate*, 53 L. T. N.S. 715; 34 W. R. 163.

A motion by Plt to stay payment of taxed costs out of fund in Court to solrs of an impecunious Deft, pending a summons by Deft to review taxation, was refused as being an unprecedented attempt to extend the practice as to security for costs: *Re Barber, Burgess v. Vinnicome*, 55 L. J. Ch. 624.

A married woman suing alone cannot be required to give security for costs, even though she has no separate property: *Re Isaac, Jacobs v. Isaac*, 30 Ch. Div. 418; *Threlfall v. Wilson*, 8 P. D. 18; *secus*, if she chooses to sue by a next friend, because then he alone is liable to Deft for costs: *Re Thompson, Stevens v. Thompson*, 38 Ch. Div. 317.

As to requiring security for costs from a Plt co. in liquidation, see Companies Act, 1862 (25 & 26 V. c. 89), s. 69; *Pure Spirit Co. v. Fowler*, 25 Q. B. D. 235; *Buckley*, 195.

As to security for costs of discovery, see *inf.* Chap. VII., p. 57.

## CHAPTER V.

## PLEADINGS.

1. *Statement of Claim struck out*—O. XIX. 27.

UPON motion this day made unto this Court by counsel for the Deft, and upon hearing counsel for the Plt, and upon reading the statement of claim, Let the statement of claim delivered by the Plt on &c., be struck out on the ground that the same tends to embarrass the fair trial of the action. Plt to pay costs of motion.—*Ker v. Williams, Kay, J.*, 28 Jan. 1886, A. 131.

For like order, with liberty to deliver another statement of claim within one month, see *Davy v. Garrett*, C. A. 12 Jan. 1878, A. 87; 7 Ch. D. 473.

For order after reply, joinder of issue, and day fixed for the hearing giving leave to amend the statement of claim within one week, on payment by the Plts of the costs of the application, see *Chesterfield Co. v. Black*, V.-C. B., 8 March, 1877, A. 488; 26 W. R. 409.

2. *Striking out part of Statement of Defence for Scandal*—O. XIX. 27.

UPON the application of the Plts, and upon hearing counsel for the applicants, and for the Deft, and upon reading the pleadings in this action, let the latter portion of the 7th paragraph of the statement of defence beginning with the words "for more than," to the end of that paragraph be struck out, on the ground that the same is scandalous and such as tends to prejudice and embarrass the fair trial of this action. Costs to be costs in the action.—*Jackson v. Haigh*, V.-C. H. at Chambers, 17 March, 1880, A. 701.

3. *Statement of Claim struck out*—O. XXV. 4.

UPON motion &c. by counsel for the Deft, and upon hearing counsel for the Plt, it is ordered that the statement of claim in this action be struck out, on the ground that it discloses no reasonable cause of action, and that this action do stand dismissed out of this Court with costs &c.—*Johnston v. J.*, Pearson, J., 1 Aug. 1884, A. 1272; 32 W. R. 1016, C. A.; 33 W. R. 239.

4. *To take Pleadings, &c. off the File.*

Let the pleadings and all other documents filed in this action be taken off the file of the Court and delivered up to the parties on whose behalf the same respectively were filed, or to their solrs.

This form can be adapted to a case where affidavits only have been filed.

5. *Leave to plead further Grounds of Defence arising after Delivery of Statement of Defence—O. xxiv. 2.*

UPON the application of the Deft, and upon hearing the solr for the Deft, who alleged that since the Deft delivered his statement of defence in this action [*or if no defence has been delivered, that since the time limited for delivery of a statement of defence expired*], that is to say, on the — day of — (*within eight days*), further grounds of defence have arisen, and upon hearing the solr for the Plt, It is ordered that the Deft be at liberty within — days from the date of this order to deliver a further statement of defence setting forth the same.

6. *Order for Delivery of Further Statement of Particulars of Counter-Claim—O. xix. 7.*

UPON the application of the Plt &c., It is ordered that the Deft P. do within &c. after service of this order, deliver to the Plt, or to his solrs, particulars in writing stating the dates and items of (the various loans) referred to in the — paragraph of the Deft's counter-claim, and also (like particulars of the services, fees, and disbursements amounting to £—) referred to in the — paragraph of the said counter-claim.—*Milner v. Peters*, V.-C. M. at Chambers, 22 Nov. 1878, B. 2023.

For forms of orders for particulars under O. xix. 7, see R. S. C., App. K., Forms 11—13.

7. *Deft refused Permission to avail himself of his Counter-claim—O. xix. 3.*

UPON motion &c. by counsel for the Plts, and upon hearing counsel for the Deft, and upon reading an affidavit of &c., filed &c., This Court being of opinion that the counter-claim of the Deft cannot be conveniently disposed of in this action [*or ought not to be allowed*], doth refuse the Deft permission to avail himself of his said counter-claim; And it is ordered that the Deft B. do pay to the Plts P. &c. their costs of the said counter-claim, including the costs of this application, such costs to be taxed &c.—*Powell v. Burney*, M. R., 24 May, 1878, B. 1059.

8. *Order to exclude Counter-claim—O. xxi. 15.*

UPON the application of &c., and upon hearing the solicitor for the Plt, who alleged that the Deft in his defence delivered on &c., sets up

a counter-claim, that the time for the Plt to deliver his reply to the said defence has not yet expired, and that the Plt contends that the claim so raised ought not to be disposed of by way of counter-claim, but in an independent action, It is ordered that the said counter-claim of the Deft be excluded at the trial of this action.—*Rees v. Fisk*, M. R. at Chambers, 15 Jan. 1878, B. 167; *Gray v. Webb*, Kay, J., 24 Ch. D. 802; *Compton v. Preston*, Fry, J., 21 Ch. D. 138.

For like order on motion, see *Padwick v. Scott*, V.-C. H., 9 March, 1876, B. 406; 2 Ch. D. 736.

For order refusing like motion, see *Dear v. Swoorder*, V.-C. H., 14 Dec. 1876, A. 2044; 4 Ch. D. 476; and see *Huggons v. Tweed*, 10 Ch. Div. 359.

9. *Leave, by further Reply, to plead Grounds of Defence to Counter-claim arising after Reply*—O. XXIV. 2.

UPON the application of the Plt, and upon hearing the solr for the Plt, who alleged that within eight days of this time a ground of defence to the Defts' counter-claim has arisen, and that the time limited for delivering his reply has expired, It is ordered that the Plt be at liberty on or before &c. to deliver a further reply to the said counter-claim, setting forth such further ground of defence.

10. *Leave to Plead (before joinder of Issue) subsequently to Reply*—O. XXIII. 2.

UPON the application of the Deft, and upon hearing &c., It is ordered that the Deft be at liberty to deliver a further pleading notwithstanding the Plt has delivered his reply, but the Plt is to be at liberty to deliver a further pleading in rejoinder thereto.

11. *Leave to withdraw Pleadings*—O. XXVI. 1.

UPON the application &c., and upon hearing &c., It is ordered that the Deft be at liberty to withdraw her amended statement of defence and counter-claim.—*Michell v. Malings*, V.-C. H. at Chambers, 7 Feb. 1877, B. 327.

12. *Another Form.*

AND the Defts by their counsel applying to be at liberty now to withdraw their statement of defence, It is ordered that the Defts be at liberty to withdraw their statement of defence.—*Swindell v. Birmingham Syndicate*, North, J., 22 March, 1884, B. 370; W. N. (84) 98.

13. *Order on Appeal for further and better Particulars*—O. XIX. 7.

DISCHARGE order dated &c., Let the Plt co. on or before &c. deliver to the Deft P. or his solrs further and better particulars stating the general nature of the impropriety, wrong, fraud, or falsity of each entry complained of in the particulars already delivered by them, and the Plt co. are to be at liberty to withdraw any items, specifying in the further

and better particulars to be delivered under this order the items so withdrawn. Plt to pay all costs of this and previous order.—*Newport Slipway and Dry Dock Co. v. Paynter*, C. A. 10 Nov. 1886, B. 1239; 34 Ch. Div. 88.

## NOTES.

## SCANDALOUS OR EMBARRASSING MATTER.

By O. XIX. 27, "the Court or a Judge may, at any stage of the proceedings, order to be struck out or amended, any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may, in any such case, order the costs of the application to be paid as between solr and client."

Scandalous matter in a pleading is that which contains offensive allegations not material to the relief claimed: *Rubery v. Grant*, 13 Eq. 443, 447; *Christie v. C.*, 8 Ch. 499. Allegations which, though offensive, state facts which may be proved in evidence at the trial (*ex. gr.*, allegations in aggravation of damages in actions for seduction or libel), are material within O. XIX. 4, and therefore not scandalous nor unnecessary: *Millington v. Loring*, 6 Q. B. Div. 190; *Whitney v. Moignard*, 24 Q. B. D. 630; *secus*, where allegations of fraudulent concealment are made in the statement of claim and withdrawn in the reply: *Brooking v. Maudslay*, 55 L. T. N.S. 343.

A pleading is embarrassing within the meaning of this rule when it contains allegations which the party is not entitled to make use of: *Heugh v. Chamberlain*, 25 W. R. 742; or raises by way of defence an issue which the Deft is not entitled to raise: *Liardet v. Hammond Electric Light, &c. Co.*, 31 W. R. 710; or contains statements of unnecessary facts: *Davy v. Garrett*, 7 Ch. Div. 473; or alleges matters of law which ought to be raised otherwise, or are merely conditional: *Stokes v. Grant*, 4 C. P. D. 27; and see *Evelyn v. E.*, 31 Ch. D. 138; 28 W. R. 531; or does not state the facts which are material for enabling the Deft to go to trial knowing what the issue which he has to meet is: *Phillips v. P.*, 4 Q. B. Div. 127; and see *Davis v. James, inf.*; or introduces embarrassing issues, as by allegations tending to re-litigate questions disposed of by a former compromise: *Knowles v. Roberts*, 38 Ch. Div. 263; and see *United Telephone Co. v. Tasker*, 59 L. T. N.S. 852; or joins distinct causes of action by separate Plts: *Smith v. Richardson*, 4 C. P. D. 112; or claims a right of way over land, without setting out the termini and general course: *Harris v. Jenkins*, 22 Ch. D. 481; and see *Spedding v. Fitzpatrick*, 38 Ch. Div. 411; or claims recovery of land with a mere general allegation of title: *Phillips v. P., sup.*; or sets up a claim by assignee of reversion without showing how reversion was created and became vested in Plt: *Davis v. James*, 26 Ch. D. 778; or claims damages for libel without setting out the defamatory words: *Harris v. Warre*, 4 C. P. D. 125; or justifies a libel, but leaves it doubtful what is justified and what is not: *Fleming v. Dollar*, 23 Q. B. D. 388; or pleads the Statute of Frauds without showing the facts which make the statute applicable: *Pullen v. Snelus*, 48 L. J. C. P. 394.

But a pleading is not embarrassing merely because it claims alternative relief: *Bagot v. Easton*, 7 Ch. Div. 1; or sets up inconsistent grounds of relief or defences: *Re Smith, Rigg v. Hughes*, 9 P. Div. 68; *Re Morgan, Owen v. Morgan*, 35 Ch. Div. 492, where Deft so pleading was called upon to amend or give particulars within fourteen days after discovery of documents. Reasonable latitude ought to be permitted: *Tomkinson v. S. E. Rail. Co.*, W. N. (87) 174.

As a general rule the defence of payment into Court is not embarrassing merely on the ground that it is combined with alternative grounds of defence: *Hawkesley v. Bradshaw*, 5 Q. B. D. 302; *Berdan v. Greenwood*, 3 Ex. Div. 251; see *Harper v. Davis*, 19 Q. B. D. 170; *Emden v. Carte*, 19 Ch. D. 311; *Spurr v. Hall*, 2 Q. B. D. 615.

For instances of the exercise of the power conferred on the Court of striking out the whole or part of a pleading containing scandalous, irrelevant, or embarrassing matter, or mere evidence, see *Davy v. Garrett*, 7 Ch. Div. 473; *Phillips v. P.*, 4 Q. B. Div. 127; *Harbord v. Monk*, 9 Ch. D. 616; 38 L. T.

N.S. 411; *Cashin v. Cradock*, 3 Ch. Div. 376; *Blake v. Albion, &c. Soc.*, 45 L. J. C. P. 663; *Knowles v. Roberts*, 38 Ch. Div. 263; see also *Harris v. Gamble*, 6 Ch. D. 748; *Heap v. Marris*, 2 Q. B. D. 630; *Herring v. Bischoffsheim*, W. N. (76) 77; *Askew v. N. E. Rail. Co.*, W. N. (75) 238; *Preston v. Lamont*, 1 Ex. D. 361; or by simple amendment of prolix or informal statements: W. N. (76) 24.

Statements by husband, in answer to wife's bill, that she had been guilty of adultery were expunged with costs as between solr and client: *Pearce v. P.*, 22 W. R. 69; so also were allegations as to frauds unconnected with the suit: *Christie v. Orington*, 8 Ch. 499; or which had been condoned long before: *Atwood v. Ferrier*, 14 W. R. 1014.

Applications under the rule may be made either by summons or motion; but if made by motion, the costs of an application by summons only may be allowed: *Marriott v. M.*, 26 W. R. 416.

The Court of Appeal in a fit case will review the discretion of the Court below: see *Knowles v. Roberts*, 38 Ch. Div. 263, explaining *Watson v. Rodwell*, 3 Ch. Div. 380.

The Court has an inherent power to prevent its records from being made the instruments of oppression, and this power will be exercised as to pleadings or affidavits which are unduly prolix: *Hill v. Hart-Davis*, 28 Ch. Div. 470; and scandalous matter in a bill of costs lodged with the taxing master will be struck out: *Re Miller and Miller*; *Re French*; *Love v. Hills*, 54 L. J. Ch. 205; 33 W. R. 210; following *Erskine v. Garthshore*, 18 Ves. 114.

In *Williamson v. L. & N. W. Rail. Co.*, 12 Ch. D. 787, the whole of a reply which was prolix and in other respects faulty was struck out as embarrassing.

#### PROCEEDINGS IN LIEU OF DEMURRER.

O. xxv. abolishes demurrers (see r. 1), but substitutes three modes of procedure by which the objects of a demurrer in obtaining a speedy decision may be attained, viz., (1) by raising a question of law; (2) by the striking out of pleadings which disclose no reasonable ground of action; and (3) by the stay or dismissal of frivolous or vexatious actions: see *Burstall v. Beyfus*, 26 Ch. Div. 35.

By O. xxv. 2, any party may raise by his pleading any point of law, which is to be disposed of by the Judge at or after the trial, but by consent, or by order on the application of either party, may be set down for hearing and disposed of at any time before the trial. By r. 3, if the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim or reply therein, the Court or Judge may thereupon dismiss the action, or make such other order therein as may be just.

As to the practice in reference to setting down points of law for hearing, see *L. C. & D. Rail. Co. v. S. E. Rail. Co.*, 53 L. T. N.S. 104; and that an action set down on a point of law is not entitled to precedence over other non-witness actions: see *Re Thorniley*, *Woolley v. Thorniley*, 53 L. J. Ch. 499; 32 W. R. 539.

Under these rules, the analogy of the old practice on demurrer will be followed as to dismissal of action: see *Percival v. Dunn*, 29 Ch. D. 128; *O'Brien v. Tyssen*, 28 Ch. D. 372; and, as under the old practice, trial of issues of fact will not in general be stayed pending appeal: *Re Palmer's Application*, 22 Ch. Div. 88.

By O. xxv. 4, "the Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Under this rule, the Court is not bound to look to the statements in the pleadings with the same strictness as on demurrer under the old practice: per Cotton, L.J., *Dadswell v. Jacobs*, 34 Ch. Div. 278, 281.

As to the meaning of the expression "reasonable cause," see *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489; *Boaler v. Holder*, 54 L. T. N.S. 298. Where a pleading presents a substantial case it will not be struck out



merely because the Plt is not likely to succeed on it at the trial: *Republic of Peru v. Peruvian Guano Co.*, *sup.*

An order under the first branch of this rule will be made on a consideration of the pleadings only, and evidence will not be received: *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489; and see *Lawrance v. Lord Norreys*, 39 Ch. Div. 213.

A statement of claim praying discovery in aid of proceedings in a foreign Court was struck out under the rule, on the ground that no such action would lie: *Dreyfus v. Peruvian Guano Co.*, 31 Ch. D. 151.

It is vexatious within the rule to make solrs or others parties without seeking any relief against them, except payment of costs or discovery: *Burstall v. Beyfus*, 26 Ch. Div. 35; and where an architect was made a party but no cause of action against him appeared, his name was struck out with costs, including the costs of an affidavit by him upon the application for the order: *Amos v. Herne Bay Pavilion Co.*, 54 L. T. N.S. 264. But in an action by copyholders for an injunction to restrain the working of coal by lessees of the lords of the manor, the lords authorising and justifying the alleged wrongful working could be joined as Defts: *Shafto v. Bolckow, Vaughan & Co.*, 34 Ch. D. 725.

The rule applies only where the action appears on the face of the pleadings to be frivolous or vexatious: *Willis v. E. Beauchamp*, 11 P. Div. 60. As to dismissal of action or stay of proceedings under the inherent general jurisdiction which the Court has to prevent abuse of its procedure, see *inf.*, Chap. XI., "DISCONTINUANCE AND DISMISSAL."

#### PROCEDURE GENERALLY.

By O. XXIV. 2, "where any ground of defence arises after the Deft has delivered a statement of defence, or after the time limited for his doing so has expired, the Deft may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the Plt may, within eight days after such ground of defence has arisen, or at any subsequent time, by leave of the Court or a Judge, deliver a further defence or further reply, as the case may be, setting forth the same."

By O. XIX. 3, "a Deft in an action may set off, or set up by way of counter-claim against the claims of the Plt, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the Plt before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the Deft to avail himself thereof."

This is a rule of procedure only, and does not confer any new rights of set-off or otherwise: *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. Div. 648; *S. C.*, 9 App. Cas. 434; *Pellas v. Neptune Marine Insurance Co.*, 5 C. P. Div. 34.

As to set-off generally, see *inf.* Chap. XLIII., "ACCOUNT."

A counter-claim, though not a cross action, has the effect of one, and if the action is discontinued the counter-claim is not thereby put an end to: O. XXI. 16; *McGowan v. Middleton*, 15 Q. B. Div. 464; overruling *Vavasour v. Krupp*, 15 Ch. D. 474; and see *Sykes v. Sacerdoti*, 15 Q. B. Div. 425.

It has been held that relief can be given on a counter-claim in respect of a cause of action accruing after the issue of the writ: *Beddall v. Mailland*, 17 Ch. D. 180; not following *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 712; and see *Toke v. Andrews*, 8 Q. B. D. 428; *Ellis v. Munson*, 35 L. T. N.S. 585; and if a Deft counter-claims in respect of such a matter the Plt may counter-claim in reply in respect of the same transaction: *Toke v. Andrews*, *sup.* Relief will not be given by counter-claim in respect of a matter totally distinct from the original subject-matter of the action: *Barber v. Blaisberg*, 19 Ch. D. 473.

A third party cannot counter-claim against the Plt: *Eden v. Weardale Iron and Coal Co.*, 28 Ch. Div. 333, where it was doubted whether a third party is a "party" within the definition in Jud. Act, 1873, s. 100.

A Deft cannot counter-claim to enforce a judgment obtained in another Division: *Birmingham Estates Co. v. Smith*, 13 Ch. D. 506.

O. XVIII. 5, permitting claims by an exor or admor as such to be joined with claims by or against him personally, does not apply to counter-claims: *Macdonald v. Carington*, 4 C. P. D. 28.

By O. XXI. 15, where a Deft sets up a counter-claim, if the Plt or any other person named as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just. The rule is to be read in connection with O. XIX. 3, and delay of the trial may be a ground for excluding the counter-claim: *Gray v. Webb*, 21 Ch. D. 802.

Where the Plt (a solr) brought an action for the amount of his bill of costs, and the Deft counter-claimed, denying retainer, and for damages for negligence, but did not appear at the trial, the Plt on proving his case was entitled to have the counter-claim dismissed and to judgment for the amount which should be found due on taxation: *Lumley v. Brooks*, 41 Ch. Div. 323.

By O. XXIII. 2, "no pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then shall be pleaded only upon such terms as the Court or Judge shall think fit."

By O. XXVII. 13, "if the Plt does not deliver a reply, or any party does not deliver any subsequent pleading, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

By O. XXIII. 5, "as soon as any party has joined issue upon the preceding pleading of the opposite party simply, without adding any further or other pleading thereto, or has made default as mentioned in O. XXVII. 13, the pleadings as between such parties shall be deemed to be closed."

The pleadings are not closed until the last of the defences has been delivered: *Ambrose v. Evelyn*, 11 Ch. D. 759.

By O. XXVI. 1, the Plt may, at any time before receipt of the Deft's defence, or after the receipt thereof, before taking any other proceeding in the action (save any interlocutory application), by notice in writing, withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such Deft's costs of the matter so withdrawn. Such costs shall be taxed, and such withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the Plt to withdraw the record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a Deft, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a Deft to withdraw his defence, or any part thereof, without such leave.

A Deft to an action for recovery of land was allowed to withdraw his defence after the action had been in the paper, upon terms of payment of balance of rent due into Court, and payment of costs occasioned by the defence and of the application: *Real and Personal Advance Co. v. McCarthy*, 14 Ch. D. 188.

As to discontinuance, see Chap. XI., *post*.

#### PARTICULARS.

By O. XIX. 6, in all cases in which the party pleading relies on misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in certain other cases, particulars are to be stated in the pleadings; and, by O. XIX. 7, "a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

The object of particulars is to enable a party to know what case he has to

meet, and thus prevent surprise at the trial and save expense: *Crompton v. Anglo-American Brush Electric Light Corporation*, 35 Ch. Div. 283; *Spedding v. Fitzpatrick*, 38 Ch. Div. 410; *Thompson v. Birkley*, 31 W. R. 230.

Plt was ordered to give particulars of items which, in his claim, were placed to the credit of the Deft: *Godden v. Corsten*, 5 C. P. D. 17. General allegations of wilful default were to be struck out unless Plt furnished particulars within a week: *Re Anstice, A. v. Hibbell*, 54 L. J. Ch. 1104; 52 L. T. 572. In an action for slander Deft was held entitled to particulars of the names of the persons to whom the slanderous words were uttered, as being part of the facts on which the Plt relied: *Bradbury v. Cooper*, 12 Q. B. D. 94, citing *Eade v. Jacobs*, 3 Ex. Div. 335; and before delivery of defence: *Roselle v. Buchanan*, 16 Q. B. D. 656. As to particulars to be given in action to restrain trespass on a road by Deft who alleges dedication by the Plt and his predecessors to the public, see *Spedding v. Fitzpatrick*, 38 Ch. Div. 410.

In the Probate Division a person alleging undue influence was not required to give particulars of acts of undue influence, but only the names of the persons charged: *Lord Salisbury v. Nugent*, 9 P. D. 23; and see *Cave v. Torre*, 54 L. T. N.S. 515; *Hankinson v. Barningham*, 9 P. D. 62; and particulars will not be ordered of allegations which are not material: *Cave v. Torre*, *sup.*

Where particulars were ordered of alleged false entries in books of account, it was not sufficient to specify the entries, but the general nature of the objections to the several items was to be indicated: *Newport Slipway Dry Dock Co. v. Paynter*, 34 Ch. Div. 88; and see Form 13, *sup.* p. 32.

Where the action is for an account, particulars, not being required to enable Deft to frame defence, will not in general be ordered: *Augustinus v. Nerinckx*, 16 Ch. Div. 13; *secus*, where the claim is for a specified sum made up of a number of items: *Blackie v. Osmaston*, 28 Ch. Div. 119; and the fact that an account is also asked for is not a sufficient ground for refusing particulars: *Kemp v. Goldberg*, 36 Ch. D. 505.

R. 6 is a rule of pleading only, and the omission to comply with it ought not to be scanned too narrowly on a question as to discovery: per Bowen, L. J., *Leitch v. Abbott*, 31 Ch. Div. 374. Where, in an action by principal against agent for fraud, the general nature of the fraud was indicated, but no particulars given, the Plt was held entitled (even though a settled account was pleaded) to discovery to enable him to give details of the fraud, before giving particulars: *Whyte v. Ahrens*, 26 Ch. Div. 717; *Leitch v. Abbott*, *sup.*; *Sachs v. Speilman*, 37 Ch. D. 295. And a Deft, by delivering statement of defence, does not waive his right to particulars: *Sachs v. Speilman*, 37 Ch. D. 295, where Deft's application for particulars was ordered to stand over till a statement of defence had been put in. And generally where the Deft has means of knowledge which the Plt has not, the Deft is not entitled to particulars until after he has given discovery: *Millar v. Harper*, 38 Ch. Div. 110; and see *Union Electrical Light Co. v. Electrical Storage Co.*, 38 Ch. Div. 325.

By O. XIX. 8, "the party at whose instance particulars have been delivered under a Judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons." This rule does not apply where the party has been previously ordered to deliver defence within a month "peremptory": *Falck v. Arthelm*, 24 Q. B. Div. 174.

## CHAPTER VI.

## AMENDMENT.

## SECTION I.—PLEADINGS.

1. *Amendment of Pleading disallowed*—O. XXVIII. 4.

UPON motion [or the application of] &c., and upon hearing &c., and upon reading &c., It is ordered that the amendment in the — paragraph of the Plt's (Deft's) statement of claim (defence) be disallowed, and be accordingly struck out of the same.—Directions as to costs.

2. *Amendment at the Trial for the Purpose of opening Settled Accounts*—O. XXVIII. 1, 6.

THIS action coming on &c.—Declare that the monthly cash accounts rendered &c. are to be treated as settled accounts.—“And this Court doth order that the Plts be at liberty within — days after the date of this order to amend their statement of claim in such manner as they may be advised, by inserting therein specific allegations relevant to the relief asked by them for opening the accounts alleged by the Defts to have been stated and settled.”—Plts M. &c. to pay to Deft C. the costs of the day, to be taxed.—Reserve further costs.—Adjourn further hearing.—And in default of amendment within the time limited the action to be dismissed with costs [*if so*, without further order].—See *Mozley v. Cowie*, Fry, J., 15 Dec. 1877, B. 2110; 26 W. R. 854.

## NOTES.

It is not now in general necessary to draw up an order for amendment of a writ or pleadings, it being provided by O. LII. 14, that when an order has been made not embodying any special terms, nor including any special directions, but simply enlarging time for taking any proceeding or doing any act, or giving leave for the amendment of any writ or pleadings, it shall not be necessary to draw up such order unless the Court or a Judge shall otherwise direct; but the production of a note or memorandum of such order, signed by a Judge, registrar, master, chief clerk, or district registrar, shall be sufficient authority for such amendment.

The rules as to amendment generally are contained in O. XXVIII., which provides, by r. 1, that at any stage of the proceedings the Court or a Judge may allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such

amendments shall be made as may be necessary for the purpose of determining the real questions in controversy; and by rr. 2, 3, without any leave, the Plt may amend his statement of claim, and the Deft his set-off or counter-claim, within the times thereby respectively limited: but a pleading so amended may, on the application of the opposite party within eight days after delivery, be disallowed, or allowed, subject to terms as to costs or otherwise: r. 4. The opposite party is then to plead to the amended pleading, or amend his pleading within the time he has to plead, or within eight days from the delivery of the amendment, whichever shall last expire; but if he has pleaded before the delivery of the amendment, and does not plead again or amend, he is to be deemed to rely on his original pleadings: r. 5.

By O. xx. 4, "whenever a statement of claim is delivered the Plt may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

Amendment of writ, as to indorsement, is under the above rules; as to parties, under O. xvi., *inf.* p. 42.

By O. xxviii. 6, in all cases not provided for by the preceding rules, either party may apply to the Court or a Judge in Chambers, or to the Judge at the trial of the action, for leave to amend any pleading, and the amendment may be allowed upon terms as to costs or otherwise.

By r. 12, the Court or a Judge may at any time, and on such terms as to costs or otherwise as may be thought just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

The discretionary powers of allowing amendments, given to the Courts by O. xxviii., have been widely exercised. The general rule is, that amendments ought always to be allowed, except when the other party cannot be placed in the same position as if the pleading had been originally correct, but an injury would be occasioned to him by the amendment which cannot be compensated by costs: *Steward v. N. Metropolitan Tram. Co.*, 16 Q. B. Div. 556; *Weldon v. Neal*, 19 Q. B. Div. 394; *Clarapede v. Commercial Union Association*, 32 W. R. 262; *Tildestley v. Harper*, 10 Ch. Div. 393.

Leave to amend by raising a new case has been granted, after a day has been fixed for the hearing: *Roe v. Davis*, 2 Ch. D. 729; and also at the hearing: *Budding v. Murdoch*, 1 Ch. D. 43; by inserting allegations for the purpose of opening settled accounts: *Mozley v. Cowie*, 26 W. R. 854; 47 L. J. Ch. 271, Form 2, *sup.* p. 38; of setting aside a sale of shares: *Ashley v. Taylor*, 10 Ch. D. 768; 27 W. R. 228; of charging wilful default on terms that Plt should enter into no new evidence, and pay costs of the hearing: *King v. Corke*, 1 Ch. D. 57; and, where necessary in order to settle the real question in dispute, a pleading may be amended even after verdict, to give effect to the finding of the jury: *Noad v. Murrow*, 40 L. T. N.S. 100, 103.

Amendment of reply after issue joined was allowed on motion on terms of Plts paying the costs which might turn out to have been thrown away by reason of the amendment, and the costs of the motion: *Preston Corporation v. Fulwood L. B.*, 34 W. R. 200.

And in an action for the recovery of land leave was given to amend by adding an alternative cause of action arising out of the defence: *Rusbrooke v. Farley*, 33 W. R. 557; 52 L. T. N.S. 572.

And if necessary the Court may order allegations to be re-inserted which had previously been ordered to be struck out: *Mansel v. A. G.*, 4 P. D. 232.

But a Plt was not allowed to amend by setting up a claim which, since the issue of the writ, had become barred by the Statute of Limitations: *Weldon v. Neal*, 19 Q. B. Div. 394; nor a Deft, after close of pleadings, to set up a defence transferring liability to a vestry, the statutory period of limitation for suing whom had in the interval expired: *Steward v. N. Metropolitan Tramways Co.*, 16 Q. B. Div. 556.

And leave will not in general be granted to raise an entirely new case of fraud: *Hendriks v. Montagu*, 50 L. J. Ch. 456.

Leave to amend three months after joinder of issue, by raising a new case wholly inconsistent with the previous pleading, was refused: *Clark v. Wray*, 31 Ch. D. 68.

Delay may be a ground for refusing the leave: *Clark v. Wray*, *sup.*; or for allowing it, with imposition of special terms, *ex. gr.*, payment of the costs of

the application as between solicitor and client: *Kurtz v. Spence*, 36 Ch. Div. 770.

An affidavit stating the nature, or showing the materiality of the proposed amendments, is no longer required: *Cargill v. Bower*, 4 Ch. D. 78; *Chesterfield Co. v. Black*, 25 W. R. 409. If such an affidavit is made, it is improper to cross-examine upon it: *Conybeare v. Lewis*, 29 W. R. 391.

If the amendment be not made within the time limited for that purpose by the order giving leave to amend, or, if no time be limited within fourteen days from the date of the order, the order to amend shall on the expiration of the time limited, or of fourteen days, as the case may be, become *ipso facto* void, unless the time be extended: O. XXVIII. 7; and see O. LXIV. 7.

By O. LXIV. 5, the time of the Long Vacation shall not be reckoned in the computation of the times allowed for filing, amending or delivering any pleading, unless otherwise directed by the Court or a Judge.

By O. LXIV. 8, the time for delivering or amending any pleading may be enlarged by consent in writing without application to the Court or Judge.

Under the former practice leave to amend would not be given at the hearing, unless the matter of amendment related to the issues already raised: see *Ld. Darnley v. L. C. & D. Rail. Co.*, 1 D. J. & S. 204, 215; *Gossip v. Wright*, 11 W. R. 632; or the position of the parties had become changed since bill filed: *A. G. v. Cambridge Gas Co.*, 6 Eq. 282; but a Plt having no title to sue when he filed his bill could not obtain a decree upon a right of suit subsequently acquired and brought forward by amendment or supplemental bill: *A. G. v. Corp. of Avon*, 3 D. J. & S. 637; and see *Peck v. Spencer*, 5 Ch. 548.

For instances of amendment at the hearing under the old practice, see *Maughan v. Blake*, 3 Ch. 32; *Ld. Darnley v. L. C. & D. Rail. Co.*, 1 D. J. & S. 204; *Bierdermann v. Seymour*, 1 Beav. 594; and after the hearing on further consideration, see *White v. Hall*, 1 Russ. & M. 332.

A Deft whose statement of defence has been held to be an insufficient denial under O. XIX. 19, will not, as a general rule, be refused leave to amend at the hearing: *Re Truefort*, *Trafford v. Blanc*, 34 W. R. 56, following *Tildesley v. Harper*, 10 Ch. Div. 393; but he will not be allowed to amend so as to raise merely technical points: *Collette v. Goode*, 7 Ch. D. 842; and see *Byrd v. Nunn*, 7 Ch. Div. 284; *Thorp v. Holdsworth*, 3 Ch. D. 637; *Edevain v. Cohen*, 43 Ch. Div. 187.

Amendment at the hearing of a foreclosure action was allowed on payment of costs where a denial by Deft was not sufficiently specific, and the case came on upon admissions: *Rutter v. Tregent*, 12 Ch. D. 758; but was refused where the Deft had omitted to deny a material fact which must have been within his knowledge: *Lowther v. Heaver*, 41 Ch. Div. 248.

In an action for trespass, where the Deft claimed a prescriptive right, the Court of Appeal, reversing Fry, J., allowed an amendment at the hearing by which the title of the Plt would be denied: *Laird v. Briggs*, 19 Ch. Div. 22.

And where a case of fraud, after Plt's case was closed, arose on the cross-examination of the Defts, leave to amend was granted, but the evidence was to be confined to matters arising upon the cross-examination: *Riding v. Hawkins*, 14 P. D. 56.

In one case, where Plt sued as riparian proprietor to restrain trespass on a river, and at the hearing it appeared that the bed of the river was vested in the Crown, whose rights he had purchased since action brought, he was permitted to issue a new writ, and the hearing of the two actions was, by consent, then proceeded with: *Bourke v. Davis*, 44 Ch. D. 110.

But Defts were not allowed, after evidence closed, to amend by pleading merger of cause of action in a previous judgment against joint tortfeasors: *Edevain v. Cohen*, 41 Ch. D. 563; 43 Ch. Div. 187.

As to amendment at hearing by adding parties, see *inf.* p. 42.

Liberty to amend after time for appealing had long expired was granted under special circumstances on special terms, in order that the other parties might not suffer any loss by the applicant's not having taken the proper course of appealing in due time: *Kurtz v. Spence*, 36 Ch. Div. 770.

The jurisdiction being discretionary, the Court of Appeal is reluctant to interfere: *Byrd v. Nunn*, 7 Ch. Div. 284; *Edevain v. Cohen*, *sup.*; but has done so where the amendment was necessary in order to try the real question between the parties: *Laird v. Briggs*, *sup.*

Where the interest of the Plt is validly assigned *pendente lite*, and an order made giving the assignee leave to carry on the proceedings, the statement of claim should be amended by adding the new title of the action and showing the devolution of interest on the new Plt: *Seear v. Lawson*, 16 Ch. Div. 121; and see *inf.* Chap. IX., "CHANGE OF PARTIES."

As to amendment of judgments and orders of Court, see *inf.* Chap. XV., "PASSING AND ENTERING."

As to costs of amendments, see O. LXV. 27 (31, 32), and *inf.* Chap. XVII., "COSTS."

## SECTION II.—AMENDMENT AS TO PARTIES.

### 1. *Adding Plt—Amendment of Writ and Statement of Claim by naming the A. G. as Plt—O. XVI. 2.*

UPON motion &c., This Court doth order that the Plts be at liberty, upon obtaining the allowance of Her Majesty's A. G. (and without prejudice to the pending motion for an injunction &c.), to amend the writ of summons issued by them in this action on &c., and the statement of claim delivered by them on &c., by adding in the said writ and statement respectively Her Majesty's A. G. as Plt in this action at the relation of the existing Plts, and by inserting in the said writ and statement of claim the names of Messrs. A. of &c., as solrs for the Plt and relators, and the names of Messrs. B., of &c., as agents for the said Messrs. A., and otherwise to amend the said writ and statement of claim as the Plts shall be advised.—Costs to be costs in the action.—See *Caldwell v. Pagham Harbour Reclamation Co.*, V.-C. H., 17 Feb. 1876, A. 243; 2 Ch. D. 221.

### 2. *Order Nisi to add Defts in Consolidated Action—O. XVI. 11.*

UPON motion &c., This Court doth order that J. and E. be added as Defts hereto, unless they shall, within — days after service of this order, show unto this Court good cause to the contrary.—See *Re Wortley, Culley v. Wortley*, M. R., 8 Dec. 1876, B. 2007; 4 Ch. D. 180.

### 3. *Action defective for want of Parties—Trial to stand over—O. XVI. 11.*

THIS action coming on for trial this day &c., And it being admitted by the Plts L. and W. that the late Plt B. is dead, and they by their counsel asking leave to amend, And upon hearing &c., This Court doth order that this action do stand over until the — day of —, to give time (or with liberty) to the Plts to remedy the defect caused by the death of the said B. [or to amend their writ and statement of claim by adding parties, and otherwise in relation thereto] as they may be advised; And this Court doth order that the Plts L. and W. do pay to the Defts M. &c. their costs occasioned by this action having been

placed in the paper for trial on the — day of — and the — day of —; such costs to be taxed by the Taxing Master.—*Lydall v. Martinson*, Fry, J., 12 June, 1877, B. 1125; 5 Ch. D. 780.

## NOTES.

## ADDING OR STRIKING OUT PARTIES.

By O. XVI. 2, "where an action has been commenced in the name of the wrong person as Plt, or where it is doubtful whether it has been commenced in the name of the right Plt, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as Plt upon such terms as may be just."

The rule applies to mistakes of law as well as of fact: *Duckett v. Gover*, 6 Ch. D. 82; *Val de Travers Co. v. London Tramways Co.*, 40 L. T. N.S. 133; 48 L. J. C. P. 312; and see *Long v. Crossley*, 13 Ch. D. 388.

The rule was held not to apply where after consideration it was decided that the original Plts had no sufficient interest in law to entitle them to sue: *Clowes v. Hilliard*, 4 Ch. D. 413; and see *Luke v. S. Kensington Hotel Co.*, 7 Ch. D. 789.

The order cannot be made on *ex parte* motion: *Tildesley v. Harper*, 3 Ch. D. 277; *Re Colbeck, Hall v. C.*, 36 W. R. 259.

The rule is to be read together with r. 11 (stated *inf.*): *Tryon v. National Provident Institution*, 16 Q. B. D. 678; and the provision in that rule as to written consent would seem to be applicable also to r. 2: *S. C.*; but see *Sanders v. Peek*, 32 W. R. 462.

For case in which the Court of Appeal under this rule directed an appeal to stand over, with liberty to amend by adding Plts, on consent being obtained, and stayed proceedings under an order on further consideration made subsequently to service of notice of the appeal, see *Gandy v. G.*, 30 Ch. Div. 57, 71.

As to adding the trustee of a bankrupt Plt as a co-Plt, see *Emden v. Carte*, 17 Ch. Div. 768; 29 W. R. 600.

By O. XVI. 11, after providing that no action shall be defeated by reason of misjoinder, the Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may seem just, order the name of any party, whether Plt or Deft, to be struck out, and the name of any party, whether Plt or Deft, who ought to have been joined, or whose presence is necessary to enable the Court effectually and completely to adjudicate upon and settle all questions in the cause or matter to be added. No person shall be added as a Plt suing without a next friend, or as the next friend of a Plt under any disability, without his own consent in writing thereto.

The provision that the consent must be in writing practically overrules *Cox v. James*, 19 Ch. D. 55, and renders obsolete *Turquand v. Fearon*, 4 Q. B. D. 280.

The written consent must be obtained though the person sought to be joined is indemnified against costs: *Tryon v. National Provident Institution*, 16 Q. B. D. 678; and even though he be trustee for the original Plt: *Beasley v. B.*, 37 Ch. D. 648.

An action ought not to be dismissed for want of parties: *Fairclough v. Marshall*, 4 Ex. Div. 37; *Van Gelder & Co. v. Sowerby Bridge Flour Society*, 44 Ch. Div. 374.

For instances of the exercise of this jurisdiction by making a co-Plt Deft at the hearing, see *Roberts v. Evans*, 7 Ch. D. 830; by adding a Deft, *Honduras Rail. Co. v. Tucker*, 2 Ex. Div. 301; *Day v. Radcliffe*, 24 W. R. 844; after joinder of issue, *Edward v. Lowther*, 45 L. J. C. P. 417; by striking out a Deft improperly joined, *Wilson v. Church*, 9 Ch. D. 552; after the Deft struck out had delivered his statement of defence, *Vallance v. Birm. &c. Land Corp.*, 2 Ch. D. 369.

For cases in which it was not exercised, see *Harry v. Davey*, 2 Ch. D. 721; *Norris v. Beazley*, 2 C. P. D. 80; *Mills v. Griffiths*, 45 L. J. C. P. 771; *New Westminster Co. v. Hannah*, 24 W. R. 899; *De Hart v. Stevenson*, 1 Q. B. D. 313; *Showell v. Winkup*, 60 L. T. N.S. 389.



A third party has no right to object to the addition of new Defts unless he can show that he will be thereby injured: *Byrne v. Brown*, 22 Q. B. Div. 657.

A Plt who has no right to sue will not be permitted to amend by joining as co-Plt a person who has such right: *Walcott v. Lyons*, 29 Ch. Div. 584; and see *Clowes v. Hilliard*, 4 Ch. D. 415; but in *Ayscough v. Bullar*, 41 Ch. Div. 341, where it was doubtful whether the existing Plt could sue alone, she was allowed to add a co-Plt on terms of paying costs of action up to amendment if, on the trial, it appeared that she was not entitled to sue.

In an action of nuisance by owners and tenant of leasehold houses, tenant declining to go on, two new tenants were added as co-Plts: *House Property and Investment Co. v. H. P. Horse Nail Co.*, 29 Ch. D. 190; distinguishing *Dalton v. Guardians of St. Mary Abbots*, 47 L. T. N.S. 349, on the ground that there the person proposed to be added was owner of a distinct property; and in an action by one of several covenantees for specific performance of a covenant to make a road, the other covenantees were ordered to be joined: *Dix v. G. W. Rail. Co.*, 55 L. J. Ch. 797; 34 W. R. 712. That the improbability of the success of the action is not, *per se*, a ground for refusing leave to amend by adding Plts, see *Long v. Crossley*, 13 Ch. D. 388. For an instance of adding a Deft, on his own application, to represent a class where there was already a Deft of that class, but not in a representative character, see *Fraser v. Cooper*, 21 Ch. D. 718. It is not right to give a party "leave to intervene" in an action, but he should be added as a Deft: *Samuel v. S.*, 12 Ch. D. 152.

As a consequence of the decisions in *King v. Hoare*, 13 M. & W. 494, and *Kendall v. Hamilton*, 4 App. Ca. 504, where an action is brought against one only of several joint contractors, he is entitled, as of right, to have his co-contractors joined as Defts: *Pilley v. Robinson*, 20 Q. B. D. 155.

Under the former practice, on defect of parties it was held discretionary either to dismiss the bill without prejudice to filing another, or to give leave to amend on payment of the costs of the day: see *Stafford v. City of London*, 1 P. W. 429; and the cause was usually ordered to stand over on payment by the Plt of the costs of the day: *Jones v. J.*, 3 Atk. 110; *Hill v. Kirwan*, Jac. 164; and by Cons. Ord. 40, r. 22, such costs were fixed at £10.

This order being annulled, the costs of the day are not now a fixed amount. Under an order to amend by striking out the name of Deft A. as party to an action, the name of Deft B. cannot be struck out without providing for his costs of the action: *Wymer v. Dodds*, 27 W. R. 675; 11 Ch. D. 436.

By O. LXV. 27 (50), where a cause or matter coming on for trial cannot be decided for want of parties or other defect on the part of the Plt, and is struck out and again set down, the Deft shall be allowed his taxed costs occasioned by the first setting down, although he does not obtain the costs of the cause or matter.

Where a second amendment of the bill was allowed, it was on payment of all the costs of both hearings: *Biedermann v. Seymour*, 1 Beav. 594.

An objection for non-joinder of Plts ought to be taken promptly, and not unnecessarily postponed to the trial: *Sheehan v. G. E. Rail. Co.*, 16 Ch. D. 59; and see *Roberts v. Evans*, 7 Ch. D. 830.

Parties can be added at any time before final judgment: *Hurst v. H.*, 21 Ch. Div. at p. 289. In a foreclosure action puisne mortgagees were added as Defts after judgment had been pronounced, but not drawn up and entered: *Keith v. Butcher*, 25 Ch. D. 750; but in general there can be no amendment after final judgment. Therefore where decree had been made against a corporation for a perpetual injunction, but the operation was suspended for five years, an amendment could not be made by adding, as co-Plts, a local board who had, in the interval, succeeded to the rights and liabilities of the corporation: *A. G. v. Corporation of Birmingham*, 15 Ch. Div. 423.

For case in which, after an order had been made on petition, an amendment was made by striking out names of co-petitioners, who had been joined without authority, and treating them as not having been served with the petition, see *Re Savage*, 15 Ch. D. 557; and as to the power of the Court to amend judgments and orders, see *inf.*, Chap. XV., "PASSING AND ENTERING."

A special case might be amended by adding parties after it was set down: *Thistlethwaite v. Garnier*, 5 D. & S. 73; *Ainsworth v. Alman*, 14 Beav. 576; or at the hearing, the case being again set down: *Barnaby v. Tassell*, 11

Eq. 363; and, on the marriage of a female Deft, without again setting down the case: *Johnston v. Brown*, 8 Eq. 584; and see *inf.*, Chap. XXI., "SPECIAL CASE."

FORM OF APPLICATION.

By O. XVI. 12, applications to add, or strike out, or substitute a Plt or Deft may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial in a summary manner.

If the amendment is only to add parties, the formal order to amend is usually made at the hearing, and judgment is then given subject to the amendment, with leave to the registrar to post-date the judgment if necessary.

By O. XVI. 49, provision is made for such amendments, if any, as the Court may think fit on third parties being admitted to defend the action.

As to correcting clerical mistakes in judgments or orders, see *inf.* Chap. XV., "PASSING AND ENTERING."

## CHAPTER VII.

## DISCOVERY.

1. *Leave to deliver Interrogatories after close of the Pleadings—*  
O. xxxi. 1.

UPON the application &c., and upon hearing &c., It is ordered that the Deft be at liberty, notwithstanding the close of the pleadings in this action, to deliver interrogatories in writing for the examination of the Plt; and the costs of this application are to be costs in the action.

For form of interrogatories, see R. S. C. Appx. B. 6; and for form of affidavit in answer, *ibid.* 7.

2. *Order to answer Interrogatories—O. xxxi. 11.*

UPON the application of the Deft, and upon hearing &c., It is ordered that the Plts do, within &c., file an affidavit in answer to the interrogatories for their examination set forth in the schedule hereto.

The schedule should set forth *verbatim* the interrogatories to be answered. A body corporate, or joint stock co., may be ordered to answer interrogatories by a member or officer: O. xxxi. 6.

3. *Order for Further Answer to Interrogatories—O. xxxi. 11.*

UPON the application of &c., and upon hearing &c., and upon reading an affidavit of the Deft B., filed &c., in answer to the interrogatories delivered by the Plts for the examination of the several Defts, and an affidavit of the Deft W. in answer thereto, filed &c., The Judge being of opinion that the answer of the Deft B. to the first of such interrogatories, and the answer of the Deft W. to the first and second of such interrogatories, are insufficient, and that the objections taken to such interrogatories respectively by such affidavits cannot be sustained, It is ordered that the Deft B. do, within — days after service of this order, file a further affidavit in answer to the said first interrogatory, and that the Deft W. do, within — days after service of this order, file a further affidavit in answer to the said first and second interrogatories.—Costs of all parties of application to be costs in the action.—See *Chesterfield Co. v. Black*, V.-C. H., 13 June, 1876, A. 1141.

The application for this order should be by summons: *Chesterfield, &c. Colliery Co. v. Black*, W. N. (76) 204.

4. *Order enlarging Time to answer Interrogatories—O. LXIV. 7.*

UPON the application of the Defts, and upon hearing &c., and upon reading the order dated &c., an affidavit &c., It is ordered that the time limited by the said order for the applicants to file a (further) affidavit in answer to the interrogatories delivered by the Plts for the examination of the applicants be enlarged until &c.

This form may be adapted and used in all cases of enlarging time.

5. *Order to strike out Interrogatories—O. XXXI. 7.*

UPON the application of the Plt, and upon hearing &c., and upon reading the interrogatories delivered by the Deft S. for the examination of the Plt, It is ordered that the said interrogatories be amended by striking out the words &c. in the first interrogatory, the whole of the second interrogatory, and the latter part of the fourth interrogatory, from the words &c. to the end.

6. *Order to strike out Scandalous Matter from Interrogatories and Affidavits—O. XXXI. 7; XXXVIII. 11.*

UPON the application of the Plts, and upon hearing the solrs for the applicants and for the Defts, and upon reading an order dated &c. (*order on appeal to strike out allegations in pleadings*), an affidavit of W. filed &c., and an affidavit of S. filed &c., It is ordered that the several parts of the interrogatories delivered for the examination of the Deft hereinafter mentioned be struck out for scandal and impertinence, that is to say, so much of the twelfth interrogatory as commences with the words &c. to the end thereof, and also the thirteenth, fourteenth, and fifteenth interrogatories; And it is ordered that part of the said affidavit of W., commencing in the thirteenth paragraph thereof with the words &c., to the end of the sixteenth paragraph thereof, and part of the said affidavit of S. commencing in the third paragraph thereof, with the words &c. to the end of the eighth paragraph thereof be struck out from the said affidavits respectively; And it is ordered that any of the office copies of the said (interrogatories and of the said) affidavits respectively that may be in the possession or power of any of the parties to this action be re-delivered to the proper officer at the Central Office for the purpose of having the hereinbefore-mentioned parts thereof respectively struck out for scandal and impertinence; And it is ordered that the Plts C. &c. do pay to the Defts W. &c. their costs occasioned by the introduction of such scandalous and impertinent matter, to be taxed by the Taxing Master as between solr and client.—See *Christie v. C.*, V.-C. M. at Chambers, 9 June, 1873, A. 1952; S. C. 8 Ch. 499.

For like orders, see *Nalborough v. Jackaman*, V.-C. M., 13 June, 1873, B. 1600; see also *Exp. Simpson*, 15 Ves. 476, 8; *Cottrill v. Coomb*, V.-C. M., 9 March, 1869, A. 605; *Hewitson v. Sherwin*, 10 Eq. 53; *Beacon v. Gorham*, V.-C. S., 17 March, 1871, A. 828; *Cracknall v. Janson*, Fry, J., 27 June, 1878, A. 1315, 11 Ch. D. 1.

7. *Order to make Affidavit of Documents, and for Inspection at Solr's Office*—O. xxxi. 12, 13, 14.

UPON the application of the Plt [or Deft] A., and upon hearing the solrs for the applicant and for the Deft [or Plt] B., It is ordered, that the Deft [or Plt] B. do, within (seven) days after service of this order, make and file a full and sufficient affidavit, stating whether he has or has had in his possession or power any, and (if any) what documents relating to the matters in question in this action and accounting for the same; And it is ordered that the Deft [or Plt] B. do, at all seasonable times, upon reasonable notice, produce at the office of Mr. —, his solr, situate at &c., the documents which by such affidavit shall appear to be in his possession or power, except such of the same (if any) as he may by such affidavit object to produce; and the applicant, his solrs and agents, are to be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof, and extracts therefrom, as the applicant shall be advised, at his expense [if ordered, add]: But previously to the said inspection the said Deft is to be at liberty to seal up such parts of the said documents as according to an affidavit to be made by him do not relate to the matters in question in this cause [or action]; And it is ordered that the said Deft [or Plt] B. do produce the same upon any examination of witnesses in this action, and at the trial thereof, as the applicant shall require; And the applicant is to be at liberty to make such further application as to all or any of the documents mentioned in such affidavit as he may be advised.

The affidavit must go to documents which the deponent has had in his possession or power, and not only those he has: see *Lethbridge v. Cronk*, 23 W. R. 703; *Anon.*, W. N. (76) 38, and *inf.* p. 62. For form of affidavit, see R. S. C. Appx. B. 8.

8. *Order for Affidavit—and for Deposit of Documents in Court*—  
O. lxi. 30.

UPON the application &c. [Form 7]; And it is ordered, that the said Deft [or Plt] B. do, within (seven) days after filing such affidavit, produce and leave at the Central Office the documents which, by such affidavit, shall appear to be in his possession or power, except such of the same (if any) as he may by such affidavit object to produce; And the applicant, his solrs and agents, are to be at liberty to inspect and peruse the documents so produced and left, and to take copies and abstracts thereof, and extracts therefrom, as the applicant shall be advised, at his expense; And the proper officer is to produce the same upon any examination of witnesses in this action, and at the trial thereof, as the applicant shall require; And the applicant is to be at liberty to make such further application as to all or any of the documents mentioned in such affidavit as he may be advised.

By Jud. Act, 1873, s. 66, production may be ordered in the office of any district registrar.

For order for committee of a lunatic's estate to make an affidavit of documents, see *Holmes v. Sayer-Milward*, V.-C. M., at Chambers, 11 April, 1876, A. 673.

As to production by the proper officer, see O. LXI. 29.

For an order specifying certain entries in accounts which alone were to be inspected, see *Firkins v. Lowe*, 13 Pri. 193.

9. *Order for Affidavit—And for Inspection at Solr's Office—  
Against two or more Parties.*

UPON the application of the Plt [*or* Deft] A., and upon hearing the solrs for the applicant, and for the Defts [*or* Plts] B. and C. [*or* B., C., and D.], It is ordered that the Defts [*or* Plts] B. and C. [*or* B., C., and D.] do within &c. [Form 7, *sup.*] make and file a full and sufficient affidavit, or full and sufficient affidavits, stating whether they or either [*or* any] of them have or have had, or has or has had in their or his possession or power any, and (if any) what documents relating to the matters in question in this action, and accounting for the same. [Add directions for inspection and sealing up &c., as in Form 7, *sup.*]

For like order to produce documents at the offices of numerous solrs, named in a schedule to the order, see *Moss v. Bainbrigg*, M. R., 1st May, 1860, B. 895.

For order to produce municipal documents at the place where they are kept, see *Prestney v. Corp. of Colchester*, 23 Feb. 1883, B. 346; and 24 Ch. Div. 376, where the form is correctly given.

10. *The Like—And for Deposit in Court—Against two or more  
Parties.*

UPON the application &c.—Directions for making affidavit, as in Form 9; And it is ordered that the said Defts [*or* Plts] B. and C. [*or* B., C., and D.] do, within (seven) days after filing such affidavit or affidavits, produce and leave at the Central Office the documents which by such affidavit or affidavits shall appear to be in their or his possession or power, except such of the same (if any) as they or either [*or* any] of them may by such affidavit or affidavits object to produce; And the applicant, his solr and agents, are to be at liberty to inspect and peruse &c. [Form 8, *sup.*]. See note, *inf.* p. 71.

11. *The Like—And for Inspection—Against a Public Body.*

UPON the application of &c. [Form 7, *sup.*], It is ordered, that the Plts [*or* Defts] do, within &c., file a full and sufficient affidavit, to be made by their clerk or secretary, stating whether the Plts [*or* Defts] have or have had in their possession or power any, and (if any) what documents relating to the matters in question in this action, and accounting for the same; And it is ordered that the Plts [*or* Defts] do, at all seasonable times, upon reasonable notice, produce at the office of Mr. —, their solr, situate at &c., the documents which, by such affidavit, shall appear to be in their possession or power, except such of the same (if any) as they may by such affidavit object to produce;

And the applicants, their solrs and agents, are to be at liberty to inspect &c. [Form 7, *sup.*].—*Ryde Commrs. v. Isle of Wight Ferry Co.*, V.-C. W. in Chambers, 19 Feb. 1861, B. 277, against Plts; *Ranger v. Great Western Ry.*, L. JJ., 27 Ap. 1859, B. 1574, 4 D. & J. 74, against Defts.

12. *Order for Affidavit and Inspection against Republican Foreign Government.*

LET the Plts, the Republic of L—, on or before the — day of —, file a full and sufficient affidavit, or full and sufficient affidavits, to be made by one or more of its officers or ministers, stating whether the said Republic has or has had in its possession or power any and (if any) what documents relating to the matters in question in this action, and accounting for the same, unless the said Republic shall on or before the said — day of — satisfy the Court by sufficient evidence that it is unable to procure such affidavit or affidavits to be made; And Let the Plts, the Republic of L—, at all seasonable times upon reasonable notice produce at the office of Messrs. —, their solrs, situate at &c., the documents which by such affidavit shall appear to be in the possession or power of the said Republic, except such of the same (if any) as the said Republic may by such affidavit or affidavits object to produce, and the applicant, his solr, and agent are to be at liberty to inspect, &c. Usual directions [Form 7, *sup.*].—*Republic of Liberia v. Imperial Bank*, V.-C. M., 31 May, 1873, B. 1327; 16 Eq. 179.

For the further order in this case, fixing a time at which, in default of a sufficient affidavit by the Republic, their bill should stand dismissed and the money in Court be repaid to Deft, see *S. C.*, 9 Ch. 569; *affd.* 1 Ap. Ca. 139, *et v. inf.* p. 64.

13. *Order for Production and Inspection of Documents referred to in an Affidavit or Pleading—O. xxxi. 15, 18.*

LET the Plt [*or* Deft] A. at all seasonable times and on reasonable notice produce at the office of Messrs. B., his solrs, situate at —, the several documents referred to in his affidavit filed the — day of — [*or* in the Plt's statement of claim, *or* Deft's statement of defence, &c. *Mention the pleading or affidavit in which the documents are referred to, and specify any particular documents required, and the paragraphs that refer to them, or except any documents not required to be produced*]; And the applicant, his solr and agent, are to be at liberty to inspect &c. [Form 7, *sup.*]; And Let the Plt [*or* Deft] A. produce the same upon any examination of witnesses in this action and at the trial thereof, as the applicant shall require.

For form of notice to produce, *v. R. S. C. Appx. B. 9.*

14. *For Inspection of Documents held not privileged.*

UPON the application &c.; and the Judge being of opinion that the documents referred to in the schedules to the affidavit of C., filed &c., are not privileged, except such as are hereinafter mentioned, It is

ordered, that C., the secretary of the Plts, the N. E. Rail. Co., do at all seasonable times, upon reasonable notice, produce at the office of the said co. at — the several documents specified in the first and second parts of the schedule to the said affidavit, except &c. [*state documents held privileged*] referred to in the said schedule; And it is ordered that the applicant, his solrs or agents, be at liberty to inspect &c. [Form 7, *sup.*].—*N. E. Rail. Co. v. Jonassohn*, V.-C. W. in Chambers, 20 Mar. 1860, B. 302.

For order directing certain documents, privileged and others, to be produced, and a further affidavit as to others to be filed, see *Macfarlan v. Rolt*, 14 Eq. 580.

15. *Defts to make Affidavit as to Documents showing Plt Heir at Law's Pedigree, and for Inspection.*

LET the Defts F. and wife, within 14 days after service of this order, make and file an affidavit stating whether any and which of the documents mentioned and set forth in the schedule to their affidavit filed in this action on the — day of —, and what part or parts thereof, relate to, or tend to show, the pedigree of the Plt; with liberty to the Plt, his solrs and agents, to inspect and peruse such of the said documents, or such parts thereof, as relate to the said pedigree, and to take copies &c.; And Let the said Defts produce such documents on the examination of witnesses &c.; but the said Defts are to be at liberty to seal up such parts of the said documents as according to such affidavit do not relate to, or tend to show, such pedigree. Costs of the application reserved till the trial.—*Rumbold v. Forteath*, V.-C. W., 28 Ap. 1857, B. 1778; 3 K. & J. 752; S. C., Note.

16. *Order enlarging Time where Affidavit filed is insufficient.*

UPON the application of the Plt [*or* Deft] A., and upon hearing the solr for the applicant, and for the Deft [*or* Plt] B., and upon reading an order dated &c., and an affidavit of the said Deft [*or* Plt] filed the — day of — in pursuance thereof, and the Judge being of opinion that the said affidavit is insufficient, and the said Deft [*or* Plt], by his solr, now applying for further time to file a full and sufficient affidavit, It is ordered, that the time for the said Deft [*or* Plt] to file a full and sufficient affidavit pursuant to the said order, be enlarged till the — day of — [*If deposit ordered*], And it is ordered, that the said Deft [*or* Plt] have till the — day of — to produce and leave at the Central Office, pursuant to the said order, any documents relating to the matters in question in this action which, by the affidavit so to be made by him, shall appear to be in his possession or power, except such of the same (if any) as he may by such affidavit object to produce; *If so*, And the costs of this application are to be costs in this action; *or* that the Deft [*or* Plt] B. pay to the Plt [*or* Deft] A. £— for the costs of this application, *or* the costs of this application, such costs to be taxed by the taxing master in case the parties differ.

For similar orders, see *Noel v. N.*, 1 D. J. & S. 469; *Abud v. Riches*, 5 May,



1876, A. 40; *Re Leigh, Rowcliffe v. Leigh*, V.-C. H., 14 July, 1876, B. 1271, without directions for production, or as to costs.

For order for Defts to make affidavit specifying books in use in the conduct of their business at Liverpool, with special directions as to the mode of inspection there and as to sealing up, see *Mertens v. Haigh*, Joh. 739; *Affd.* 3 D. J. & S. 528.

17. *Order for further Affidavit as to particular Documents—  
against one Deft.*

LET P. within &c., make and file a further full and sufficient affidavit stating whether he has, or has had, in his possession or power any, and, if any, which of the following documents relating to the H— Mills, being the matters referred to in the summons taken out by the Plts on the — day of —, and accounting for the same, that is to say, any letters or copies of letters from or to R. C. and B. or either of them, or from or to any other person or persons, or any other documents relating to the said mills.—Usual directions.—*Fenton v. F.*, M. R. 4 May, 1876, A. 1031; and see *Warden v. Peddington*, 32 Beav. 639.

18. *The Like—against several Defts.*

LET the Defts F. and G. on or before &c., or subsequently within four days after service of this order make and file a further full and sufficient affidavit, or full and sufficient affidavits, stating whether they or any of them have or has had in their or any of their possession or power any and (if any) what documents relating to the matters in question in this action, and accounting for the same, particularly the documents referred to in the said affidavit of the Plt and G. filed the — day of —. Usual directions.—*Fearnehough v. Fernell*, V.-C. M. at Chambers, 21 June, 1876, A. 1115.

19. *Order for Production, on prepayment of Expenses, of Documents  
from India set forth in Deft's Affidavit.*

LET, upon the Plt's prepaying the expense of conveyance by a ship or ships of the class known as Class A 1 at Lloyd's, the Defts G. &c., within (six) weeks after receipt of notice from the Plt at the offices of the said Defts at Calcutta, and within (six) weeks after the receipt of the like notice at the office of the said Defts at Rangoon, by any such ship or ships as aforesaid, transmit to the office of the Defts, situate at —, in the City of London, such of the books, papers, and documents set forth in the said affidavit of the said Defts filed, &c., as are at their said offices at Calcutta and Rangoon respectively, and as shall be specified in such notices; And the applicant, his solrs or agents, are to be at liberty to inspect &c., all the said books, papers, and documents so to be transmitted as aforesaid, and to take copies &c.—Defts to produce the same upon any examination of witnesses and at the trial.—Costs of application to be costs in the action.—*Lindsay v. Gladstone*, V.-C. G., 23 Nov. 1868, B. 3038; 9 Eq. 132.

20. *Plt, the Assignee of Bankrupt, to have same Inspection of Accounts kept in Indian Currency as Bankrupt was entitled to under former Order—with Bankrupt's Aid as Accountant.*

LET the applicant, his solrs or agents, be at liberty to have the same inspection of the several books and documents mentioned in the said order, dated &c., as was given to the late Plt L. (bankrupt) by the same order; And Let the applicant, his solrs or agents, be at liberty at all seasonable times, upon giving reasonable notice to inspect the same, with the assistance of the said late Plt L. as his accountant.—*Lindsay v. Gladstone*, V.-C. J., 25 Nov. 1869, B. 2833; 9 Eq. 135.

21. *Further Order for Inspection by Clerk of Plt's Solr and by the Bankrupt.*

LET L. the bankrupt, accompanied by a duly authorized clerk of Messrs. A., the Plt's solrs, be at liberty at all seasonable times, upon giving reasonable notice, to inspect and peruse, at the offices of Messrs. W., the books and documents mentioned in the several orders made in these actions, dated &c., and to take copies &c.—Defts to produce the same on any examination of witnesses and at the trial as required.—Costs of the application to be costs in the action.—*Lindsay v. Gladstone*, V.-C. J., 21 Dec. 1869, B. 3137; 9 Eq. 136.

22. *Inspection of Letters from Third Party marked Private, on undertaking not to use them for any Collateral Purpose.*

AND the Plt, by his counsel, undertaking not to use or give in evidence, or cause or wilfully suffer to be used or given in evidence, the letters or writings hereinafter referred to, or any copies or copy, abstracts or abstract, extracts or extract, thereof or therefrom, or from either of them, or parol evidence of the contents thereof, or any or either of them, in any action or actions already commenced or hereafter to be commenced against the Defts, or any or either of them, or against them or any or either of them jointly with any other person or persons, or against the writer of the said letters, either alone or jointly with any other person or persons, for any other purpose or purposes whatsoever collateral to this action; Let the Defts the Rt. Hon. W., commonly called Lord B. &c., within (four) days after service of this order, at all seasonable times upon reasonable notice, produce at the office of their solrs, Messrs. —, situate at —, the two letters dated the — and — days of —, and mentioned in the affidavit of —, filed the — day of —, with liberty for the Plt, his solr or agent, to inspect &c.—Defts to produce the letters before the examiner or at the hearing as required.—Costs of the appeal to be costs in the action.—*Hopkinson v. Lord Burghley*, L.JJ., 14 March, 1867, A. 789; S. C., 2 Ch. 447, following the language of *Richardson v. Hastings*, M. R. 31 July, 1844, B. 1599; 7 Beav. 354.

23. *Order for Inspection against Exors on Application of a Claimant after Admon Decree.*

LET the Plt F. and the Defts C., &c. within (ten) days after service of this order, make and file a full and sufficient affidavit or full and sufficient affidavits, stating whether the said Plt and the Defts hath or have had in her, his, or their possession or power any and (if any) what documents relating to the claim in this action of the applicant G., and accounting for the same. Usual directions for inspection, &c.—*Re M<sup>r</sup> Veagh, M<sup>r</sup> Veagh v. Croall*, 5 March, 1863, B. 501; S. C., 1 D. J. & S. 407.

24. *Order overruling Objections, and for Production against Exors on like Application.*

LET, notwithstanding the objection raised by the Defts B. &c., by their said affidavit, to produce the documents set forth in the second part of the schedule to their said affidavit, and admitted to be in their or his possession or power, the Defts B. &c., at all seasonable times, upon reasonable notice, produce at the office of &c., their solrs, situate at —, the bank book of the exors, and also all copy letters to the Plts from the Deft B. contained in the letter books referred to in the second part of the schedule to the said affidavit of the said Defts.—Usual directions.—*Re Dewson*, M. R. in Chambers, 23 Nov. 1875, A. 2029.

25. *Claimant against Testator's Assets to deposit at Judge's Chambers suspected Documents used by him as Evidence—and for Inspection of them by Witnesses—and of other Documents admitted.*

LET, notwithstanding the order of —, in *Phillips v. Groves*, dated &c., the claimant P., within (four) days after service hereof, produce and leave until further order with the Chief Clerk such of the several documents as are mentioned in the said order, and as the claimant has used as his evidence in support of his claim; And Let the claimant, within (four) days after service hereof, produce and leave at the office of Mr. H., at —, his solr, the several other documents, letters, papers, and writings, except the briefs and opinions of counsel, admitted by the said P., by his said affidavit, filed on the — day of —, and the schedules thereto, to be in his possession, custody, or power, and also an alleged letter of the — day of —, since admitted to be in his possession; And Let the Plt and the Deft and the said P., and their solrs, agents, and witnesses, prior to their examination, be at liberty from time to time to inspect and peruse such of the said documents as shall be so left with the Chief Clerk; but such inspection by the Plt and the Deft, their solrs, agents, and witnesses, is to be made in the presence of the Chief Clerk and the solr for the said P., the Plt or Deft first giving the names and addresses of such witnesses to the Chief Clerk; And Let the Plt and the Deft, and their respective solrs, be at liberty to inspect and peruse from time to time such of the said

several other documents, letters, papers, and writings as shall be so left with the Chief Clerk as aforesaid; and the Plt and the Deft are to be at liberty to take copies thereof, or extracts or abstracts therefrom, as they shall be advised, at their own expense; And Let the proper officer produce the same to the Plt's solrs, agents, and witnesses, before the Judge, and at the trial of this action.—See *Groves v. G.*, V.-C. Wood, 13th Dec. 1853, A. 585; Kay, xix.

26. *Deposit of Mortgage Deed and Policies in Court.*

LET the Deft K. deposit the said two policies and the indenture of mortgage, dated &c., and made between &c., in a box indorsed *In Chancery "Re Swann, deceased, Swann v. Kersey, &c."* and deposit the box so indorsed in the Central Office.—See *Swann v. S.*, V.-C. M. at Chambers, 19 Jan. 1876, B. 824.

27. *Orders for Production in Court and in Chambers enforced by Attachment—O. xxxi. 21.*

WHEREAS by an order dated &c., it was ordered, *inter alia*, that the Deft C. should within fourteen days after service of the said order make and file a full and sufficient affidavit, stating whether he had or had had in his possession or power any and (if any) what documents relating to the matters in question in this action, and accounting for the same; And it was ordered that the said Deft should, within four days after filing such affidavit, produce and leave at the Central Office the documents which by such affidavit should appear to be in his possession or power, except such of the same (if any) as he might by such affidavit object to produce; And whereas by an order dated &c., It was ordered that the Deft should, within four days after service of the said order, leave in the chambers of Mr. Justice A., situate at the Royal Courts of Justice, the following account, duly verified by affidavit, that is to say, An account of the rents and profits of a piece of land called &c., in the writ in this action mentioned, received by the Deft as agent for and on behalf of the Plt, between the — day of — and the — day of —. Now upon motion this day made unto this Court by counsel for the Plt, who alleged that the Deft has been guilty of a contempt of this Court in not complying with the said orders, and upon reading the said orders and the affidavit of &c., filed &c., and an affidavit of &c., filed &c., of service of notice of this motion on the Deft, This Court doth order that the Plt be at liberty to sue out a writ of attachment against the Deft for his contempt in not having filed an affidavit nor left accounts in compliance with the said orders dated &c.—*Caulcutt v. C.*, V.-C. H., 30th March, 1876, A. 636.

28. *Order on Motion objecting to Sufficiency of Answer to Interrogatories—O. xxxi. 10.*

UPON motion &c., by counsel for the Plts, and upon hearing counsel for the Defts, and upon reading an affidavit of the Deft C., and an affidavit of the Deft W. filed respectively &c., in answer to the interro-

gatories delivered by the Plts for the examination of the said Defts respectively, This Court being of opinion that the answer of the Deft C. to the first of such interrogatories, and the answer of the Deft W. to the first and second of such interrogatories, are insufficient, [if so, add and that the objections taken to such interrogatories respectively by such affidavits cannot be sustained] doth order that the Deft C. do within fourteen days after service of this order file an affidavit in further answer to the said first interrogatory, and that the Deft W. do within fourteen days after service of this order file an affidavit in further answer to the said first and second interrogatories.—Costs of all parties of this application to be costs in the action.—*Chesterfield Colliery Co. v. Black*, V.-C. H., 13th June, 1876, A. 1143.

29. *Ex parte Order under Bankers' Books Evidence Act, 42 & 43 V. c. 11, s. 7, to inspect Books.*

UPON the application of L., and upon hearing the solr of the applicant, and upon reading an affidavit of &c., Let the applicant, her solr and agent, be at liberty, at all seasonable times upon reasonable notice, to inspect and take copies of any entries in the books of the — Bank, Limited, situate at &c., and at their branches elsewhere in London, relating to dealings and transactions by and between the said Bank and the firm of W. and P., who kept an account or accounts with the said Bank commencing in or about the year 18—, such inspection and copies being necessary to the applicant for the proceedings in this action.—*Re Pickering, P. v. P.*, Chitty, J., at Chambers, 2 Dec. 1884, B. 1454; *Neate v. Busby*, Kay, J., at Chambers, 13 June, 1884, B. 756; *Re Luckie, Nizon v. Luckie*, Kay, J., at Chambers, 8 March, 1883, B. 354.

30. *Order for Names of Parties constituting a Firm—O. XVI. 14.*

UPON the application of the Defts, and upon hearing the solrs for the applicants and for the Plts, Let the Plts M. & Co., on or before &c., deliver on oath to the applicants, B. and J., a statement of the names and places of residence of all the persons constituting the firm on whose behalf this action is brought.—Plts to pay Deft's costs of application.—*Montanini & Co. v. Bartlett*, Chitty, J., at Chambers, 19 Jan. 1885, B. 64.

The application, though in this case by motion, should be made by summons in Chambers: *S. C.*, 24 W. R. 783.

As to form of order in patent case as to sale by Deft of pirated machines, giving names and addresses of purchasers, but not of his agents for sale, see *Murray v. Clayton*, 21 W. R. 118.

DISCOVERY AND PRODUCTION GENERALLY.

For the rules of the Court of Chancery as to discovery and production of documents, and that every party to a suit in equity is entitled for the proof of his own case to the benefit of all the evidence, personal and documentary, which can be obtained from his opponents, material to the questions coming on for trial, see Wigram, Hare, and Kerr on Discovery; and see Dan. 1806 *et seq.*, and Bowen, L. J., in *Leitch v. Abbott*, 31 Ch. Div. 374.

The general right to discovery is not affected by the Jud. Acts, which relate only to procedure: *A. G. v. Gaskill*, 20 Ch. Div. 519; *Hunnings*

*v. Williamson*, 10 Q. B. D. 470; *Ind, Coope & Co. v. Emmerson*, 12 App. Cas. 309; *Lyell v. Kennedy*, 20 Ch. Div. 489, 491; 8 App. Cas. 217, 223; *Kearsley v. Phillips*, 10 Q. B. Div. 466. It is not in principle more extensive than it formerly was in the Court of Chancery: *Lyell v. Kennedy*, *sup.*; and discovery will not be allowed where the Court of Chancery before the Acts would not have allowed it; *e.g.*, when the subject of the action is a penalty: *Hunnings v. Williamson*, *sup.*; and as to discovery in actions for penalties, *v. inf.* p. 84.

A Plt is entitled to discovery of the facts upon which the Deft relies to establish his case, but not of the evidence which it is proposed to adduce: *Eade v. Jacobs*, 3 Ex. Div. 335; for illustrations of the effect of this principle see *inf.*, "RESISTANCE TO DISCOVERY," pp. 74—76.

Now that by virtue of the Jud. Act, 1873, s. 24 (2), Courts of equity and common law have concurrent jurisdiction, a plea of purchase for valuable consideration is no longer available as a bar to discovery in an action to recover possession of land: *Ind, Coope & Co. v. Emmerson*, 12 App. Cas. 300; and the ordinary rules of discovery apply to patent actions, notwithstanding the statutory provision for delivery of particulars: *Birch v. Mather*, 22 Ch. D. 629.

The rules of equity as to discovery are to prevail: *Bolckow, Vaughan & Co. v. Fisher*, 10 Q. B. Div. 166; *Anderson v. Bank of Columbia*, 2 Ch. Div. 654, 658; *Bustros v. White*, 1 Q. B. Div. 426; and see *Kearsley v. Phillips*, 10 Q. B. Div. 466; regard being had to the different natures of Chancery and common law actions: *A. G. v. Gaskill*, 20 Ch. Div. 530; *Mercier v. Cotton*, 1 Q. B. Div. 442.

#### ACTIONS FOR DISCOVERY ONLY.

Now that every division of the High Court has equal power of compelling discovery, no action for discovery will be brought in one division in aid of an action in another: *Orr v. Diaper*, 4 Ch. D. 92; and actions for discovery only can rarely now be necessary.

It has now been decided that an action for discovery only in aid of proceedings in a foreign Court will not lie: *Dreyfus v. Peruvian Guano Co.*, 41 Ch. D. 151; following *Bent v. Young*, 9 Sim. 180; and observing upon *Croze v. Del Rio*, 9 Sim. 185, n.

The Court will not compel discovery in favour either of an inferior Court or a Court which has power, in itself, to compel a discovery: *Bent v. Young*, 9 Sim. 191; *Earl of Derby v. Duke of Athol*, 1 Ves. sen. 202.

For cases in which discovery has been granted in aid of arbitrations, see *Brit. Empire Shipping Co. v. Somes*, 3 K. & J. 433; *Ainsworth v. Starkie*, W. N. (76) 8; and *semble*, it would not now be granted, having regard to O. xxxvi. 50, 55c; and see *inf.* Chap. XXVI., "ARBITRATIONS."

In *Orr v. Diaper*, 4 Ch. D. 92, an action lay against shippers of goods bearing counterfeits of Plt's trade mark for discovery of names of consignors. For action in aid of proceedings to recover land in India, see *Reiner v. Marquis of Salisbury*, 2 Ch. D. 378.

As to whether an action will lie by principal against agent for the sole purpose of enforcing production of documents to a particular person, see *Dadswell v. Jacobs*, 34 Ch. Div. 278.

Solrs or agents ought not to be made parties for discovery only: *Burstall v. Beyfus*, 26 Ch. Div. 35.

#### PROCEDURE TO OBTAIN DISCOVERY.

The rules of procedure as to discovery and inspection are contained in O. xxxi., of which rr. 1—11 and r. 24 regulate discovery by interrogatories; rr. 12 and 13 to affidavit of documents; rr. 14—18 refer to production and inspection of documents; and rr. 19—22, both to discovery and inspection.

The right to discovery without the leave of the Court is now limited to actions in which relief by way of damages or otherwise is sought, on the ground of fraud or breach of trust. In such actions, the Plt may, at any time after delivering his statement of claim, and the Deft may, at or after the time of delivering his defence, deliver interrogatories, without any order for that purpose: O. xxxi. 1. In all other cases leave of the Court is requisite.

Where a writ is issued in the name of a firm, the action may be stayed until the Plts or their solrs shall have, in answer to a written demand, given the names and addresses of the members of the firm: O. VII. 2; and where a

firm is suing or being sued, any party may apply by summons to a Judge for a statement of the names of the partners: O. XVI. 14; but this did not apply to a Plt suing on behalf of himself and others (underwriters): *Re Leathley*, W. N. (76) 259.

By O. XLVIII. 1, two or more persons liable as co-partners and carrying on business within the jurisdiction may be sued in the name of the firm of which they were co-partners when the cause of action arose.

As to discovery in aid of execution, see O. XLII. 32—34, and *inf.* Chap. XXVII.; *Irwell v. Eden*, 18 Q. B. Div. 588.

#### SECURITY FOR COSTS OF DISCOVERY.

Any party seeking discovery is required to pay a sum of money into Court to a separate account in the action, to be called "Security for Costs Account," to abide further order: O. XXXI. 26. In the case of interrogatories, the payment is to be made before delivery of them, and the amount is 5*l.*, and if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. In other cases the payment is to be made before the application for discovery, and the amount is 5*l.*, but the Court or Judge may direct payment of an additional sum. The party seeking discovery must, with his interrogatories or order for discovery, serve a copy of the receipt for the payment into Court, and the time for answering or making discovery is to commence from the date of such service. The party from whom discovery is sought is not to be required to answer or make discovery unless and until the payment has been made: *Ibid.*

The rule does not apply to an application for production of a document in which both parties have a common interest: *Brown v. Liell*, 16 Q. B. D. 229.

Where one set of interrogatories was delivered to several Defts, each of whom was required to answer particular interrogatories, only one sum of 5*l.* was required to be paid: *Eder v. Attenborough*, 23 Q. B. D. 130; *secus*, *semble*, where separate sets are delivered: *Ibid.*; and *Campbell v. Lord Poulett*, W. N. (84) 48.

Where several Defts appeared by different solrs and severed in their defences, on application for discovery of documents and leave to interrogate, the Plts were required to pay two separate sums of 5*l.* in respect of each Dft: *Liverpool and Manchester Bread Co. v. Firth*, (1891) 1 Ch. 367, following *Smith v. Reed*, W. N. (83) 196. But where the application was for discovery of documents only, the fact of Defts severing was not a ground for ordering more than one deposit, and the test was rather considered to be whether there were separate grounds of action: *Joyce v. Beall*, 39 W. R. 316.

In the event of non-payment, the party from whom discovery is sought is relieved from answering, but is not entitled to apply for an order to strike out the interrogatories: *Eder v. Attenborough*, 23 Q. B. D. 130.

The object of requiring the deposit is to check unnecessary applications for discovery. It is intended for the benefit of the clients themselves, not solely of the party from whom discovery is sought: *Aste v. Stumore*, 13 Q. B. Div. 326. The Court has discretion to dispense with the deposit: *Newman v. L. & S. W. Rail Co.*, 24 Q. B. D. 454; distinguishing *Boarder v. Lindsay*, 34 W. R. 473; but is not bound to do so simply because the parties have so agreed: *Aste v. Stumore*, *sup.*

As to poverty being a ground for dispensing with the deposit, see *Smith v. Went*, 50 L. T. N.S. 382; *Compagnie Pacifique v. Guano Co.*, W. N. (83) 166.

The power to order additional security in the case of discovery of documents is not confined to the occasion when the order is made, but may be exercised at any subsequent time if circumstances so require: *Cooke v. Smith*, 39 W. R. 273 (C. A.).

After the cause or matter has been finally disposed of, the amount deposited is, unless otherwise ordered, to be paid out to the party who paid it in, in the event of costs being adjudged to him, but, if he is ordered to pay costs, is to be subject to a lien for such costs: O. XXXI. 27. Where no taxation of costs is required, the taxing officer, master, or chief clerk may grant a certificate which will operate as an order for payment: O. XXXI. 28.

#### LEAVE OF THE COURT.

By O. XXXI. 2, "in deciding upon any application for leave to exhibit interrogatories, the Court or Judge shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to

make admissions, or to produce documents relating to the matter in question, or any of them."

As to when the leave is required, *v. sup.* p. 57.

Upon an application for leave it is not necessary to produce a copy of the proposed interrogatories; all that is required is a statement, not necessarily in writing, as to their general nature and scope: *Martin v. Spicer*, 32 Ch. D. 592; *Swabey v. Dovey*, 32 Ch. D. 352; *Hall v. Liardet*, W. N. (83) 165; and the Court will not settle the interrogatories, or decide as to their relevancy in particular: *Ibid.*

In general discovery will not be allowed till after defence, as until then it is usually impossible to say what the matters in question are: *Sachs v. Spielman*, 37 Ch. D. 303; *Mercier v. Cotton*, 1 Q. B. Div. 442; *Hancock v. Guerin*, 4 Ex. D. 3; *Webster v. Whewall*, 15 Ch. D. 120; *Republic of Costa Rica v. Strousberg*, 11 Ch. Div. 323; *Davies v. Williams*, 13 Ch. D. 550; but there is no absolute rule of practice to that effect, at all events in the Chancery Division: *Harbord v. Monk*, 9 Ch. D. 617.

In a redemption action against a mortgagee in possession, production was ordered before defence, without any special case being made: *Union Bank of London v. Manby*, 13 Ch. Div. 239; and in *Harbord v. Monk*, 9 Ch. D. 616, in an action by a stockbroker to open accounts, and alleging fraud, both parties were to deliver interrogatories, the defence not to be put in until the Plt had answered the Deft's interrogatories.

A Deft will not in general be allowed to exhibit interrogatories before he has put in his defence: *Disney v. Longbourne*, 2 Ch. D. 704; and see *Egremont v. Egremont Co.*, 14 Ch. D. 158; unless the discovery is in the nature of particulars, which are necessary to enable him to prove his defence: *Augustinus v. Nerinckx*, 16 Ch. Div. 13; or to decide whether to defend: *Hawley v. Reade*, W. N. (76) 64; or how much to pay into Court: *Megaw v. Diarmid*, L. R. Ir. 10 C. L. 376; *Horne v. Hough*, L. R. 9 C. P. 135; *Frost v. Brook*, 23 W. R. 260; *Clarke v. Bennett*, 32 W. R. 550.

Documents referred to in a pleading must be produced as soon as the pleading is delivered, unless some special reason is shown: *Quilter v. Heatley*, 23 Ch. Div. 42; and *quære*, whether there is any general rule of practice that the Plt cannot obtain an order for production before he has delivered his statement of claim: *Republic of Costa Rica v. Strousberg*, 11 Ch. Div. 323; but general discovery of documents will not be allowed unless essential to the statement of the Plt's claim: *Cashin v. Craddock*, 2 Ch. D. 140, 147; and see *Davies v. Williams*, 13 Ch. D. 550; *Phillips v. P.*, 40 L. T. N.S. 815, 822; 27 W. R. 940; *British and Foreign, &c. Co. v. Wright*, 32 W. R. 413; and, although particulars have been applied for by the Deft, the Plt will be allowed discovery if it is necessary to enable him to give details, and the Deft, from the nature of the case, has means of knowledge which the Plt has not: *Leitch v. Abbott*, 31 Ch. Div. 374; *Millar v. Harper*, 38 Ch. Div. 110; even though the object of the action is to open settled accounts: *Whyte v. Ahrens*, 26 Ch. Div. 717; *Sachs v. Spielman*, 37 Ch. D. 295; and see *sup.* Chap. V., "PLEADINGS."

As to refusal of discovery as not being sufficiently material at a particular stage of the action, see *inf.* "PREMATURE DISCOVERY," pp. 76—78.

#### INTERROGATORIES.

By O. xxxi. 1, the Plt or Deft may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer; provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

An "opposite party" is one between whom and the party seeking discovery there is an issue joined: *Molloy v. Kilby*, 15 Ch. Div. 164; and see *Shaw v. Smith*, 18 Q. B. Div. 193.

Thus, Defts to counter-claim, not being Defts in the original action, cannot interrogate Plt: *Molloy v. Kilby, sup.*

Third parties having liberty to appear at the trial and oppose the Plt's claim are opposite parties liable to be interrogated: *Eden v. Weardale Iron Co.*, 34 Ch. Div. 233; *MacAlister v. Bishop of Rochester*, 5 C. P. D. 194; and, being in the position of Defts, can interrogate: *Eden v. Weardale Iron Co.*,



35 Ch. Div. 287; but a Deft is not in general an opposite party to his co-Deft: *Brown v. Watkins*, 16 Q. B. D. 125. An infant Plt or Deft cannot be compelled to answer interrogatories: *Mayor v. Collins*, 24 Q. B. D. 361; but whether this is so in proceedings for divorce, *quære*: *Redfern v. R.*, (1891) P. (C. A.) 139; nor a guardian *ad litem*, as he cannot make admissions against the infant's interest: *Ingram v. Little*, 11 Q. B. D. 251; and a next friend is not a "party" to the action: *Re Corsellis, Lawton v. Elwes*, 52 L. J. Ch. 399; *Dyke v. Stephens*, 30 Ch. D. 189.

By O. XXXI. 5, "if any party to a cause or matter be a body corporate or a joint stock co., whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, co. or body, and an order may be made accordingly."

This rule does away with the former practice in equity of making the secretary or some other officer, against whom no relief was claimed, a party for the purposes of discovery only: *Wilson v. Church*, 9 Ch. D. 552.

A similar provision was made by C. L. P. Act, 1854, s. 51, as to which see *Bechervaise v. G. W. Rail.*, L. R. 6 C. P. 36; and directors had to answer interrogatories after the commencement of a winding-up: *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37.

It is not competent to the person requiring the discovery to select any person he thinks fit, but the corporation must name a proper person to give the discovery: *Rep. of Costa Rica v. Erlanger*, 1 Ch. Div. 171; and see *Manchester, &c. Co. v. Slagg*, W. N. (82) 127.

Where a corporation elected to answer by their town clerk, who was a solr, he could not decline to answer questions on the ground of professional privilege: *Swansea Corporation v. Quirk*, 5 C. P. D. 106; *secus*, where by the terms of the order the corporation were required so to answer: *Salford Corporation v. Lever*, 24 Q. B. D. 695.

In an action against a municipal corporation for malicious arrest, the town clerk was interrogated: *McFadzen v. Liverpool Corporation*, L. R. 3 Ex. 279.

The secretary of a co. is usually the proper person to answer: *Berkeley v. Standard Discount Co.*, 13 Ch. Div. 97, at p. 99, under a winding-up as well as in an action: *Re Alexandra Palace Co.*, 16 Ch. D. 58. If a member of the co. is examined, he cannot refuse to file his affidavit in answer until he has been paid his taxed costs of making it: *Berkeley v. Standard Discount Co.*, *supra*.

The liquidator of a co. being wound up is subject to discovery as an ordinary litigant in proceedings against strangers or alleged contributories: *In re Barned's Bkg. Co.*, 2 Ch. 350; but in questions between creditors, contributories, and officers of the co., it is the duty of the liquidator to give them every opportunity of becoming acquainted with anything material, but he can act only under the direction of the Court as to production of books, &c.: *Gooch's Case*, 7 Ch. 207; and cannot be required to make an affidavit of documents, except under special circumstances: *Re Mutual Society*, 22 Ch. Div. 714.

The ordinary practice is for the co.'s solr to act for the person interrogated, who should not incur separate costs: *Berkeley v. Standard Discount Co.*, *sup*.

And as to production of documents by officers of corporations, &c., see *inf*. p. 63.

By O. XXXI. 28, "in any action against or by a sheriff in respect of any matters connected with the execution of his office, the Court or a Judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned."

The suppliant in a petition of right is not entitled to discovery or production against the Crown: *inf*. Chap. XXV.; and see *Lane v. Gray*, 16 Eq. 552; *secus*, the Crown as against the suppliant: *Tomline v. The Queen*, 4 Ex. D. 282; *Bray*, 70.

A recognised foreign government suing in an English Court was not required to name any co-Plt for purposes of discovery: *U. S. v. Wagner*, 2 Ch. 582; but could only obtain relief by complying with the rules as to discovery: *Prioleau v. U. S.*, 2 Eq. 659; and the proceedings could be stayed until some person had been named who could be made Deft to a cross bill for

discovery: *Rep. of Peru v. Weguelin*, 20 Eq. 140; but the English Deft could not himself choose a person for that purpose: *Rep. of Costa Rica v. Erlanger*, 19 Eq. 33; 1 Ch. Div. 171; and that the president of a republic should not be made a party for discovery, see *Prioleau v. U. S.*; *Rep. of Costa Rica v. Erlanger*, *sup.*

The object of interrogatories is not merely to give to the interrogating party information as to that of which he is ignorant, but to enable him to obtain admissions: *A. G. v. Gaskill*, 20 Ch. Div. 519; and the fact that the information may be obtained on examination and cross-examination at the trial is no bar to the discovery: *Ibid.*

A Plt in an ejectment action has the same right to interrogate (in support of his own title) as a Plt in any other action: *Lyell v. Kennedy*, 8 App. Ca. 217.

But in general a Plt in an action for a penalty will not be allowed to administer interrogatories: *Hunnings v. Williamson*, 10 Q. B. D. 459; *Martin v. Treacher*, 16 Q. B. D. 507; unless the penalty is merely imposed by way of compensation, as under the Copyright Act: *Adams v. Battey*, *Cole v. Francis*, 18 Q. B. Div. 625.

For form of interrogatories, see R. S. C. Appx. B., 6; *Cawley v. Burton*, 32 W. R. 33.

Plts (exors) were allowed to interrogate as to the circumstances of an alleged payment to their testator of the sum claimed by them: *Hills v. Bates*, L. R. 9 C. P. 688.

A Deft may ask by interrogatories any questions tending to destroy the Plt's claim: *Hoffman v. Postill*, 4 Ch. 673.

As to Deft interrogating Plt in action for breach of contract, see *Jourdain v. Pulmer*, L. R. 1 Ex. 102; and that he can do so as to the amount of damage or Plt's expenses when he does so *bond fide* that he may know what to pay into Court, *Horne v. Hough*, L. R. 9 C. P. 135; *Frost v. Brook*, 23 W. R. 260; *Megaw v. Diarmid*, L. R. Ir. 10 C. L. 376; but not as to witnesses: *S. C.*; nor so as to deter from giving evidence at all: *Stock v. Ellis*, 22 W. R. 17.

As the proper mode of obtaining discovery of documents is by an order for an affidavit of documents, an interrogatory as to documents was always discouraged, and no exceptions to the answer to it were allowed: *Piffard v. Beeby*, 1 Eq. 623; *Barnard v. Hunter*, 19 Jur. 165; 4 W. R. 34; though if it was answered at all, it was to be answered fully: *Piffard v. Beeby*, *sup.*; and now a general roving interrogatory, in the nature of a cross-examination on the affidavit of documents, will not be permitted: *Hall v. Truman*, *Hanbury & Co.*, 29 Ch. Div. 307; *Morris v. Edwards*, 23 Q. B. Div. 287; *S. C.*, 15 App. Cas. 309; *Nicholl v. Wheeler*, 17 Q. B. D. 101; *Edison Co. v. Holland Co.*, W. N. (88) 31; *Jacobs v. G. W. Rail. Co.*, W. N. (84) 33; *secus*, perhaps, an interrogatory as to specified relevant documents, where a special ground for requiring discovery is shown: *Hall v. Truman*, *Hanbury & Co.*, *sup.*; *Morris v. Edwards*, 15 App. Cas. 314; and see *Newall v. Telegraph, &c. Co.*, 2 Eq. 756.

And a party cannot be required to set out his imperfect recollection of a document not produced for his inspection, and not suggested to be lost or beyond the jurisdiction: *Dalrymple v. Leslie*, 8 Q. B. D. 5.

And, generally, as to the matters in respect of which an answer to interrogatories may be required, *v. inf.* "RESISTANCE TO DISCOVERY."

By O. xxxi. 7, any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

All the interrogatories have been struck out where the greater part were objectionable: *Cawley v. Burton*, 32 W. R. 33.

For Plt's interrogatories struck out in an action against the publisher of a newspaper for libel, see *Wilton v. Brignell*, 20 S. J. 121; *Carter v. Leeds Daily News Co.*, W. N. (76) 11.

Interrogatories as to documents have been struck out: *Pitten v. Chatterburg*, W. N. (75) 248; *Bannicot v. Harris*, W. N. (76) 9.

But the provisions of this rule are not often resorted to, as it is not intended that the Judge should go through all the interrogatories and strike out those which he considers objectionable. The better course is to take objections by the affidavit in answer: *Sammons v. Bailey*, 24 Q. B. D. 727.

As to service of interrogatories together with writ out of the jurisdiction, see *Young v. Brassey*, 1 Ch. D. 277; *Bacon v. Turner*, 24 W. R. 637.

By O. XXXI. 3, in adjusting the costs of the cause or matter, inquiry shall at the instance of any party be made into the propriety of exhibiting interrogatories, and if it is the opinion of the taxing officer, or of the Court or Judge, either with or without an application for inquiry, that interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the interrogatories and the answers thereto shall be paid in any event by the party in fault.

#### AFFIDAVIT IN ANSWER.

The affidavit in answer to interrogatories is to be filed within ten days, or such other time as a Judge may allow (r. 8), and, unless it is otherwise ordered, is, if exceeding ten folios, to be printed (r. 9). The form is given in R. S. C. Appx. B. 7.

A foreigner will be allowed a reasonable time for answering: *The Emma*, 24 W. R. (Adm.) 587; and see Ord. XI. 4.

By r. 6, "any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer."

This course should always be taken where particular interrogatories are objected to: *Sammons v. Bailey*, 24 Q. B. D. 727; *Gay v. Labouchere*, 4 Q. B. D. 206; and see *Harvey v. Lovekin*, 10 P. Div. 122, 130.

As to the striking out pleadings on the ground of scandal, *v. sup.* p. 33; and as to the cases in which discovery may be resisted, *v. inf.* pp. 73 *et seq.*

By r. 10, "no exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons;" and by r. 11, "if any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit, or by *vivâ voce* examination, as the Judge may direct."

The rule of the Court has always been, that a Deft answering must always answer fully: see *Saull v. Browne*, 9 Ch. 364; although his case depends on a variety of circumstances, and though he denies the Plt's case *in toto*, unless he can show that the discovery is sought vexatiously or oppressively, or is such as to be burdensome and injurious to him, and never likely to be used. A full answer is one which answers all interrogatories which are material to the points to be decided at the trial, and as to which no valid claim of privilege is set up. But in considering the question of sufficiency, the Court regards the substance and not the form of the answer: *Lyell v. Kennedy*, 27 Ch. Div. 16; *Parker v. Wells*, 18 Ch. Div. 487; *Bolckow, Vaughan & Co. v. Fisher*, 10 Q. B. Div. 166, 170.

No answer can be required as to conclusions of law or inference from facts or construction of instruments. But a question of fact must be answered, though it refer to written documents: *Hoffman v. Postill*, 4 Ch. 673.

Where particular questions are asked as to the contents of certain letters which are required to be set out, an answer simply that they contain no such matter, or that if any such letters were written or received, they have not been preserved, is insufficient: *Rishton v. Griesell*, 14 W. R. 578, 789; and a party cannot be required to admit on oath that which he has already admitted in his statement of defence: *A. G. v. Gaskill*, 20 Ch. Div. 519; but in the case of a letter of which the writer (Deft in a libel action) has not preserved a copy, it is a sufficient answer that he does not recollect the contents with exactness: *Dalrymple v. Leslie*, 8 Q. B. D. 5.

As to referring to books instead of setting out the contents in an answer, see *Drake v. Symes*, Joh. 647; *Telford v. Ruskin*, 1 Drew. & S. 148.

An answer stating that the Deft had already answered precisely similar interrogatories filed in an action at law by the same Plt touching the same subject was held insufficient: *Hudson v. Grenfell*, 3 Giff. 388; 5 L. T. N.S. 417.

Plt in a copyright suit is entitled to particular discovery as to the original sources from which Def't alleges he derived his information: *Kelly v. Wyman*, 17 W. R. 399.

The summons for further answer ought in general to specify the interrogatories or parts of interrogatories to which a further answer is required: *Anstey v. N. & S. Woolwich Subway Co.*, 11 Ch. D. 439; *Chesterfield Colliery Co. v. Black*, 24 W. R. 783; but where all the answers are objected to, a summons for further answer may be in general terms: *Furber v. King*, 50 L. J. Ch. 496; 29 W. R. 536.

On a question of sufficiency, the party may refer to the whole of his answer, but must not endeavour to import into an admission matter unconnected with it: *Lyell v. Kennedy*, 27 Ch. Div. 1; and see O. xxxi. 24; and *inf.* p. 85.

As a party is bound to answer to the best of his knowledge, information and belief, he must make reasonable endeavours to procure information from his agents or servants, and an answer simply denying knowledge may be insufficient, if it does not show that he has made such endeavours: *Bolckow, Vaughan & Co. v. Fisher*, 10 Q. B. Div. 161; *Anderson v. Bank of Columbia*, 2 Ch. D. 644, 657, 659; *secus*, where there is nothing to show that the acts as to which he is interrogated were done in the presence of his servants or agents: *Rasbotham v. Shropshire Union, &c. Co.*, 24 Ch. D. 110; and see *A. G. v. Rees*, 12 Beav. 50; *Hall v. L. & N. W. Rail.*, 35 L. T. N.S. 848; *Hennessy v. Wright*, 36 W. R. 879; 24 Q. B. D. 445, n.; *London, Tilbury & Southend Rail. Co. v. Kirk & Randall*, 51 L. T. N.S. 599.

A party cannot be required to answer as to his information and belief with regard to facts, when such information and belief are derived solely from communications privileged on ground of professional confidence: *Kennedy v. Lyell*, 9 App. Ca. 81; and *v. inf.* p. 79.

Where a claim of privilege is set up, a further answer will not be required unless it is clear the claim cannot be substantiated; reasonable suspicion is not sufficient: *Lyell v. Kennedy*, 27 Ch. Div. 1.

It is only in cases of insufficiency that a further answer can be required; the duty of the Court being to consider sufficiency or insufficiency, not truth or falsity: *Lyell v. Kennedy*, 27 Ch. Div. 1; but (per Bowen, L. J.) an embarrassing answer may be dealt with as insufficient: *Ibid.*

An evasive answer in an extreme case has been taken off the file: *Furber v. King*, 50 L. J. Ch. 496; 29 W. R. 536; *Read v. Burton*, 3 K. & J. 166; 3 Jur. N.S. 263; and see *Hill v. Hart-Davis*, 26 Ch. Div. 470; but in general a further answer will be ordered: *Lyell v. Kennedy*, 27 Ch. Div. 28; and see *Hunter v. Nockolds*, 2 Ph. 540; *Marsh v. Hunter*, 3 Madd. 437.

Where a further answer *vivâ voce* is directed, it may be made a term of the order that the costs of and occasioned by the application shall be borne by the party interrogated in any event, but in general the costs should be reserved: *Vicary v. G. N. Rail. Co.*, 9 Q. B. D. 168.

Such answer only can be required *vivâ voce* as would have been sufficient in the affidavit, and any examination exceeding these limits must be at the cost of the party examining: *Litchfield v. Jones*, 54 L. J. Ch. 207.

Where a full answer had been given to the Plt, a voluntary liquidator, a strong case was required to induce the Court to allow a further examination under the Companies Act, 1862, s. 115: *Re Metropolitan Bank, Heiron's Case*, 15 Ch. Div. 139.

Refusal to file an answer as complicated, informal, and uncertain, was sustained: *Walker v. Daniell*, 22 W. R. 595.

#### DISCOVERY OF DOCUMENTS.

By O. xxxi. 12, "any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit."

The rule does not alter principles, but gives the Court discretion to refuse discovery where there is no reasonable prospect of its being of use: *Downing v. Falmouth Sewerage Board*, 37 Ch. Div. 234.

On an application for an affidavit of documents, special evidence should not be adduced, but the Court will look at all the proceedings in the action, pleadings as well as evidence: *Downing v. Falmouth Sewerage Board*, *sup.* Where there is a mass of affidavits, notice should be given of the particular portions relied on: *Ibid.*

After reference of an action by consent to an arbitrator, no order for discovery can be made, as nothing remains but for the Court to record judgment according to the award: *Penrice v. Williams*, 23 Ch. D. 353.

As to the stage of the action at which application for discovery should be made, *v. inf.* p. 76; and for cases in which discovery or inspection may be ordered to await the decision of an issue or question, which ought to be decided first, or on which the right to it depends, *v. r.* 20.

The expression "any other party," in r. 12, is confined to opposite parties (as to meaning of which, *v. sup.* p. 58): *Brown v. Watkins*, 16 Q. B. D. 125; *Shaw v. Smith*, 18 Q. B. Div. 193; and therefore a Deft cannot in general obtain discovery of documents from his co-Deft: *Brown v. Watkins*, *sup.*

A person consenting to be treated as a party to an action may have production from the parties who obtained the consent order: *Dent v. D.*, 1 Eq. 186.

The next friend of an infant Plt, not being a party to the action, cannot be required to make the affidavit: *Dyke v. Stephens*, 30 Ch. D. 189 (dissenting from *Higginson v. Hall*, 10 Ch. D. 235); *Re Corsellis*, *Lawton v. Elwes*, 52 L. J. Ch. 399; 31 W. R. 414; *et v. sup.* p. 59.

O. xxxvii. 7, under which Court has power "at any stage of the proceedings," to order attendance of any person for producing documents which he could be compelled to produce at the hearing, does not confer any new right of discovery against non-parties: *Straker v. Reynolds*, 22 Q. B. D. 357. The object of the rule was to remove the difficulty which existed in compelling production at any other stage than the hearing, and the Court has no jurisdiction to order a non-party to produce a document unless the parties are entitled to the production of it for the purpose of justice at the moment the order is made: *Elder v. Carter*, 25 Q. B. Div. 194.

As to the effect of an order under the rule (which is equivalent to a subpoena *duces tecum*), and that it may be made *ex parte* on a non-party; and that the production is not for private inspection, but with reference to some proceeding in the litigation, see *Re Smith, Williams v. Frere*, (1891) 1 Ch. 323.

It was at one time doubted (*Law v. Indisputable, &c. Co.*, 10 Ha. xx.), but afterwards settled, that where production of documents was required from a co., the secretary or some other officer should make an affidavit: see *Ranger v. G. W. R.*, 4 D. & J. 74; and see *Ryde Commrs. v. I. of W. Ferry Co.*, Form 11, p. 48; and as to delivering interrogatories to members or officers of corporations, *v. sup.* p. 59. The clerk of a co. making affidavit that the documents were in the custody of the warden and court of assistants, and that without their leave he had not access to them, but not stating that he had asked leave and been refused, had to make a further affidavit: *A. G. v. Mercers' Co.*, 9 W. R. 83; 3 L. T. N.S. 438; and after an affidavit by directors that they had no documents in their possession other than those in the possession of the co., a further affidavit by them that they had no documents whatever in their possession or power, was held insufficient: *Clinch v. Financial Corp.*, 2 Eq. 271.

Affidavit of documents on behalf of a municipal corporation has been ordered to be made by the town clerk: *Corporation of Hastings v. Ivall*, 8 Ch. 1017; and as to claim of privilege in such a case, *v. sup.* p. 59.

Defts who stated in their answer that they had been, but were no longer, treasurers and trustees of the society, could not be ordered to produce documents in the society's possession: *Penney v. Goode*, 1 Drew. 474; and where the officers have been changed since the transaction, see *Moline v. Tasmanian Ry.*, 32 L. T. N.S. 828; and that they cannot evade giving discovery by resigning, *Acorn v. Landed Est. Co.*, 14 W. R. 387. The solr of a co. is not an "officer" of it: *Brown v. Thames, &c. Co.*, 43 L. J. C. P. 112.

As to production of a co.'s books by the secretary on his cross-examination, under a subpoena *duces tecum*, see *In re Emma Mine*, 10 Ch. 194; and as to

examining officers of the co. and other persons in a winding-up, and requiring production of documents, see Companies Act, 1862, s. 115, and Buckley, 281 *et seq.*; as to production to inspectors appointed by the Board of Trade, s. 58.

The liquidator of a co., being an officer of the Court acting under its direction as to production of books, &c., will not, as of course, be ordered to make an affidavit of documents: *Re Mutual Society*, 22 Ch. Div. 720; *Gooch's Case*, 7 Ch. 207; and as to discovery by liquidators, *v. sup.* p. 59.

As to discovery by a foreign government, *v. sup.* p. 59. Where Plts, a foreign republic, persisted in not filing a sufficient affidavit, a day was fixed for dismissal of bill and repayment to Deft of money paid into Court unless sufficient affidavit then filed: *Rep. of Liberia v. Imperial Bk.*, 9 Ch. 569; affirmed in D. P., *sub nom. Rep. of Liberia v. Roye*, 1 App. Cas. 139. An affidavit by the consul in England as to documents abroad that "to the best of his knowledge, remembrance, information and belief" there were no such documents, was insufficient: *S. C.*

#### AFFIDAVIT AS TO DOCUMENTS.

The affidavit to be made by the party against whom an order for production is made is to be in the Form 8 in App. B. to R. S. C., and is to specify those documents which the deponent objects to produce: r. 13.

As to examination of witnesses and production of documents in Scotland, see 22 V. c. 20; 48 & 49 V. c. 74, s. 2; *Campbell v. A. G.*, 2 Ch. 571.

The applicant is obliged to accept the oath of the adverse party as to the description, relevancy, and possession of the documents: *Wright v. Pitt*, 3 Ch. 809; *Lyell v. Kennedy*, 27 Ch. Div. 19; *Wiedeman v. Walpole*, 24 Q. B. D. 537; and the affidavit is therefore conclusive against the party seeking discovery, unless, either from the affidavit itself or from the documents therein referred to, or from the pleadings, it can be shown to be insufficient or inaccurate: *Jones v. Monte Video Gas Co.*, 5 Q. B. Div. 556; *Hall v. Truman*, 29 Ch. Div. 319; *Comp. Financiere v. Peruvian Guano Co.*, 11 Q. B. Div. 55; *Morris v. Edwards*, 15 App. Cas. 309; although it merely goes to knowledge, information and belief: *Adams v. Fisher*, 3 My. & C. 526; or belief on advice: *Peile v. Stoddart*, 1 Mac. & G. 192; *Chart. Bk. of Ind. v. Rich*, 4 B. & S. 73; 11 W. R. 830; unless there is something to show that the statement is untrue: *Mansell v. Feeney*, 2 J. & H. 313; 9 W. R. 532; *Combe v. Corp. of Lond.*, 1 Y. & C. C. 651; *Luscombe v. Steer*, 37 L. J. Ch. 119; *Greenwood v. G.*, 6 W. R. 119 (in which case the order should be for a further affidavit, and not for production at once: *Corp. of Hastings v. Ivall*, 8 Ch. 1017); or that the party has not examined the documents sufficiently to know their contents: *Manby v. Bewicke*, 8 D. M. & G. 476; 4 W. R. 757.

And see *Gresley v. Mousley*, 2 K. & J. 288; *Commrs. of Sewers v. Glassey*, 15 Eq. 302; *Sutherland v. S.*, 17 Beav. 209.

The untruth may be shown by contradictory statements, by a discrepancy between the affidavit and other documents already produced, or by the nature of the case: *Bowes v. Fernie*, 3 M. & C. 632; *Greenwood v. G.*, 6 W. R. 119; or by anything which, appearing on the face of the pleadings, is "enough to raise a reasonable suspicion that the Deft has further documents which may help the Plts to make out their case:" *Turner, L. J.*, in *Noel v. N.*, 1 D. J. & S. 473; *Wright v. Pitt*, 3 Ch. 809; *Comp. Financiere v. Peruvian Guano Co.*, 11 Q. B. Div. 55; *e.g.*, where a number of customers' names were given, but no books relating to the business: *Saull v. Browne*, 17 Eq. 402; and see *Macfarlan v. Rolt*, 14 Eq. 580; *Westm. &c. Co. v. Clayton*, 12 W. R. 123; *Imp. Land Co. of M. v. Masterman*, 22 W. R. 66.

And the rule as to the conclusiveness of the affidavit applies when the claim is for privilege on the ground that the documents relate exclusively to the party's own case: *Bewicke v. Graham*, 7 Q. B. Div. 400; *A. G. v. Emerson*, 10 Q. B. Div. 191; *Roberts v. Oppenheim*, 26 Ch. Div. 724; unless the Court can see with reasonable certainty that the nature of the documents has been misrepresented or misconceived: *A. G. v. Emerson, sup.*; and see *Roberts v. Oppenheim, sup.*

And where the description of some of the documents in the schedule to the affidavit appeared not to agree with a claim of professional privilege, a further affidavit was ordered: *Lyell v. Kennedy*, 8 App. Cas. 217, 229.

As to whether the affidavit can be regarded as conclusive in respect of specific documents of which inspection is sought under rr. 17, 18, see *Wiedeman v. Walpole*, 24 Q. B. D. 537; *S. C.*, 24 Q. B. Div. 626.

In one case the Court inspected one of the documents, and finding the affidavit was manifestly inaccurate as to it, ordered inspection of all: *Ponsonby v. Hartley*, W. N. (83) 13, 44; but the propriety of such a practice has been questioned: see *Leslie v. Cave*, 56 L. T. N.S. 332; 35 W. R. 515; and *Re Holloway*, 12 P. D. 169.

When the documents have been inspected by the Court by consent of the parties, no appeal will lie: *Bustros v. White*, 1 Q. B. Div. 423.

An affidavit *prima facie* sufficient cannot be impeached by a contentious affidavit: *Jones v. Monte Video Gas Co.*, *sup.*; *Morris v. Edwards*, 23 Q. B. Div. 287; 15 App. Cas. 309; and see *Richards v. Watkins*, 6 Jur. N.S. 168; *Reynell v. Sprye*, 1 D. M. & G. 656, 712; or questioned by interrogatories: *Nicholl v. Wheeler*, 17 Q. B. Div. 101; *Hall v. Truman*, 29 Ch. Div. 307; except as to specified relevant documents upon a *prima facie* case being shown: *Ibid.*; and see *Newall v. Telegraph, &c. Co.*, 2 Eq. 756; and *Bray*, 214, 505.

The documents must be described with sufficient distinctness to enable the Court to enforce its order: *Taylor v. Batten*, 4 Q. B. Div. 85; *Bewick v. Graham*, 7 Q. B. Div. 400, 410; and see *Fortescue v. F.*, 24 W. R. 945; *Bovill v. Cowan*, 5 Ch. 495; *Hamilton v. Nott*, 16 Eq. 112, 117; and possession must be admitted clearly. It has been held sufficient if the relevancy can be inferred from the description in the schedule, though no express admission of it appear in the body of the affidavit: *Storey v. Lennox*, 1 My. & C. 525. A party must examine his documents before answering or making affidavit as to their relevancy, to enable himself to schedule them correctly: *Gabbett v. Curndish*, 3 Swa. 267, n.; and must show that he has tried to obtain the information required from his agents: *Glengull v. Fraser*, 2 Ha. 99; *McIntosh v. G. W. Rail.*, 4 D. & S. 544; and *v. sup.* p. 62.

A statement that the documents did not "relate to or evidence," the title of the Plt was too ambiguous: *Felkin v. Herbert*, 40 L. J. Ch. 798.

The inaccuracy of the affidavit as to one document does not of itself destroy privilege as to others: *Leslie v. Cave*, 56 L. T. N.S. 332; 35 W. R. 515.

As to the identification of letters, where numerous, by tying them up in bundles, and numbering or otherwise distinguishing them, so that they may be readily called for, see *Cooke v. Smith*, 39 W. R. 273 (C. A.); *Hill v. Hart-Davis*, 26 Ch. Div. 740; *Bewicke v. Graham*, 7 Q. B. Div. 400; *Taylor v. Batten*, *sup.*; *Mayor of Bristol v. Cox*, 26 Ch. D. 681; *Walker v. Poole*, 21 Ch. D. 836; and as to the description of documents or letters for which privilege is claimed, see *Taylor v. Batten*, 4 Q. B. D. 88; *Bewicke v. Graham*, *sup.*; *Gardner v. Irvin*, 4 Ex. Div. 53.

The affidavit must not be confined to documents for which an order for production could be made under r. 14, as being in the possession or power of the deponent: *v. inf.* p. 66; but all documents must be included of which the party has any possession or property jointly with others, or even in which he has no property at all, provided they are in his corporeal possession (see para. 7 of form); and see *Price v. P.*, 48 L. J. Ch. 215; *Vyse v. Foster*, 13 Eq. 602; *Swanston v. Lishman*, 45 L. T. N.S. 360; *Bray*, 225.

Books of a solicitor employed by a trustee to receive rent of trust property were not required to be mentioned in the trustee's affidavit of documents: *Eglinton v. Lamb*, 35 L. J. Ch. 113; *Colyer v. C.*, 30 L. J. Ch. 408. Production was ordered, at the instance of a purchaser under a decree, of documents relating to the property: *Dent v. D.*, 35 L. J. Ch. 112.

An affidavit by husband and wife should state what documents they or either of them have or have had in the possession or power of them or either of them. It is not sufficient to state what documents are in their joint possession, as that might enable them to keep back documents of which one of them had separate possession: *Fendall v. O'Connell*, 29 Ch. Div. 899.

Where underwriters were suing in the names of a foreign firm, they could not relieve themselves from making a further affidavit on the ground that they had done all they could to comply with the order, but the case was to be treated as if the nominal Plts were suing for their own benefit: *Wilson v. Raffalovich*, 7 Q. B. Div. 553.

A party must make the affidavit though there is nothing to show that there

are any documents: *The Minnehaha*, L. R. 3 A. & E. 148; and though he has good grounds against producing the documents. It is not sufficient for the deponent to state that documents are privileged; he should set forth the facts upon which the privilege is grounded: *Gardner v. Irvin*, 4 Ex. Div. 49; *Taylor v. Batten*, 4 Q. B. Div. 85.

An affidavit unnecessarily prolix was ordered on motion to be taken off the file: *Walker v. Poole*, 21 Ch. D. 835.

It seems that documents for which privilege is claimed as relating to the party's own title only are sufficiently described by giving their dates: *Taylor v. Oliver*, 45 L. J. Ch. 774; 34 L. T. N.S. 902.

As to what documents must be produced under a *subpoena duces tecum* by a solr not a party, see *Lee v. Angus*, 2 Eq. 59; by a partner in a bank of the bank's books, *A. G. v. Wilson*, 9 Sim. 526; by the secretary of a co. on a petition to wind up, *Re Emma Mine*, 10 Ch. 194; as to allowing inspection by intended witnesses, *v. inf.* p. 71.

#### PRODUCTION OF DOCUMENTS.

By O. XXXI. 14, which reproduces in a somewhat different form 15 & 16 V. c. 86, ss. 18, 20, now repealed, "it shall be lawful for the Court or a Judge at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

Orders for production are not made on the solrs of the parties: *Cashin v. Craddock*, 2 Ch. D. 140.

The right to production is not more extensive as against a Plt than a Deft: *Minet v. Morgan*, 8 Ch. 361; 21 W. R. 467; but see *Boyd v. Petrie*, 17 W. R. 903, and *Hoffmann v. Postill*, 4 Ch. 673.

Production cannot be ordered when no proceeding has been commenced: *Re Burton, &c. Co.*, 31 L. J. Q. B. 62; but may be when only an appeal is pending: *Re Nat. Funds Ass. Co.*, 24 W. R. 774.

Production was ordered on a Plt's application after replication: *Lafone v. Falkland Isl. Co.*, 4 K. & J. 38; 6 W. R. 4; *Parkinson v. Chambers*, 1 K. & J. 72.

The Deft had no right to production until he had put in his answer: *Smith v. Lay*, 18 W. R. 915; *Halliday v. Temple*, 8 D. M. & G. 96; but see *P. of W. v. Liverpool*, 1 Sw. 114; 3 Sw. 570; but had though he had not filed an affidavit: *Haldane v. Eckford*, 7 Eq. 425; or a further affidavit of documents after an order to do so: *Noel v. N.*, 1 D. J. & S. 468.

A Plt lost his right to move on an admission of relevancy in the answer by amending his bill, and thereby altering his case: *Ilverfield v. Pyman*, 2 Ph. 202; but this depended on the nature and extent of the amendment: *A. G. v. Thompson*, 8 Ha. 118; *Evans v. Richard*, 1 Sw. 7; and in *Warden v. Peddington*, 32 Beav. 639, the Plt was held entitled to a further affidavit on account of his amendments.

Notice may be given, at any time, to any party to produce any document referred to in his pleadings or affidavits, and if the notice be not complied with (except for such cause as the Court shall consider sufficient), such document cannot be used in evidence: O. XXXI. 15. For form of such notice, see R. S. C. Appx. B. No. 9.

Notice must then be given (see the form R. S. C. Appx. B. No. 10) by the party required to produce of willingness to produce such documents for inspection at the office of his solr, at a time named (within two or four days, according as the documents have or have not been set out by him in his affidavit of documents), or in the case of bankers' books, or other books of account, or books in constant use in trade or business, at their usual place of custody, and any objection to production must then be stated: r. 17; and in default an order for inspection founded on an affidavit may be made by a Judge: r. 18.

The object of rr. 15 to 18 is to give parties the same advantage as if the documents had been fully set out in the pleadings, and immediate production of such documents must be given, unless special reason to the contrary can be shown: *Quiller v. Hatley*, 23 Ch. Div. 42.

Production of books or documents in a District Registry may be ordered in any action: Jud. Act, 1873, s. 66.



Production of documents in the custody of the master or registrar relating to the estate of a deceased lunatic will be ordered on application of a party showing a *prima facie* title: *Re Smyth*, 15 Ch. Div. 286.

To obtain production of a document as to which there is any dispute (and title deeds are subject to the same rule), the applicant must show that he has an interest in the document, *i.e.*, that he requires its production for the legitimate purposes of the action; and that it is, or may be, evidence which may prove, or lead or assist him to prove, his case; and these points must be admitted by the affidavit of the other party: *A. G. v. Thompson*, 8 Ha. 112; and that it is not privileged for any of the reasons given, *inf.* pp. 78 *et seq.* Where the Defts admitted that the Plt had had an interest under a settlement, but alleged that by subsequent deeds that interest had determined, they had to produce the settlement: *Bugden v. South*, 3 Jur. N.S. 783; 26 L. J. Ch. 425; 5 W. R. 128.

In general the Court has no discretion to refuse to order production of documents not protected by privilege: *Bustros v. White*, 1 Q. B. Div. 423; *Anderson v. Bank of British Columbia*, 2 Ch. Div. 654; but would not order it at the suit of a person claiming as next of kin against the Solr to the Treasury, to whom admon had been granted, until the Plt had made a *prima facie* case: *Lane v. Gray*, 16 Eq. 552; and see *Wynne v. Humberston*, 27 Beav. 421; 30 L. T. N.S. 306; nor where the cause had been set down for hearing: *Waters v. Shaftesbury*, 12 Jur. N.S. 3; nor where the production was wanted for a criminal prosecution: *S. C.* As to what documents the Plt in an action on a marine policy can have produced, see *Kellock v. Home, &c. Co.*, 12 Jur. N.S. 653; *China Steamship Co. v. Commercial Union Ass. Co.*, 8 Q. B. Div. 142; *W. of England Bank v. Canton Co.*, 2 Ex. D. 472; *Henderson v. Underwriting Association*, (1891) 1 Q. B. 557.

In an action to restrain sewage nuisance, a general order as to documents in possession of the Deft board was refused, but an order was made limited to certain resolutions and correspondence with the Local Government Board: *Downing v. Falmouth United Sewerage Board*, 37 Ch. Div. 234.

Privilege claimed for documents is not lost by their being referred to in the pleadings; the penalty for non-production being that they cannot afterwards be used in evidence: *Roberts v. Oppenheim*, 26 Ch. Div. 724.

In all cases where documents are produced there is an implied undertaking, which may be enforced by injunction, not to divulge the contents: *Wms. v. P. of W. Ins. Co.*, 23 Beav. 338. And the Court will take care that no vexatious or improper use be made of documents ordered to be produced: *Mansell v. Feeney*, 9 W. R. 610; and will be cautious where the party producing might be prejudiced thereby outside the case: *Carver v. Pinto Leite*, 7 Ch. 90; *Heugh v. Garrett*, 44 L. J. Ch. 305; and as to inspection under the Bankers' Books Evidence Act (42 & 43 V. c. 117), see *Re Marshfield, M. v. Hutchings*, 32 Ch. D. 499, 502.

On ordering production of letters marked "private and confidential," against the wish of the writer, an undertaking not to use them for any collateral object was required: *Hopkinson v. Burghley*, 2 Ch. 447. And as to a creditor obtaining production after admon judgment in support of his claim, see *In re M'Veagh*, 1 D. J. & S. 399, where the exors were Defts. After judgment the summons must specify the points on which discovery is sought: *Haldane v. Eckford*, 7 Eq. 425.

#### PRODUCTION OF DOCUMENTS—POSSESSION OR POWER.

Possession of an agent is the possession of the principal, so that a party to an action must produce documents which are with his agents: *Morrice v. Swaby*, 2 Beav. 500; and all that he has a right to inspect are in his power, though wrongfully withheld: *Taylor v. Rundell*, 1 Ph. 222; unless they are held by the agents as agents for others also: *Edmonds v. Foley*, 10 W. R. 210 (*et inf.*), or are their own property: *Colyer v. C.*, 9 W. R. 452; 30 L. J. Ch. 408. But in bankruptcy proceedings a clerk of the debtors, who were abroad, could not before adjudication be made to produce their documents: *Exp. Byrne*, 35 L. J. Bkey. 43. They must be produced, though in the hands of agents abroad: *Gabbett v. Cavendish*, 3 Sw. 267, n.; time being allowed: *Morrice v. Swaby*, *sup.*; *Farquharson v. Balfour*, T. & R. 184; *Mertens v. Haigh*, 3 D. J. & S. 528.

Represves of a deceased deputy steward of a manor, Defts to a bill by the lord, had to produce memoranda made by the deceased for his own use: *Bp. of Winch. v. Bowker*, 9 W. R. 404; 29 Beav. 479. But an exor had not to produce cheques drawn by his testator and in the hands of the bankers: *Bayley v. Cass*, 10 W. R. 370.

A party to an action is not bound to produce documents deposited by him as a security for money lent before the institution of the suit, if too poor to redeem them: *North v. Huber*, 7 Jur. N.S. 767; 29 Beav. 437, following *Re Williams*, 7 Jur. N.S. 323; nor letters pawned by him with other goods before the suit commenced: *Liddell v. Norton*, Kay, xi.

But documents must be produced, although subject to a solr's lien, and he must be paid off if necessary: *Exp. Shaw*, Jac. 270; *Rodick v. Gandell*, 10 Beav. 270; this only refers however to a party's own solr; *Palmer v. Wright*, 10 Beav. 234; but it holds good against a bankrupt unless he really cannot get the documents produced: *Vale v. Oppert*, 10 Ch. 340; and a bankrupt must state what documents have passed to his trustee: *Anon.*, W. N. (76) 38.

As to how far a solr's lien may be a valid excuse for non-production, or a ground for production upon terms of paying money into Court or otherwise, see *inf.* Chap. XL., "SOLICITORS."

The order for production will not go unless the party has the sole possession of the documents: *Kearsley v. Phillips*, 10 Q. B. Div. 465.

One of the trustees of a mortgage could not be ordered to produce the documents relating to the mortgaged property in the absence of the other: *Kearsley v. Phillips*, *sup.*

Documents in the joint possession of a Deft and others, not parties to the action, are protected: *Reil v. Langlois*, 1 M. & G. 627; *Kettlewell v. Barstow*, 7 Ch. 686; *Murray v. Walter*, C. & P. 114; *Kearsley v. Philips*, 10 Q. B. Div. 465; and an order to produce a deed, admitted to be in the joint possession of two Defts, was after the death of one refused in the absence of his represves: *Robertson v. Shewell*, 15 Beav. 277. An application that a Deft should produce documents in the possession of an agent for himself and his co-tenant in common, not a party to the suit, was refused with costs: *Edmonds v. Foley*, 30 Beav. 282; 10 W. R. 210; *Murray v. Walter*, C. & P. 114; but see *Walburn v. Ingilby*, 1 M. & K. 61.

Where joint possession is shown, it is not necessary that the deponent should state that the co-owner will not consent to the production: *Kearsley v. Philips*, 10 Q. B. Div. 465; but the nature of the joint possession ought to be shown: *Bovill v. Cowan*, 5 Ch. 495.

In *Warwick v. Q. Coll.* (12., 4 Ex. 254, it was held that a party could not be ordered to produce documents relating to a compromise between him and non-parties: and see *Bagnull v. Carlton*, W. N. (76) 215; but in *Hutchinson v. Glover*, 1 Q. B. D. 138, in an action against shipowners for damage to cargo by a collision, compromises of other suits relating to the collision had to be produced, it not appearing that the other parties to the compromises objected. And a Plt in a patent suit was bound to answer as to compromises of other suits by him with reference to the same patent: *Betts v. Neilson*, W. N. (66) 170. Where private accounts between the Plt and Deft had been entered in books of a partnership between Deft and his father, who refused to allow production, an order against the father was refused: *Hadley v. Macdougall*, 7 Ch. 312; and as to producing partnership books on a *subp. duces tecum*, see *A. G. v. Wilson*, 9 Sim. 526; and see *Richards v. Watkins*, 6 Jur. N.S. 168. Production was refused against a Deft in the absence of a co-Deft with whom he had deposited the document: *Burbidge v. Robinson*, 2 M. & G. 244; but possible injury to the mortgagor did not entitle a mortgagee to resist production of the mortgage deeds to persons interested in the mortgage money: *Gough v. Offley*, 5 D. & S. 653. And after the dissolution of a co., the liquidator having the absolute control over documents in his possession was bound to produce them: *London & Yorkshire Bk. v. Cooper*, 15 Q. B. Div. 473; but no order could be made against the committee of a lunatic for inspection of documents which were in the custody of the Court, as the Plt should apply in the lunacy: *Vivian v. Little*, 11 Q. B. D. 370.

It is no ground for resisting production that other persons have an interest in the documents: *Kettlewell v. Barstow*, 7 Ch. 686; *Re Turner*, 24 W. R. 54; *Blenkinsopp v. B.*, 2 Ph. 607; *Plant v. Kendrick*, L. R. 10 C. P. 692; nor

that it will disclose names of customers: *Howe v. McKernan*, 30 Beav. 547; as to documents of a partnership in possession of the Defts (shareholders), see *Glyn v. Caulfield*, 3 Mac. & G. 463.

A motion for production of documents in the hands of trustees was refused in the absence of the c. q. ts.: *Ford v. Dolphin*, 1 Drew. 222; and of documents in hands of Deft and a co-exor not a party: *Morrell v. Wootten*, 15 Jur. 319; *Cridland v. De Mauley*, 13 Jur. 442; *Lazarus v. Mozley*, 5 Jur. N.S. 1119.

When Plt had obtained production of a document from a Deft, a motion by another Deft that Plt produce it to him was refused in the absence of the first: *Reynolds v. Godlee*, 4 K. & J. 88.

An allegation that deeds are in the possession of the Defts, or some of them, will not sustain the action against one of them who has no interest: *Weise v. Wardle*, 19 Eq. 171; and see *M. of London v. Levy*, 8 Ves. 398.

#### PRODUCTION OF DOCUMENTS—MORTGAGEES, ETC.

Under sect. 16 of the Conveyancing Act, 1881, a mortgagee is bound to produce his deeds to the mortgagor at all reasonable times. In cases not within the section, a mortgagee is not in general ordered to produce the deeds until he is paid off: *Chichester v. Donegal*, 5 Ch. 497; *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273, 283; nor to state their contents; *S. C.*; *Bridgewater v. De Winton*, 33 L. J. Ch. 238; and see *Beavan v. Cook*, 17 W. R. 872; *Freeman v. Butler*, 33 Beav. 289.

Although the Plt has no absolute right to discovery of documents before the Deft has delivered his defence, it may properly be allowed in a redemption action on the footing of wilful default against a mortgagee in possession: *Union Bank of London v. Manby*, 13 Ch. Div. 239.

For special cases in which the order has been made, see *Davis v. Parry*, and other cases, *sup.*; *Balch v. Symes*, T. & R. 87; *Patch v. Ward*, 1 Eq. 436, where an order for production of the mortgage deed itself was made; but see *Anon.*, W. N. (76) 23. A mortgagee taking a conveyance of the equity of redemption from a trustee thereof with notice of the trust, cannot refuse production of the conveyance in a suit by the c. q. ts. to redeem on payment of the amount paid: *Smith v. Barnes*, 1 Eq. 65.

Tenants in common, as between themselves, must produce; but where A. has mortgaged his share to B. (*Edmonds v. Foley*, 30 Beav. 283), B. cannot be made to do so; and where one had sold his share subject to a mortgage he could not be called on to show the deeds in the absence of his mortgagor: *Lambert v. Rogers*, 2 Mer. 489.

A mortgagee admitting himself redeemable must set out the accounts: *Elmer v. Creasy*, 9 Ch. 69; and a Deft cannot refuse to produce documents because he has a lien on them for literary labour: *Brougham v. Cauvin*, 37 L. J. Ch. 691; 16 W. R. 688.

On payment of what is found due, the mortgagor (Deft) is entitled to delivery of the security and all documents on oath: *Weeks v. Stourton*, 13 W. R. 489; although other persons claim an interest in them: *Re Turner*, 24 W. R. 54.

As to production by Deft in a suit to establish the mortgage, see *Hunt v. Elmes*, 27 Beav. 62.

#### IMPEACHED DOCUMENTS.

In a suit to impeach a deed, the Court refused to order production of it on motion: *Tyler v. Drayton*, 2 S. & S. 309; *secus*, where it was charged and not denied that the alleged fraud appeared on the deed: *Kennedy v. Green*, 6 Sim. 6; and in a suit to set aside as fraudulent a bill of sale, or to redeem it if valid, the bill of sale was on motion ordered to be produced: *Neate v. Latimer*, 2 Y. & C. 257; 11 Bli. N.S. 149; 4 Cl. & F. 570; and where the production of the original deed can be required, all subsequent documents which depend upon and proceed from it must be produced: *Jones v. J.*, Kay, vi.; *Cannock v. Jauncey*, 1 Drew. 497. Where the answer stated a release not anticipated by the bill, without volunteering to produce it, the Deft was not to produce it until the hearing: *Atkins v. Wright*, 14 Ves. 211; and the Court ordered a mortgagee, who had been sold to the mortgagor, to produce

the mortgage deed which was impeached: *Davis v. Parry*, 4 Jur. N.S. 431; 27 L. J. Ch. 294; 6 W. R. 174.

A mere allegation that a mortgage is invalid will not protect it from production: *Crisp v. Platel*, 8 Beav. 62.

Where an exor (Def't) alleged that the testator's signature to a receipt relied on by the Plt was a forgery, he produced numerous cheques signed by the testator; but was not bound to produce others which he alleged to be forgeries: *Wilson v. Thornbury*, 17 Eq. 517; but see *Groves v. G., Kay*, xix., *et sup.* p. 54; *Boyd v. Petrie*, 3 Ch. 818.

#### INSPECTION.

By O. xxxi. 18, if a party "offers inspection elsewhere than at the office of his solr, the Judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party."

By r. 19, "an order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused."

Inspection of court rolls was to be at the office of the steward: *Carew v. Davis*, 21 Beav. 213; and generally where inspection will suffice, and deposit in Court will be an injury to the Def't, the latter is not ordered: *M. of Berwick v. Murray*, 1 M. & G. 530.

No allowance is to be made for costs of inspection of documents, under O. xxxi. 15, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for such inspection: O. LXV. 27 (17); and as to payment and allowance of costs of copies or extracts, see O. LXV. 27 (18).

Under the old practice the strict rule was that the inspecting party was entitled to have the documents deposited at the Record and Writ Clerk's Office, and it afterwards grew to be the practice, as a matter of indulgence and convenience to the producing party, to allow them to be produced at the office of his solrs: *Brown v. Sewell*, 16 Ch. Div. 518.

The costs of such production and inspection will not be allowed the successful party on a party and party taxation: *Brown v. Sewell*, 16 Ch. Div. 517; *Woodroffe v. Daniel*, 10 Sim. 126; *Flockton v. Peake*, 12 W. R. 1023; and where the party inspecting had been, by an arrangement, furnished with copies, he had to pay the stationer's charge only: *Kennedy v. George*, 6 W. R. 218.

By O. LXI. 30, "where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers, or otherwise, the same shall be left or deposited in the Central Office, and shall be subject to such directions as may be given for the production thereof."

If a party state that documents in his possession are in daily use at his place of business, the order will be that the applicant be at liberty to inspect them there: see O. xxxi. 17, and *sup.* p. 66; and if he cannot obtain a satisfactory inspection there, he may apply for a further order: *Grane v. Cooper*, 4 M. & C. 263; and see *Maund v. Allies*, *Ib.* 508; *Mornington v. Keane*, 4 W. R. 793; *Gardner v. Dangerfield*, 5 Beav. 389; *Mertens v. Haigh*, Joh. 735; 11 W. R. 792; 3 D. J. & S. 528.

The Judge has a discretion (with which the C. A. will not readily interfere) as to the place of production and inspection, and having made the common order for inspection at the solr's office in London, may make a fresh order for inspection elsewhere: *Prestney v. Corporation of Colchester*, 24 Ch. Div. 376.

A local board, as they were not carrying on a trade, had to send documents and minute book to London: *A. G. v. Whitwood L. B.*, 19 W. R. 1107; but where the documents consisted principally of ancient charters and account books of a corporation kept at Colchester, inspection there was allowed as an

indulgence, but with liberty to the Plt to apply for inspection of particular documents in London: *Prestney v. Corporation of Colchester*, 24 Ch. Div. 376.

Where the documents were voluminous, and in Dublin, and were of consequence to the business there, Deft was to deliver a list, and Plt to have copies of all such as he pleased: *Gabbett v. Cavendish*, 3 Swa. 267, n.; failing agreement as to making copies the documents were to be deposited: *Prentice v. Phillips*, 2 Ha. 152.

In *Wiedeman v. Walpole*, 24 Q. B. D. 537 (*S. C.*, 24 Q. B. Div. 537, reversed on other grounds), it was held that the Court might order inspection of a specific document under O. xxxi. 18, notwithstanding that it was not disclosed by the affidavit of documents (which contained the usual averment negating the existence of relevant documents other than those specified), and it was said that rr. 17 and 18 both contemplated the possibility of a party obtaining inspection of documents as to which the other party had made no admission at all.

Jud. Act, 1873, s. 66, provides that the Court or any Judge of the division to which any cause or matter is assigned may order any books or documents to be produced in the office of any district registrar.

Under the common order to inspect, a party may take notes and make copies of any part not sealed up: *Coleman v. W. Hartlepool Ry.*, 5 L. T. N.S. 266; Form 7, *sup.* p. 47; *Pratt v. P.*, 30 W. R. 837; 47 L. T. N.S. 240; and, in general, a right to take copies is always treated as incidental to a right to inspect: *Mutter v. Eastern and Midland Rail. Co.*, 38 Ch. Div. 92, 105.

The statutory right of inspecting the registers of a co. given to holders of stock and debentures by the Companies Clauses Acts, 1845, ss. 45, 63, and 1863, s. 28, may be exercised at all reasonable times without reason assigned: *Holland v. Dickson*, 37 Ch. D. 669; and includes a right to take copies: *Mutter v. Eastern and Midland Rail. Co.*, 38 Ch. Div. 92, 105.

As to inspection of documents in possession of a co. under Companies Act, 1862, s. 156, see *Re North Brazilian Sugar Factories*, 37 Ch. Div. 83; and as to inspection of books of co. under Companies Act, 1862, ss. 161, 162, by member dissenting from reconstruction of co., see *In re Glamorganshire Bank, Morgan's Case*, 28 Ch. D. 620, and Buckley, 347, 396.

Pending an appeal from an order to deposit documents in Court, inspection was deferred: *Kelly v. Hutton*, 15 W. R. 916; *secus*, where the appeal was as to the relief: *Gardner v. L. C. D. Ry.*, 15 W. R. 137.

As to inspection in patent suits, *v. inf.* Chap. LII. "PATENTS."

The order directs production to the party, his solrs and agents: see Forms 7—12, pp. 47—49; an undertaking to produce to a party implies production to his solr and agents, though not named: *Williams v. P. of W. Ins. Co.*, 23 Beav. 338.

The term "agent" does not include other Defts: *Bartley v. B.*, 1 Drew. 233; nor a relative, though the only person conversant with the accounts: *Summerfield v. Prichard*, 17 Beav. 9; nor a professional accountant appointed *pro re natâ*, unless by special order which will be made if circumstances require it: *Bonnardet v. Taylor*, 1 J. & H. 383; *Gibney v. Clayton*, 27 L. R. Ir. 75; and see *Swansea Vale Ry. v. Budd*, 2 Eq. 274, where the Deft's surveyor was allowed to see plans, &c., on which the issue mainly depended. And on the application of a bankrupt's assignee, the accounts being extensive and kept in Indian currency, an accountant was allowed, the bankrupt himself being employed as such accountant, and the inspection could be made in the presence of any duly authorized clerk of the assignee's solrs: *Lindsay v. Gladstone*, 9 Eq. 132, *sup.* Form 20, p. 52; and in a complicated case inspection was to be allowed to any number of persons, not exceeding twelve, whose names and addresses Plt was to give, and to hire a large room for the purpose: *Rep. of Peru v. Weguelin*, 41 L. J. Ch. 165. In *Blair v. Massey*, Ir. Rep. 5 Eq. 623, inspection by Plt's counsel was allowed; and see *Draper v. Manchester, &c. Ry.*, 7 Jur. N.S. 86, where it was suggested that "solr" meant solr in the cause, and "agent" some person connected with the suit or a general agent; and as to persons being personally disqualified from inspection by interest, see *S. C.*

A special order is required for inspection by intended witnesses, and will only be made on special grounds: *Boyd v. Petrie*, 3 Ch. 818; as where the genuineness of signatures is disputed: *Groves v. G.*, Kay, App. xix. *et sup.* pp. 54, 70.

As to inspection for verifying copy by witnesses, see *Phelps v. Prew*, 3 E. & B. 430; 18 Jur. 245.

By the Bankers' Books Evidence Act, 1879 (42 & 43 V. c. 11), s. 7, "on the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order made under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

As to the mode of proof of entries in bankers' books, see Chapter VIII. "EVIDENCE."

The object of the Act is not merely to relieve bankers, but to facilitate proof of transactions recorded in their books: *Arnott v. Hayes*, 36 Ch. Div. 731.

Liberty was given to a residuary legatee Plt in an admon action, to inspect at testator's bankers books for four years, containing entries of accounts of testator's business: *Re Marshfield, M. v. Hutchings*, 32 Ch. D. 499.

The procedure being in substitution for *subpoena duces tecum*, there is jurisdiction to make the order *ex parte*, but such jurisdiction will be cautiously exercised, and evidence of *bona fides* and materiality of the proposed inspection may be required: *Arnott v. Hayes*, *sup.* See form of order, *sup.* p. 55.

Inspection may be ordered of entries relating to banking accounts kept in names of persons other than parties to the action, if kept on their behalf: *Howard v. Beall*, 23 Q. B. D. 1.

As to inspection of property, *v. inf.* p. 86.

#### SEALING UP PART.

A party swearing that parts of documents were immaterial was allowed to seal them up, producing the rest: *Gerard v. Penswick*, 1 Swa. 533; *Mansell v. Feeney*, 9 W. R. 610; Form 7, *sup.* p. 47. Part of a pedigree may be sealed up by a Deft on the ground that it does not relate to the Plt's case: *Kettlewell v. Barstow*, 7 Ch. 686; but not part of court rolls in a suit by a freehold tenant: *Warwick v. Q. Coll.*, 36 L. J. Ch. 505.

As to what portion of their books, and of letters relating to sales, the Defts in a trade-mark case could seal up, see *Carver v. Pinto Leite*, 7 Ch. 90. The question of materiality is more strictly sifted where the discovery is such that it might be to prejudice the party making it independently of the suit: *S. C.*, and see *Heugh v. Garrett*, 44 L. J. Ch. 305.

An answer admitting possession of documents without claiming privilege was allowed to be qualified by an affidavit (at Deft's cost: *Smith v. Massie*, 4 Beav. 417), so as to protect portions or the whole of them: *Curd v. C.*, 1 Ha. 274, affirmed on appeal; and see *Blenkinsopp v. B.*, 10 Beav. 277; liberty to seal up or not to deposit might be given after affidavit admitting possession: *Talbot v. Marshfield*, 1 Eq. 6; on a motion for production of documents sealed up by the Deft, the M. R. himself examined them, and, having satisfied himself that they might possibly serve the Plt, allowed him to inspect them: *Caton v. Lewis*, 22 L. J. Ch. 946; and so *Wood, V.-C.*, where the affidavit was not explicit: *Lafone v. Falkland Islands Co.*, 4 K. & J. 34; 27 L. J. Ch. 25; 6 W. R. 4; and see *The Macgregor Laird*, L. R. 1 Ad. & E. 307; *Bustros v. White*, 1 Q. B. Div. 423; and generally as to the practice where a right to seal up is desired or claimed, see *Bray*, 233; *Dan.* 1841.

Where a few unimportant portions had been improperly sealed up, the Plt was not entitled to a general unsealing: *Jones v. Andrews*, 58 L. T. N.S. 601.

In the case of partnership books, in an action by residuary legatees for accounts, surviving partner and exor of testator was not entitled to seal up such entries as he might swear to be irrelevant, but only such as related to specified private matters: *Re Pickering, P. v. P.*, 25 Ch. Div. 247.

As to allowing inspection of certain entries only in books, see *Firkins v. Loue*, 13 Pr. 193; *Goodall v. Little*, 1 Sim. N.S. 155.

On a question of identity of land all parts of deeds which did not relate to parcels were sealed up: *Earp v. Lloyd*, 3 K. & J. 549; *Luscombe v. Steer*, 37 L. J. Ch. 119.

The books of a railway company were produced, with liberty to seal up parts irrelevant or otherwise privileged: *Wilson v. Northampton, &c. Railway*, 14 Eq. 477.

#### RESISTANCE TO DISCOVERY—(1) IRRELEVANCY.

O. xxxi. 1, provides that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

No discovery can be compelled which is not directly or indirectly material to the issue to be tried at the hearing: see *Wigram*, 158; *Bray*, 16 *et seq.*; *Bleckley v. Rymer*, 4 Drew. 248; *Kettlewell v. Burstow*, 7 Ch. 686; *Adams v. Lloyd*, 3 H. & N. 351; *Re Morgan, Owen v. M.*, 39 Ch. Div. 316. But the right to discovery is not confined to facts directly put in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue: *Marriott v. Chamberlain*, 17 Q. B. Div. 163. Thus, the alleged writer of a libellous letter may be asked whether he did not write another letter addressed to a third person: *Jones v. Rickards*, 15 Q. B. D. 439; and an interrogatory, the answer to which will enable the Court to make an immediate judgment, is relevant: *Re Morgan, Owen v. M.*, 39 Ch. Div. 316.

In an action by patentee against licensee for an account, when the Deft licensee denies user and sets up a plea of secret process, the Plt is entitled to full discovery, but not oppressively so as to compel disclosure of the secret process: *Ashworth v. Roberts*, 45 Ch. D. 623.

Nor is the right confined to the obtaining of information. It may be used to obtain an admission from the opposite party, so as to facilitate proof and save expense: *A. G. v. Gaskill*, 20 Ch. Div. 519; *Gumbrecht v. Parry*, 32 W. R. 204; and see *Dalrymple v. Leslie*, 8 Q. B. D. 5.

If a fact is relevant, discovery of it cannot be resisted merely because particulars of evidence intended to be used or the names of proposed witnesses would thereby be disclosed: *Marriott v. Chamberlain*, 17 Q. B. Div. 164; *Storey v. Lennox*, 1 My. & Cr. 525; 1 Keen, 341.

The oath of the party that documents ordered to be produced are immaterial is sufficient, unless there be something in the nature of the case, or on the face of his statements, to show that this is not so: *Minet v. Morgan*, 8 Ch. 361; 21 W. R. 467; *Combe v. C. of Lond.*, 1 Y. & C. Ch. 652, *et v. sup.* p. 64.

All documents admitted to be relevant must be produced, unless good reason be shown to the contrary: *Storey v. Lennox*, 1 My. & C. 525; and as to what amounts to an admission of relevancy, see *S. C.*, and that scheduling them does, see *Greenwood v. G.*, 6 W. R. 119.

An interrogatory asking in substance whether the Deft had not been in such a position that he must have knowledge of the truth or falsity of the allegations in the statement of claim, was held irrelevant: *Re Morgan, Owen v. M.*, 39 Ch. Div. 316.

A Deft sued as agent and denying the agency by his answer, had not to answer as to what appeared to be his private affairs: *G. W. Colliery Co. v. Tucker*, 9 Ch. 376. Questions as to sale of surplus water were held relevant in a suit by a water co. to restrain diversion of a stream: *Wilts, &c. Co. v. Swindon W. W. Co.*, 20 W. R. 333.

As to whether documents required merely for comparing handwriting are relevant, see *Wilson v. Thornbury*, 17 Eq. 517.

As to production of compromises with persons not parties, *sup.* p. 68.

Inquisitorial questions, such as would, were an answer to them compelled, make the Court a scourge to the country, need not be answered: *Dos Santos v. Frietas*, cited *Wigram*, 165; and see O. xxxi. 7, which provides for the expunging of any interrogatories which are "oppressive"; and *Parker v. Wells*, 18 Ch. Div. 484; *A. G. v. Gaskill*, 20 Ch. Div. 529; but questions as to the amount of a Deft's pecuniary resources, whence derived, &c., must, if material, be answered: *Newton v. Dimes*, 3 Jur. N.S. 583; 30 L. T. N.S. 30; and a Deft required to give an account of partnership transactions was not allowed to refuse an account of the debts owing to the firm on the ground that it would disclose the private affairs of the customers: *Telford v. Ruskin*, 1 Dr. & S. 148; *Howe v. M'Kernan*, 30 Beav. 547; and an answer as to private dealings was compelled where fraud was alleged: *Gartside v. Outram*, 3 Jur. N.S. 39; 26 L. J. Ch. 113; 5 W. R. 35.

## RESISTANCE TO DISCOVERY—(2) DISCOVERY RELATING EXCLUSIVELY TO OWN CASE.

The general principle is, that a party must give discovery of the facts upon which he relies to establish his case, but not of the evidence which it is proposed to adduce: *Eade v. Jacobs*, 3 Ex. Div. 335; and see *Bidder v. Bridges*, 29 Ch. Div. 29; *A. G. v. Gaskill*, 20 Ch. Div. 529; *Kettlewell v. Barstow*, 7 Ch. 686; *Briton Medical Assoc. v. Britannia Fire Assoc.*, 59 L. T. N.S. 888; *Garland v. Oram*, 7 Times L. R. 86. This principle is otherwise expressed by the statement that a party has no right to see his adversary's brief: *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 656; *The Palermo*, 9 P. Div. 6; *Saunders v. Jones*, 7 Ch. D. 435.

Thus, details of conversations, upon which reliance is placed, may have to be set out: *Eade v. Jacobs*, 3 Ex. D. 335; *Lyon v. Tweddell*, 13 Ch. D. 375; *A. G. v. Gaskill*, 20 Ch. Div. 519; *Fisher v. Owen*, 8 Ch. D. 645; and details as to communication to Plt of a creditor's deed, of which he claims the benefit: *Johns v. James*, 13 Ch. D. 370.

In an action to set aside a will for undue influence, Plt was entitled to ask what sums Deft had received from testator, or from his universal legatee since his death: *Re Holloway, Young v. H.*, 12 P. D. 167; newspaper proprietors, Defts in an action for libelling Plt, as author of letters which they published, were obliged to state approximately the extent of the circulation of their paper, but not to answer as to the names of the persons from whom the letters were obtained, what was paid for them, and what inquiries were made and steps taken to test and verify information: *Parnell v. Walter*, 24 Q. B. D. 441; and discovery could not be required as to quantities of goods sold by Plts in action for injunction as to user of trade name, such quantities being evidence in support of Plt's case: *Benbow v. Low*, 16 Ch. Div. 93; explaining *Saunders v. Jones*, 7 Ch. Div. 435.

In general, the names of persons who may be called as witnesses need not be disclosed: *Eade v. Jacobs, sup.*; unless such names are relevant facts in the case, or discovery of relevant facts cannot be made without disclosing them: *Marriott v. Chamberlain*, 17 Q. B. Div. 154. Thus, Deft was not bound to give the names of persons in whose presence a verbal consent, relied on by him as a defence, was given: *Eade v. Jacobs, sup.*; nor a Plt, in action for dissolution of partnership, the names of persons in whose presence the Deft, his partner, misconducted himself: *Lyon v. Tweddell*, 13 Ch. D. 375; nor a newspaper proprietor, admitting publication of alleged libel, the name of the writer of the words, unless the identity of such writer were a fact material to some issue: *Gibson v. Evans*, 23 Q. B. D. 384; *Henessy v. Wright*, 36 W. R. 880; 24 Q. B. Div. 445, n.

Where a Deft made no case of his own, simply denying the Plt's case, he could not protect his documents as being only evidence of his own case, for Plt's case included matters charged as answers to an expected defence: *A. G. v. Corp. of London*, 2 M. & G. 247, 265.

As to whether Plt and Deft are in the same position as to this ground of privilege, see *Hoffmann v. Postill*, 4 Ch. 673; *Minet v. Morgan*, 8 Ch. 361; 21 W. R. 467.

In order to protect documents from production on this ground, it is material for the party to aver on oath that they form, support, or evidence his own title, and are intended to be or may be used by him in evidence accordingly, and that they do not contain anything impeaching his own case or title, or forming or supporting the case or title of the opposite party: *A. G. v. Emerson*, 10 Q. B. Div. 191; and see *Bewicke v. Graham*, 7 Q. B. Div. 400; *Bulman v. Young*, 49 L. T. N.S. 736; *Morris v. Edwards*, 15 App. Cas. 309.

A statement that documents were obtained by a Deft for his own defence, and that they did not relate to or evidence the "title" of the Plt, was not sufficiently distinct to protect them: *Felkin v. L. Herbert*, 30 L. J. Ch. 798; and see *Mansell v. Feeney*, 9 W. R. 610.

In *Bolton v. Liverpool*, 1 M. & K. 88, a statement that the documents were the title deeds of the Defts was sufficient to protect them without using the word exclusively, or denying their supporting the Plt's title: but see *Minet v. Morgan, sup.*; and *A. G. v. Emerson, sup.*; *Combe v. London, sup.*; *Harris v. H.*, 4 Ha. 179.

If a Deft admit the relevancy of documents to a part of the Plt's case, and do not distinctly deny that they prove that part of the case, he is not



privileged by a general statement that they are his own evidence: *Smith v. D. of Beaufort*, 1 Ha. 507; 1 Ph. 209; *Gresley v. Mousley*, 2 K. & J. 288; and he might lose his right to protect a deed relating solely to his own case, but put forward by himself, by making it by statement or by partial quotation part of his answer: *Hardman v. Ellames*, 2 M. & K. 732; *Adams v. Fisher*, 3 M. & C. 549; *Latimer v. Neate*, 4 Cl. & F. 570; 11 Bli. N.S. 149; *Hunt v. Elmes*, 27 Beav. 62; 5 Jur. N.S. 645; *secus*, if the Plt stated the deed and the Deft admitted and referred to it: *Howard v. Robinson*, 4 Drew. 522; see also *Glover v. Hall*, 2 Ph. 484.

And for a clear statement of the rule, see *Combe v. Corp. of London*, 1 Y. & C. C. 651.

A waiver of privilege as to some documents does not preclude the assertion of it as to others in respect of which it was originally claimed: *Lyell v. Kennedy*, 27 Ch. Div. 1.

A Plt in an action to establish commonable rights had to give discovery as to the nature of his title, but not as to the evidence of it: *Bidder v. Bridges*, 29 Ch. Div. 29; *Cayley v. Sandycroft*, 33 W. R. 577; and as to right of Plt to discovery in an action for recovery of land, see *Lyell v. Kennedy*, 8 App. Cas. 217; *Bleazby v. B.*, 10 L. R. Ir. 60.

And in order to obtain protection for documents of title, he need not assert that they contain nothing impeaching his own title: *A. G. v. Emerson*, *sup.*; *Morris v. Edwards*, 15 App. Cas. 309; and a party is not entitled to see documents which only prove his title, if at all, by destroying his adversary's: *Bolton v. Corp. of Liverpool*, 3 Sim. 467; 1 M. & K. 88; and see *Owen v. Wynn*, 9 Ch. Div. 33; *Jenkins v. Bushby*, 35 L. J. Ch. 400; nor is he entitled to see documents, because he may find evidence on which to turn the Deft out of possession: *Bolton v. Corporation of Liverpool*, 1 M. & K. 92; *Kettlewell v. Barstow*, 7 Ch. 686.

And that a document relating to the Plt's own title, though referred to in the pleadings, need not be produced until defence is put in, see *Webster v. Whewall*, 15 Ch. D. 120.

Notwithstanding the provision in sect. 2 of the Vendor and Purchaser Act, precluding purchaser of leasehold from calling for lessor's title, such a purchaser, in an action for specific performance, proving *aliunde* that the title is bad, and raising a definite objection, will, like an ordinary litigant, be entitled to production of relevant documents, but not if he merely denies the title or vaguely alleges the existence of restrictive covenants: *Jones v. Watts*, 43 Ch. Div. 574.

A c. q. t. (though only of proceeds of sale of land) is *prima facie* entitled to discovery and production of documents in possession of the trustees relating to the trust estate: *Re Cowin, C. v. Gravett*, 33 Ch. D. 179.

A Deft must produce evidence common to both parties, such as (the question being identity or boundaries of land) maps and deeds in his possession: *Earp v. Lloyd*, 3 K. & J. 549, and cases there cited; *Bolton v. Liverpool*, *sup.*; *Jenkins v. Bushby*, 35 L. J. Ch. 400; *Barry v. Scully, Jr.* Rep. 6 O. L. 449; especially in a suit by a lessor against his lessee: *Brown v. Wales*, 15 Eq. 142.

And the former rule, that a Deft in an ejectment action cannot be compelled to give discovery of documents in his possession, no longer holds good: *The New British, &c. Co. v. Peed*, 3 C. P. D. 196.

In suits between partners each must produce all documents relating to the partnership: *Adams v. Fisher*, 3 My. & C. 547; *secus*, where there was an agreement that the Plt should have no right to examine the books or accounts: *Turney v. Bayley*, 4 D. J. & S. 332; 33 L. J. Ch. 500; overruling *S. C.*, 34 Beav. 105.

As to production of title deeds by a mere stakeholder, holding them for whoever should turn out to be entitled to the land, see *Whittingham v. Cusack, Jr.* Rep. 7 Eq. 159.

Where title deeds relating to two estates were in custody of the solrs of the previous owner of both, the owner of one estate was only entitled to an order for deposit in Court with liberty to inspect: *Wright v. Robotham*, 33 Ch. D. 106.

An heir in tail, suing devisees, was entitled to discovery and inspection of any deeds creating estates in tail general only: *Shaftesbury v. Arrowsmith*, 4 Ves. 66; or to prove his pedigree: *Wright v. Vernon*, 1 Drew. 344; and

heir-at-law Plt may see such parts of any deed as relate to his pedigree, the rest being sealed up: *Rumbold v. Forteach*, 3 K. & J. 44, 748; and as to different rights of heir-at-law and heir in tail, *S. C.*, and *Quin v. Ratcliff*, 6 Jur. N.S. 1327; 9 W. R. 65; but an heir-at-law of a feme covert entitled in default of appointment could not see the deed creating the power: *Bennett v. Glossop*, 3 Ha. 578.

Assignee of co-heiresses suing to recover land was entitled to interrogate the Deft as to matters relevant to the pedigree and heirship of the co-heiresses, and as to alleged admissions by Deft that his possession of the land was as trustee for the ancestress: *Lyell v. Kennedy*, 8 App. Ca. 217.

In a suit against him by a copyhold tenant, the lord must produce documents, including the court rolls, without payment of fees: *Hoare v. Wilson*, 4 Eq. 1; although he denies Plt's title: *Warrick v. Q. Coll.*, 3 Eq. 683.

But a person claiming adversely to the manor and manorial rights as owner in fee is not entitled to production of the court rolls: *Owen v. Wynn*, 9 Ch. Div. 29; and as to inspection of court rolls, see O. xxxi. 19, *sup.* p. 70.

In a suit against a bankrupt's assignees, evidence given by the Plt in the Court of Bankruptcy was not to be produced until the hearing: *Gandee v. Stansfield*, 4 D. & J. 1.

For cross-examining the Plt on his affidavit, the Deft was entitled to production of an examination in Bankruptcy therein mentioned: *Bell v. Johnson*, 9 W. R. 549.

In a suit for discovery in aid of a defence to an action, Plt was entitled to see the nature of the claim at law, but not the evidence to be adduced in support of it: *Bellwood v. Wetherell*, 1 Y. & C. Ex. 211; and was entitled to an admission or denial of facts stated in the bill: *Garle v. Robinson*, 3 Jur. N.S. 633.

A valuation of a surveyor, made with a view to the defence, was privileged: *Llewellyn v. Badeley*, 1 Ha. 527.

#### RESISTANCE TO DISCOVERY—(3) PREMATURE DISCOVERY.

By O. xxxi. 20, "if the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."

Objections to answering any one or more interrogatories on the ground that "the matters inquired into are not sufficiently material at that stage" are now taken by the affidavit in answer: see r. 6.

Upon the principle that no discovery is necessary in respect of matters admitted, the Deft under the old practice could resist discovery by demurrer or plea, whereby the allegations in the Plt's bill were wholly or partially admitted.

The cases as to the grounds of resisting discovery by demurrer are collected, Seton, 4th edition, pp. 157, 158. The most important of these grounds, with reference to the new practice under O. xxv., was where the Plt's case, being for relief, failed to show on the face of it a title to the relief sought, in which case it was demurrable, and a demurrer to relief was a bar to discovery: see *Evan v. Portreeve, &c. of Avon*, 29 Beav. 152; 6 Jur. N.S. 1361; 9 W. R. 84; 30 L. J. Ch. 165.

This ground of objection will now be raised under O. xxv. 4, by application to strike out the statement of claim as disclosing "no reasonable cause of action or answer": *v. sup.* Chap. V., "PLEADINGS."

Discovery could also be resisted by demurrer on grounds peculiar to the demurring Deft, such as that he had no interest in, or was not a party to, the suit or action, and the evidence required from him could have been obtained by making him a witness: *Plummer v. May*, 1 Ves. 426; *Fenton v. Hughes*, 7 Ves. 290; *Irving v. Thompson*, 9 Sim. 17; *Kerr v. Rew*, 5 My. & C.

154. Thus a corporation might demur if the evidence required could be obtained from their officer: *Saunders v. S.*, 3 Drew. 387.

Officers and agents of corporate bodies were sometimes made parties for discovery: *Dummer v. Corp. of Chippenham*, 14 Ves. 246; but now that discovery can be obtained from any member or officer of such bodies under O. xxxi. 5, *sup.* p. 59, such persons can no longer be necessary parties; and to make solrs or others parties for payment of costs or discovery is objectionable and "vexatious" within the meaning of O. xxv. 4: *Burstall v. Beyfus*, 26 Ch. Div. 35; *Barnes v. Addy*, 9 Ch. 244; and see *Elder v. Carter*, 25 Q. B. Div. 194, 198.

Now that, by virtue of the Jud. Act, 1873, s. 24 (2), Courts of Equity and Common Law have concurrent jurisdiction, the defence of purchase for valuable consideration is no longer available as a bar to discovery in an action to recover land: *Ind v. Emmerson*, 12 App. Cas. 300.

The Court is reluctant, before the right to relief is established, to enforce discovery which may be injurious to the Deft, and will only be useful to the Plt if he succeeds in establishing his right to relief: *Fennessy v. Clark*, 37 Ch. Div. 186; *Heugh v. Garrett*, 44 L. J. Ch. 305; and see *Leitch v. Abbott*, 31 Ch. Div. 374; and *Parker v. Wells*, 18 Ch. Div. 477, and observations of Sir G. Jessel in that case.

Where a bill was filed to establish Plt's right to land, as heir-at-law of an intestate, and the Defts pleaded a denial of Plt's heirship, in bar of all the relief and all the discovery, except as to whether the Plt was lineally descended from the intestate's grandfather, the Court protected certain documents which the Defts objected to produce, on the ground that they did not relate to anything to be tried at the hearing, "but, as we are advised and say, consist exclusively of documents which the Plt will be entitled to the production of by way of consequential relief," if he should succeed: *Kettlewell v. Barstow*, 7 Ch. 686.

Where Deft denied an alleged trust, he was not obliged to go into matters of account, disclosure of which would not help the Plt to obtain a judgment or an immediate order for payment, but would involve a long examination of books: *Parker v. Wells*, 18 Ch. Div. 477.

Where Plt's right to a particular account was denied, but the Deft made admissions sufficient for all purposes up to and including the decree, the Deft was not bound to give any further details respecting the account: *Lockett v. L.*, 4 Ch. 340; *De la Rue v. Dickinson*, 3 K. & J. 388. And a Deft was not required to answer as to items of a settled account which Plt did not seek to set aside: *Wier v. Tucker*, 14 Eq. 25. Where the issue was agency, discovery of entries, which, unless the agency was established, were mere matters of private concern, was refused: *Re Leigh, Rowcliffe v. L.*, 6 Ch. Div. 256; *Vermine v. Edwards*, 29 W. R. 189.

A partner could not be made to set out partnership accounts in his answer: *Lockett v. L.*, 4 Ch. 336; and see *Wier v. Tucker*, 14 Eq. 25; *Lyon v. Tweddell*, 13 Ch. D. 375; nor a Plt to set out correspondence between him and a third person, an order to inspect which could be obtained: *Hoffmann v. Postill*, 4 Ch. 673.

But an exor was required to set out his accounts though he denied the Plt's right of suit as a creditor, but not to set them out in detail: *Thompson v. Dunn*, 5 Ch. 573; 18 W. R. 334, 854; *Cull v. Inglis*, 37 L. J. Ch. 385; 16 W. R. 477; but see *Kettlewell v. Barstow*, 7 Ch. 686.

An exor as a general rule is under an obligation to set out the accounts of his testator's estate, and will seldom be protected from discovery of his accounts: *Thompson v. Dunn*, 5 Ch. 573; 18 W. R. 334, 854; *St. George v. St. G.*, 19 L. R. Ir. 225; and this obligation has not been affected by the Jud. Act.; *Re Sutcliffe, Alison v. A.*, 44 L. T. N.S. 547; 29 W. R. 732; but an executor will be protected from discovery of his accounts in a suit by legatees when he admits assets: *Forbes v. Tanner*, 11 W. R. 414; 9 Jur. N.S. 455; and see *Pullen v. Smith*, 5 Ves. 20.

A Deft in a suit for waste was bound to answer as to the number and value, &c., of trees cut down, though he claimed the right to cut them down: *Nevery v. Kilmorey*, 19 W. R. 271.

In *Adams v. Fisher*, 3 My. & C. 526, where an exor sued the Deft as solr to the estate, and prayed an account, and the Deft by his answer denied that he was such solr, Lord Cottenham refused production of documents, admitted to be in his possession, relating to the estate: and see

*De la Rue v. Dickinson*, 3 K. & J. 388. But *Adams v. Fisher* has been much questioned: see *contra*, *Clegg v. Edmondson*, 22 Beav. 125; *S. C.* compromised, 3 Jur. N.S. 299, 1. J.J.; *Great Luxembourg Rail. Co. v. Magnay*, 23 Beav. 646, aff. L. J.J.; *Reade v. Woodroffe*, 24 Beav. 421; and Lord Lyndhurst's remarks on *Adams v. Fisher* in *Lancaster v. Evors*, 1 Ph. 349; and Lord Selborne's in *Elnor v. Creasy*, 9 Ch. 71; *Hawkins v. Carr*, L. R. 1 Q. B. 89; *Robson v. Flight*, 33 Beav. 268; *Hills v. Wates*, L. R. 9 C. P. 688.

And in an action for infringement of trade mark, after an order for trial of questions of fact, discovery as to sales by Deft was not granted until the Plt made his election whether to claim damages or an account of profits: *Fennessy v. Clark*, 37 Ch. Div. 184; and see *Murriott v. Chamberlain*, 17 Q. B. Div. 154, 162; *Pape v. Lister*, L. R. 6 Q. B. 242; *Benbow v. Low*, 16 Ch. Div. 93, 96, 99. Discovery to show the amount of damage was not given until the question of liability had been decided, the two questions being severable: *Elkin v. Clark*, 21 W. R. 447.

As to whether a Deft will be allowed discovery for the purpose of paying a proper sum into Court in discharge of alleged liability, see *Frost v. Brook*, 23 W. R. 260; *Clarke v. Bennett*, 32 W. R. 530.

A liquidator, Plt in an action, will not be permitted to evade an order postponing discovery by availing himself of the process of examination given by the Companies Act, 1862, s. 115: *Re North Australian Territory Co.*, 45 Ch. Div. 87.

#### PRIVILEGE—(1) COMMUNICATIONS WITH SOLICITOR OR COUNSEL.

A general protection from discovery is accorded to communications between client and solr or counsel.

The object of this privilege is to enable litigants to communicate freely and safely with their legal advisers: *Nias v. N. & E. Ry.*, 3 My. & C. 357; *Lawrence v. Campbell*, 4 Drew. 489; *Greenough v. Gaskell*, 1 My. & K. 103; *Reece v. Trye*, 9 Beav. 319; and it ought not to be extended further than is necessary for that object: *Glyn v. Caulfield*, 3 Mac. & G. 463; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

It is, therefore, confined to communications between the client and his legal adviser, with the view of the client obtaining legal advice as regards the conduct of litigation or the right to property: *Wheeler v. Le Marchant*, 17 Ch. Div. 675; but see *Lowden v. Blakey*, 23 Q. B. D. 332, 334; and does not (except in the distinct and modified form noticed *inf.* p. 82) extend to facts communicated to the solr by a third party, nor to knowledge acquired by the solr from a third person as well as the client; and it must be clearly stated that the knowledge was obtained by the solr in his character of solr, and from the client: *Spenceley v. Schulenburg*, 7 East, 357; *Desborough v. Rawlins*, 3 M. & C. 515; *Sawyer v. Birchmore*, 3 M. & K. 572; *Thomas v. Rawlings*, 27 Beav. 140; *Lewis v. Pennington*, 6 Jur. N.S. 478; *Ford v. Tenant*, 32 Beav. 162; *Marsh v. Keith*, 1 Dr. & S. 342; *Exp. Campbell*, 5 Ch. 703; *Page v. Ward*, 17 W. R. 435; *Re Land Credit Society of Ireland*, 15 W. R. 703; but "all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that the legal advice may be obtained safely and sufficiently": *Jessel, M. R.*, 17 Ch. Div. 682. Thus, the privilege extends to communications between solr and his town agent, and the client and the town agent: *Hughes v. Bidulph*, 4 Russ. 190; and to correspondence passing through a third person acting as the medium of communication between the client or solr: *Wheeler v. Le Marchant, sup.*; *Bunbury v. B.*, 2 Beav. 173; *Reid v. Langlois*, 1 M. & G. 638; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Steele v. Stewart*, 1 Ph. 471; *Carpmael v. Powis*, *ibid.* 687; *Hooper v. Gumm*, 10 W. R. 644; and between the solr and his witnesses: *Curling v. Perring*, 2 M. & K. 380; *Holmes v. Baddeley*, 1 Ph. 476; to communications between a Scotchman in Scotland and Scotch solrs in London, who acted as his legal advisers: *Laurence v. Campbell*, 4 Drew. 485; 7 W. R. 336; to those between a co.'s officers, agents, engineers, &c., and the solrs of the co.: *Wilson v. Northampton, &c. Ry.*, 14 Eq. 477; and with persons doing the work of the solr, so as to stand in his position: *Lyell v. Kennedy*, 27 Ch. D. 26; *ex. gr.*, to the reports of an accountant employed by the solr: *Walsham v. Stainton*, 2 H. & M. 1.

The privilege may be claimed by the town clerk and solr of a municipal

corporation, interrogated by the opposite party: *Corporation of Salford v. Lever*, 24 Q. B. D. 695; unless the corporation have themselves elected to answer by him: *Mayor of Swansea v. Quirk*, 5 C. P. D. 106; but it does not extend to a person who is not a legal adviser, nor acting for him; *ex. gr.*, the "poursuivant" of a herald's college, employed in the conduct and support of a pedigree sought to be enrolled in the college: *Slade v. Tucker*, 14 Ch. D. 824; or a patent agent, or a solr acting in that capacity: *Moseley v. Victoria Co.*, 55 L. T. N.S. 482.

The privilege is that of the client, not of the legal adviser, who is bound to claim it on the client's behalf: *Anderson v. Bank of British Columbia*, 2 Ch. D. 649; *Procter v. Smiles*, 55 L. T. N.S. 527; but is equally extensive whether asserted by the solr or the client: *semble*, *Thompson v. Fulk*, 1 Drew. 26.

But as the privilege depends entirely on the employment of a solr, it cannot be claimed by a person conducting his own case: *Kyshe v. Holt*, W. N. (88) 128; and see *Lyell v. Kennedy*, 27 Ch. Div. 25.

A party cannot be required to answer as to his information and belief derived exclusively from privileged communications: *Lyell v. Kennedy*, 9 App. Ca. 81.

The advice or communication in order to be privileged must have been given by the legal adviser professionally and confidentially: see *Wheeler v. Le Marchant*, 17 Ch. D. 682; *Bursill v. Tanner*, 16 Q. B. Div. 5; *Gardner v. Irvin*, 4 Ex. Div. 53; *Kennedy v. Lyell*, 23 Ch. D. 405, 406; *Foakes v. Webb*, 28 Ch. D. 287; *Reg. v. Cox*, 14 Q. B. D. 153 (C. C. R.); and not as a friend: *Smith v. Daniell*, 18 Eq. 649; though after the dispute arose: *Greenlaw v. King*, 1 Beav. 137; but the solrs having, without the client's knowledge, ceased to practise, makes no difference: *Devaynes v. Robinson*, 20 Beav. 142; *Calley v. Richards*, 19 Beav. 401.

A solr had to answer to whom, when and why, he parted with documents of his client formerly in his possession: *Banner v. Jackson*, 1 D. & S. 472; and could not claim privilege so as to refuse discovery of the residence of a ward of Court: *Ramsbotham v. Senior*, 8 Eq. 575.

A solr employed to obtain the execution of a deed, and who was one of the witnesses, was not precluded from giving evidence as to what passed at the time of execution: *Crawcour v. Salter*, 18 Ch. Div. 30.

And in general a solr must state the names of the clients on whose behalf he claims privilege: *Bursill v. Tanner*, 16 Q. B. Div. 1; and must disclose facts as to which he himself, if called as a witness, would be obliged to answer; *e.g.*, in an action for specific performance of an agreement, whether interviews and correspondence had not taken place between the solrs of the parties, and between the Deft's solr and a third person in reference to the agreement: *Foakes v. Webb*, 28 Ch. D. 287.

The privilege does not extend to protect communications between solr and client for effecting a fraud impeached in the action: *Mornington v. M.*, 2 J. & H. 703; *Feaver v. Williams*, 11 Jur. N.S. 902; *Phillips v. Holmer*, 15 W. R. 578; *Re Postlethwaite, P. v. Rickman*, 35 Ch. D. 725; *Russell v. Jackson*, 9 Ha. 392; *Follett v. Jeffries*, 1 Sim. N.S. 3; and where a sale by trustees to one of themselves was impeached as fraudulent, communications between one of them and his co-trustee acting as his solr were not privileged: *Re Postlethwaite, P. v. Rickman*, 35 Ch. D. 725; and communications made to a solr by a client for the purpose of being guided in the commission of a crime were not privileged, although the solr was ignorant of the purpose for which his advice was sought: *Reg. v. Cox*, 14 Q. B. D. 153 (C. C. R.); but see *Charlton v. Coombes*, 4 Giff. 372; and as to documents shown to contain legal advice or opinions, *Sankey v. Alexander*, Ir. Rep. 8 Eq. 241. And that a client's address, communicated to his solr when applying for advice, is privileged, unless solr and client were jointly engaged in commission of some wrongful act, see *Re Arnott*, 60 L. T. N.S. 109; 37 W. R. 223.

The privilege continues, although the solr, &c., afterwards becomes interested in the matter in dispute: *Chant v. Brown*, 7 Ha. 79; where in a dispute between c. q. ts., one employed the trustee as his solr, communications between them were not privileged from the other c. q. t.: *Tugwell v. Hooper*, 10 Beav. 348; and as to the right of a c. q. t. in respect of documents relating to the trust, *v. sup.* p. 75. The privilege exists, though the solr claiming it be charged with fraud in conducting the client's business: *Greenough v. Gaskell*, 1 M. & K. 98; but see also *Gartside v. Outram*, 3

Jur. N.S. 40; 5 W. R. 35; the privilege can in general be claimed by the represes of the client and the solr: *Minet v. Morgan*, 8 Ch. 361; 21 W. R. 467; *Gresley v. Mounsey*, 2 K. & J. 288; but the privilege that belonged to a testator cannot be claimed by his exors against the beneficiaries under his will: *Russell v. Jackson*, 9 Ha. 387; nor can it be claimed by a solr in an action against him by the client: *Gresley v. Mounsey*, 2 K. & J. 288; *Wynne v. Humberstone*, 27 Beav. 421; 32 L. T. N.S. 306.

The privilege does not extend to letters, &c., written by Deft's solr to a third party (the Deft's agent) before the dispute arose, or could have arisen: *Original, &c. Co. v. Moon*, 30 L. T. N.S. 193, 585; but does generally extend to communications made before the suit began, and even before it was contemplated: *Minet v. Morgan*, 21 W. R. 467; 8 Ch. 361; and the cases discussed in the judgment of Lord Selborne: *Turton v. Barber*, 17 Eq. 329; *Wilson v. Northampton, &c. Railway*, 14 Eq. 477; *Macfarlan v. Rolt*, 14 Eq. 580; *Mostyn v. West Mostyn Co.*, 34 L. T. N.S. 531; and see *O'Shea v. Wood* (C. A.), April 16, 1891; reversing *S. C.*, (1891) P. 237.

So that documents (e.g., a case for counsel's opinion) are sufficiently protected by the words "relating to the matters stated in the bill": *Nias v. N. & E. Railway*, 3 My. & C. 355; or "with reference to questions connected with the matters in dispute in this cause": *Minet v. Morgan*, *sup.*; but in *Paddon v. Winch*, 9 Eq. 666, letters were not protected because not "in anticipation of the claim raised by the suit;" and communications between co-Defts as to their defence were not protected: *Goodall v. Little*, 1 Sim. N.S. 155; *Betts v. Menzies*, 2 J. & H. 602; 26 L. J. Ch. 528; 5 W. R. 767; *Glyn v. Caulfield*, 3 Mac. & G. 463; *scus*, where one, a solr, acted as agent for the solr on the record: *Hamilton v. Vett*, 16 Eq. 112; and see *Blenkinsopp v. B.*, 2 Ph. 607; *Carr v. New Quebrado Co.*, W. N. (73) 208. As to client and solr being both Defts, see *Gaskell v. Chambers*, 26 Beav. 303.

Copies of documents, though procured by the solr for the purposes of the action, are not privileged, if the originals were not: *Chadwick v. Bowman*, 16 Q. B. D. 561.

A collection of documents *publici juris* (e.g., entries in public records and registers, and of photographs of tombstones and houses), may be privileged if made for the purposes of the action, and the result of the professional skill of legal advisers: *Lyell v. Kennedy*, 27 Ch. Div. 1.

Documents prepared by Plt's solr, and which came into existence for the purpose of private and confidential communications in an action, were held privileged in a different action by the same Plt against a different Deft in reference to the same subject-matter: *Pearce v. Foster*, 15 Q. B. Div. 114; *q.v.*, as to the rule being "once privileged always privileged;" and *querre*, whether such rule ought not to be limited by the consideration that the privilege is at an end when the purposes of the confidence on which it is grounded are exhausted: and see *Bray*, 409.

#### PRIVILEGE—(2) CASES AND OPINIONS OF COUNSEL.

Cases and opinions of counsel as to the matters in question are privileged in the same way as communications between solr and client, whether stated and obtained in contemplation of, or since the commencement of, the action, or not: *Wilson v. Nthmptn. &c. Ry.*, 14 Eq. 477; *Minet v. Morgan*, 8 Ch. 361; 21 W. R. 467, and cases there; *Bolton v. Corp. of Liverpool*, 1 M. & K. 88, is overruled on this point; and see *Manner v. Dix*, 1 K. & J. 451; 3 W. R. 313; 1 Jur. N.S. 466.

Opinions of counsel and the friendly opinion of an ex-chancellor, privilege for which was claimed as taken "in anticipation of and relation to the litigation," but not as confidential communications, had to be produced: *Smith v. Daniell*, 18 Eq. 649; and see *Anderson v. Bk. of Brit. Columbia*, 2 Ch. D. 644.

The privilege has been extended to cases and opinions prepared and obtained with reference to prior suits between the same parties, and to suits between the Deft and other parties than the Plt, on the same matter: *Combe v. Corp. of London*, 1 Y. & C. C. 631; *Thompson v. Falk*, 1 Drew. 21. *A fortiori*, when the question in dispute is the same in the former as in the existing action: *Bullock v. Corrie*, 3 Q. B. D. 356; and see *Pearce v. Foster*,

15 Q. B. Div. 114; *Holmes v. Baddeley*, 1 Ph. 476. So also where the litigation had taken a different form from that contemplated: *Lafone v. Falkland Isl. Co.*, 27 L. J. Ch. 25. And a copy of a case and opinion, lent to a Deft by a person who was litigating the same point with the Plt, was protected: *Enthoven v. Cobb*, 2 D. M. & G. 632.

The privilege is not necessarily lost by giving a copy of, or extract from, the opinion to the solr on the other side: *Carey v. Cuthbert*, Ir. Rep. 6 Eq. 599.

Cases, &c., in which Plt and Deft have a joint interest must be produced; *ex. gr.*, an opinion which had been taken by the predecessor in title of them both: *A. G. v. Berkeley*, 2 J. & W. 291; and see *Reynell v. Sprye*, 10 Beav. 51. Privilege cannot in general be claimed as against c. q. ts. of the client, who are entitled to the production of documents held by their trustees in that character: *Re Cowin, C. v. Gravett*, 33 Ch. D. 179; *Lewin*, 975; *ex. gr.*, cases and opinions submitted and taken by the trustees for their guidance as such, for the c. q. ts. will have to pay the expense of them: *Wynne v. Humberston*, 27 Beav. 421; *Talbot v. Marshfield*, 2 Dr. & Sm. 649; *Re Postlethwaite, P. v. Rickman*, 35 Ch. D. 722. Cases and opinions so taken must be produced in a hostile action against the trustees by the c. q. ts.: *Devaynes v. Robinson*, 20 Beav. 42; except those taken in contemplation of the action: *Brown v. Oakshott*, 12 Beav. 252; *Bacon v. B.*, 34 L. T. N.S. 349; and as to exors and legatees, see *Russell v. Jackson*, 9 Ha. 387; *Bowen v. Pearson*, 9 Jur. N.S. 789. But cases and opinions taken for the purposes of the trustees' defence in litigation against them by their c. q. ts. are protected: *Talbot v. Marshfield*, *sup.*; *Wynne v. Humberstone*, *sup.*; *Thomas v. Sec. of St. for India*, 18 W. R. 312; but evidence to show that opinions were taken for the trust, and had been printed and published, was not admitted: *Underwood v. Same*, 35 L. J. Ch. 545. Exors who had used part of the estate in their business had to produce the books: *Vyse v. Foster*, 13 Eq. 602. But a mere claimant to the trust estate cannot call for them: *Wynne v. Humberstone*, 27 Beav. 421; 32 L. T. 306; *Newland v. Steer*, 11 Jur. N.S. 596; but see *Cull v. Inglis*, 16 W. R. 477; and *Re Pine, M. R. in Cham.*, 18th Nov. 1863, Dan. 1022, 1843, where an order was made on a claimant coming in under a decree to produce documents, and see *Groves v. G.*, Kay, xix.

Letters between trustees, and between trustees and their solrs relating to the trust before action brought, were not privileged against the beneficiaries: *Re Mason, M. v. Cattley*, 22 Ch. D. 609; and the solr of trustees of a settlement could not refuse, on the ground of professional privilege, to produce the settlement to a judgment creditor of a c. q. t.: *Bursill v. Tanner*, 16 Q. B. Div. 1; and a trustee cannot claim privilege for communications with his co-trustees employed as his solr: *Re Postlethwaite, P. v. Rickman*, 35 Ch. D. 722; and see *Tugwell v. Hooper*, 10 Beav. 348.

On similar principles, shareholders, in an action against the co., were entitled to discovery of professional communications between the co. and its legal advisers paid for out of the co.'s funds: *Gouraud v. Edison Co.*, 57 L. J. Ch. 498; W. N. (88) 94; and as to the right of a ratepayer to see cases and opinions taken by the corporation, see *Corp. of Bristol v. Cox*, 26 Ch. D. 683.

Trustees are entitled to discovery as to any dealings with the trust property, so as to know who are their c. q. ts.: *Hurst v. H.*, 9 Ch. 762. And letters from a joint solr of two persons (*e.g.*, husband and wife) must be produced in a subsequent suit between them: *Warde v. W.*, 3 Mac. & G. 365; see also *Ford v. De Pontes*, 7 W. R. 299; 5 Jur. N.S. 993; *Tugwell v. Hooper*, 10 Beav. 348, *et sup.*; *Gresley v. Mousley*, 2 K. & J. 288, *sup.* p. 80. A case for and opinion of a Dutch counsel were privileged: *Bunbury v. B.*, 2 Beav. 177.

Indorsements on counsel's brief in the Probate Court, but not his instructions, were ordered to be produced, and shorthand notes of the proceedings: *Nicholl v. Jones*, 2 H. & M. 595; *Walsham v. Stainton*, *Id.* 1; and that shorthand notes of proceedings, though taken in anticipation of other proceedings, are not privileged: see *Rawstone v. Corp. of Preston*, 30 Ch. D. 110; *Re Worswick, Robson v. Worswick*, 38 Ch. D. 370; distinguishing *Nordon v. Defries*, 8 Q. B. D. 508, *contra*.

A draft settled by counsel of an advertisement of the result of successful

proceedings in a trade mark action is privileged: *Lowden v. Blakey*, 23 Q. B. D. 332.

### PRIVILEGE—(3) COMMUNICATIONS WITH AGENTS, &c.

Information obtained through an agent employed by the solr is protected, if confidential, and made in anticipation of, or with a view to, proceedings in the litigation: *Reid v. Langlois*, 1 Mac. & G. 627; *Greenough v. Gaskell*, 1 My. & K. 98; *Bustros v. White*, 1 Q. B. Div. 423; but it must have reference to impending or actual litigation: *Wheeler v. Le Marchant*, 17 Ch. Div. 675; *Chart. B. of Ind. v. Rich*, 4 B. & S. 73; *M'Corquodale v. Bell*, 1 C. P. D. 471; and see *Steele v. Stewart*, 1 Ph. 471; and the extension of the privilege to any communications with a mere agent, made with a view to litigation (see *Ross v. Gibbs*, 8 Eq. 522), has been distinctly disapproved: *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

The privilege extends to all information sent at the instance of the solr by an agent employed by him, or by the client on the recommendation of the solr: *Bustros v. White*, 1 Q. B. Div. 423, 427; and if a document comes into existence for the purpose of being communicated to the legal advisor with the object of obtaining his advice, or of enabling him to prosecute or defend an action, it is privileged, as being something done for the purpose of serving as a communication between adviser and client: *Southwark, &c. Co. v. Quick*, 3 Q. B. Div. 315, 322, where information obtained by the client *suo motu*, for the purpose of being submitted to his solr with a view to future litigation, was protected. And see, as to protection of that "which comes into existence merely as the materials of the brief," *Anderson v. Bk. of British Columbia*, 2 Ch. Div. 644, 656.

A medical report to an insurance co., on which the insurance was founded, had to be produced in an action for the money assured: *Mahoney v. Widows' L. A. Fund*, L. R. 6 C. P. 252. A letter written to the English manager of the Defts by their manager abroad containing information as to threatened litigation, and intended for laying before their solrs, but not made as a "confidential communication," was not privileged: *Anderson v. Bank of British Columbia*, 2 Ch. D. 654; 24 W. R. 724; and see *English v. Tottie*, 1 Q. B. D. 141. And production was ordered of letters between the Deft's solrs and their surveyor, and between the surveyor and the solrs, except such, if any, as the Defts should state by affidavit to have been prepared confidentially after the dispute had arisen, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties: *Wheeler v. Le Marchant*, 17 Ch. Div. 675.

In *Lafone v. Falkland Isl. Co.*, 4 K. & J. 34; 6 W. R. 4; 27 L. J. Ch. 25, the privilege was extended to a mere agent collecting evidence; and as to letters between Plt himself (who was not then employing a solr) and third persons, see *Storey v. Lennox*, 1 My. & C. 525; and see *Richards v. Gellatly*, L. R. 7 C. P. 127; *Parr v. L. C. & D. Ry.*, 24 L. T. N.S. 558; *M'Corquodale v. Bell*, 1 C. P. D. 471; *English v. Tottie*, 1 Q. B. D. 141.

Correspondence between vendor and purchaser, referring to an expected claim by B., was to be produced in a suit by B. against the purchaser: *Paddon v. Winch*, 9 Eq. 666. An examination in bankruptcy taken in contemplation of the suit was privileged: *Fenton v. Queens, &c. Co.*, 38 L. J. Ch. 263.

The rules in law and equity were not it seems uniform: see *Wolley v. N. L. Ry.*, L. R. 4 C. P. 602; *Chartered Bank v. Rich*, 4 B. & S. 73; but any such difference has been now abolished, and the rules of equity prevail: *Anderson v. Bank of British Columbia*, *sup.*

As to communications being privileged as confidential between master and servant or workman, &c., and restraining disclosure, see Chap. XXXI., "INJUNCTIONS"; Kerr, Inj., Chap. 11; and that fraud of the employer supersedes the private obligation of secrecy, *Gartside v. Outram*, 5 W. R. 35; 3 Jur. N.S. 39; and as to private letters, *Hopkinson v. L. Burghley*, 1 Ch. 447; *Howard v. Gunn*, 32 Beav. 462; and see Form 22, *sup.* p. 52; *Allen v. Royden*, 42 L. J. C. P. 206; *Crouther v. Appleby*, L. R. 9 C. P. 23. Notes prepared by the manager of a co. for an arbitration which never took place, were privileged in a suit against a co.: *Carr v. New Quebrada Co.*, W. N. (73) 208.



Arbitrators, whose fees have not been paid, are privileged from disclosing anything tending to show the contents of the award: *Ponsford v. Swaine*, 1 J. & H. 433. *Secus*, where fraud and collusion were alleged and denied in general terms by the arbitrator: *Padley v. Lincoln Water Co.*, 2 M. & G. 68.

Husband and wife are privileged from answering as to access before marriage, although the question is as to the parentage of a child born three months after their marriage: *Anon.*, 22 Beav. 481; 23 Beav. 273.

As to making a party produce his private memoranda, see *Mattock v. Heath*, W. N. (75) 201.

The right to discovery may be lost by contract: *Turney v. Bayley*, 4 D. J. & S. 332; 33 L. J. Ch. 499; overruling *S. C.*, 34 Beav. 105.

As to discovery and production in patent cases, *v. inf.*, Chap. LII., "PATENTS."

A communication made to the wrong person by a *bonâ fide* mistake was held privileged: *Tompson v. Dashwood*, 11 Q. B. D. 43.

#### PRIVILEGE—(4) PUBLIC POLICY.

On grounds of public policy, documents relating to affairs of state and the public service have been held privileged from discovery. Thus, in a cause of damage for a collision by a vessel belonging to the R. N., though production of the log-book was ordered, reports to the Admiralty were held privileged: *The Bellerophon*, 44 L. J. (Adm.) 5; 23 W. R. 248; and see *Wright v. Mills*, 62 L. T. N.S. 558; *Hennessy v. Wright*, *inf.*, and cases there considered; and *Fitzgibbon v. Greer*, Ir. Rep. 9 C. L. 294; and *Wadeer v. E. I. Co.*, 8 D. M. & G. 186; 2 Jur. N.S. 407, where exemption was claimed by the E. I. Co., and allowed, for documents of a political character.

And that the claim for privilege should be supported by the oath of the person at the head of the particular department of the public service with which the communication has taken place, see *Beatson v. Skene*, 5 H. & N. 583; *Hennessy v. Wright*, 57 L. J. Q. B. 530; *Kain v. Farrer*, 37 L. T. N.S. 469.

#### PRIVILEGE—(5) CRIMINATING QUESTIONS.

Discovery need not be given if it would form evidence or links in a chain of evidence of facts that would expose the Deft—

(a) To criminal proceedings: *Thorpe v. Macaulay*, 5 Mad. 218; *Macaulay v. Shackell*, 1 Bli. N.S. 96; *Parkhurst v. Lowten*, 2 Swa. 202; *Claridge v. Hoare*, 14 Ves. 59. It is for the Court to decide if the answer would form a link in criminatory evidence: *Sidebottom v. Adkins*, 3 Jur. N.S. 631; 15 W. R. 743. Public or private trustees cannot refuse to answer as to corrupt execution of the trust: *Dummer v. Corp. of Chippenham*, 14 Ves. 245; and see *A. G. v. Brown*, 1 Swa. 265; *M'Loughlin v. Dwyer*, Ir. Rep. 9 C. P. 170. A wife may decline to answer on the ground that her answers might subject her husband to a charge of felony: *Cartwright v. Green*, 8 Ves. 405. A corporation cannot decline answering as to matters which could not form the subject of an indictment, or only of a prosecution in Sicily: *K. of Two Sicilies v. Willcox*, 1 Sim. N.S. 301, 334. And that a party cannot refuse to answer or to produce documents after having disclosed enough for a conviction, see *S. C.*, and *Ewing v. Osbaldiston*, 6 Sim. 608. The privilege cannot be claimed after a pardon under the great seal for the supposed crime: *R. v. Boyes*, 7 Jur. N.S. 1158; 1 B. & S. 311.

A witness will not be excused from answering upon a mere statement of his belief that his answer may tend to criminate him. The Court must be satisfied that there is reasonable ground for him to apprehend danger, but where this is apparent, great latitude must be allowed: *Re Reynolds*, 20 Ch. Div. 294; and see *Exp. Gilbert*, *In re Genese*, W. N. (86) 134; *Adams v. Lloyd*, 3 H. & N. 351; 4 Jur. N.S. 590; 6 W. R. 752; *M'Fadden v. Mayor of Liverpool*, L. R. 3 Ex. 279; *Bradley v. Clayton*, 26 L. R. Ir. 405.

The party claiming protection for a document on this ground must pledge

his oath that, to the best of his belief, its production would tend to criminate him: *Webb v. East*, 5 Ex. Div. 108; but in an action of libel Defts were not bound to swear that a letter on which the action was founded would subject them to a criminal prosecution in order to avoid production, because the letter, if material at all to Plt's case, must have contained criminating matter: *Hill v. Campbell*, L. R. 10 C. P. 222; see *Greenfield v. Reay*, L. R. 10 Q. B. 217; and see *Taylor*, Ev. p. 1524; and in answer to interrogatories in an action for libel, it was sufficient for the Deft, who denied publication, to object upon the ground that his answer might tend to criminate him, without saying that he believed it would do so: *Lamb v. Munster*, 10 Q. B. D. 110.

A party examined under 15 & 16 V. c. 80, s. 31 (for which O. l.v. 16 is now substituted) could refuse to answer questions likely to prejudice him in a pending action: *Venables v. Schweitzer*, 16 Eq. 76.

(b) To ecclesiastical censures; as for an incestuous marriage: *Brounsuord v. Edwards*, 2 Ves. 243; fornication: *Finch v. F.*, *Ib.* 491; or simony: *Parkhurst v. Louten*, 2 Swa. 214, 5. As to questions tending to degrade the witness, see *Taylor*, p. 1249; Best, 129, 599.

(c) To penalties in actions by common informers: *Martin v. Treacher*, 16 Q. B. Div. 507; under the Metropolis Man. Act, 1855, s. 54: *Hunnings v. Williamson*, 10 Q. B. D. 459; in action for treble damages under 2 Will. & M., sess. 1, c. 5, s. 4, for pound-breach and rescue of chattels distrained for non-payment of tithe rent-charge: *Jones v. J.*, 22 Q. B. D. 425; in action, under 11 Geo. 2, c. 19, for double the value of goods fraudulently removed by a tenant: *Hobbs v. Hudson*, 25 Q. B. Div. 232; *secus*, where the penalty is imposed merely by way of compensation, as under the Copyright Act (3 & 4 Will. 4, c. 15, s. 2): *Adams v. Batley*; *Cole v. Francis*, 18 Q. B. Div. 625; and the rule does not apply to questions tending to expose the party to penalties under 13 Eliz. c. 5: *May*, Vol. Conv. 540, 541; *Bunn v. B.*, 4 D. J. & S. 316; but did, under the late Stock Jobbing Act, 7 Geo. 2, c. 8, repealed by 23 & 24 V. c. 28: *Short v. Mercier*, 3 M. & G. 205; *S. C.*, 2 D. & S. 635 (but this Act did not apply to railway shares: *Williams v. Trye*, 18 Beav. 366); and under a private Act, for acting as a broker without licence: *Robinson v. Kitchen*, 8 D. M. & G. 88; *Green v. Weaver*, 1 Sim. 404. As to penalties under the Solr's Act, 6 & 7 V. c. 73, see *Scott v. Miller*, Joh. 220, 328; and see *Aston's Case*, 5 Jur. N.S. 615, 779; 4 D. & J. 320; and penalties under the Foreign Enlistment Act: *The Mary*, L. R. 2 A. & E. 319.

The witness must state his belief that the penalty would be incurred: *Scott v. Miller*, *sup.*

(d) To forfeiture of estate; as for simony: *Parkhurst v. Louten*, 2 Swa. 194; 1 Mer. 391; 3 Mad. 121; or for infringing the Pluralities Act: *Boteler v. Allington*, 3 Atk. 457; or for assigning a lease without licence; or for breaches of covenants in leases: *Ld. Uxbridge v. Staveland*, 1 Vez. 56; *May v. Hawkins*, 3 W. R. 550; 1 Jur. N.S. 600, Exch.; or by a marriage without consent: *Chancey v. Fenhoulet*, 2 Vez. 265; 2 Atk. 392; or for waste: *Ib.*; *Boteler v. Allington*, 3 Atk. 453; or (of marital rights) by a false oath of the consent of the bride's father: *A. G. v. Lucas*, 2 Ha. 566; or of estate by being an alien: *Finch v. F.*, 2 Vez. 491; and as to forfeiture of an estate by an attempt to alienate, see *Hambrook v. Smith*, 16 Jur. 144; and see *Hurst v. H.*, 9 Ch. 762; or by having acted as agent for the Confederate States of America: *U. S. v. Macrae*, 3 Ch. 79. But if the penalty would go to the Plt, and he waive it (*L. Uxbridge v. Staveland*, *sup.*), or if the time within which the penalty must be sued for has elapsed (*Corp. Trin. Ho. v. Burge*, 2 Sim. 411), discovery must be given.

Exposure to a civil suit alone is no bar to discovery: 46 Geo. 3, c. 37.

Leave to administer interrogatories ought not to be refused on the ground that it is plain they must criminate; the objection must be taken in the answer: *Harvey v. Lovekin*, 10 P. Div. 122; *Alhusen v. Labouchere*, 3 Q. B. D. 654; *Fisher v. Owen*, 8 Ch. Div. 645.

And where the objection is to producing a document, it should be taken in the affidavit of documents: *Webb v. East*, 5 Ex. Div. 108.

## PROCESS IN DEFAULT OF DISCOVERY.

By O. xxxi. 21, "if any party fails to comply with any order to answer interrogatories, or for discovery or for inspection of documents, he shall be liable to attachment. He shall also, if a Plt, be liable to have his action dismissed for want of prosecution, and, if a Deft, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly."

For form of order dismissing action for want of prosecution, see *inf.*, Chap. XI.

By r. 22, "service of an order for interrogatories or discovery or inspection made against any party on his solr, shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order."

A solr, upon whom an order for interrogatories or discovery or inspection is served, is liable to attachment if he neglect, without reasonable excuse, to give notice thereof to his client: r. 23.

By O. XLIV. 2, no writ of attachment is to be issued without leave of the Court, to be applied for on notice to the party against whom the attachment is to be issued.

It has been held that the provisions for attachment do not apply to orders for discovery of names of partners under O. XVI. 14, *sup.* p. 57; nor to orders for accounts, under O. XV. 1: *Pike v. Keene*, 24 W. R. 322.

Though service on the solr is sufficient, yet O. XLI. 5, requiring indorsement on the copy served showing consequences of disobedience, applies, and attachment could not issue in the absence of such indorsement: *Hampden v. Wallis*, 26 Ch. Div. 746.

Where the order for attachment was discharged on an insufficient affidavit, the order of discharge was discharged, so as to revive the original order, but attachment was not to issue for a fortnight: *Price v. P.*, 48 L. J. Ch. 215.

Where Plt was shown at Deft's office a letter book, inspection of which was refused till counsel's opinion had been taken, and Deft subsequently asserted he had lost the book, an attachment was ordered: *Mornington v. Keene*, 4 W. R. 793.

Where the order is complied with after the issue of the writ of attachment, the enforcement of the writ ought to be stayed: *Gay v. Hancock*, 56 L. T. N.S. 726.

For cases in which the penalty by attachment has been enforced, see *Thomas v. Palin*, 21 Ch. D. 360; *Litchfield v. Jones*, 25 Ch. D. 64; *Joy v. Hadley*, 22 Ch. D. 571; *Mellor v. Thompson*, W. N. (83) 128.

Where the defence is struck out, the Deft is in default, and O. xxvii. applies: *Fisher v. Hughes*, 25 W. R. 528.

The penalty of dismissal will not be enforced, except as a last resort: see W. N. (75) 202, 204; *Hartley v. Owen*, 34 L. T. N.S. 752; *Twycross v. Grant*, W. N. (75) 201, 229; *Kennedy v. Lyell*, W. N. (82) 137; *Dauvillier v. Myers*, W. N. (83) 58.

For the enforcement of the penalty against a Deft whose disobedience was wilful, see *Haigh v. H.*, 31 Ch. D. 478.

An order, made in presence of Deft's solr, that if Deft did not file answers to interrogatories within three days judgment might be signed against him, need not be served upon him: *Farden v. Richter*, 23 Q. B. D. 124; and see O. LII. 14.

As to waiver of contempt by acceptance of answer after time, see *Roberts v. Albert Bridge Co.*, 8 Ch. 753; and for the practice on attachment for default in answering in the Lancaster Court of C. P., see *Coston v. Blackburn*, L. R. 8 Q. B. 54.

## USING DISCOVERY AT THE TRIAL.

By O. xxxi. 24, "any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers, or any part of an answer of the opposite party to interrogatories without putting in the others, or the whole

of such answer: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

As to the effect of this rule, see *Lee v. Kennedy*, 27 Ch. Div. 1, 15, 29.

Portions of the answer to a bill for discovery could not be read upon the trial at law without reading the whole, and documents admitted in the answer were part of it and could not be read without reading the whole answer, unless by special order of the Court of Chancery that they should be produced at the trial: *Brown v. Jackson*, 1 M. & C. 243; *Aston v. L. Exeter*, 6 Ves. 288; *Hart v. Mace*, 12, 243. As to reading parts of an answer and withdrawing parts already read, see *Freeman v. Latham*, 5 Ha. 329; and see O. XXXVII. 21—25.

As to reading a dismissed co-Def't's answer on appeal from the order dismissing him, see *Newitt v. Berridge*, 4 D. J. & S. 45.

#### INSPECTION OF PROPERTY.

An order for the inspection of any property the subject of the action may be made by the Court or a Judge, and authority given to enter any land or building to take samples and make observations or experiments: O. L. 3. The application for such order may be made by any party to the action: r. 6; or the Judge himself may inspect: r. 4; but inspection will not be ordered of articles not in the possession, power, or custody of the Def'ts, their servants or agents: *Turner v. Ash*, 37 W. R. 301.

And inspection cannot be granted to one Def't of property belonging to another Def't when there is no right in question between them: *Shaw v. Smith*, 18 q. B. Div. 193.

The Court has power, under r. 3, to make an interlocutory order before trial, giving Plt liberty to enter upon Def't's land and make excavations: *Lucas v. Beaumont*, 27 Ch. D. 356.

And for cases as to inspection, see *Whaley v. Brancher*, 12 W. R. 570, 595; *Cooper v. Ince Hall Co.*, W. N. (76) 24 (trespass); *Barlow v. Bailey*, W. N. (70) 136; *Flower v. Litch*, W. N. (76) 169, 230 (nuisance).

In *Mitchell v. Darby Colliery Co.*, 10 Q. B. D. 457, inspection by Plt was allowed on his paying costs in any event.

#### DELIVERY OF DOCUMENTS OUT OF COURT.

##### 1. To a Party or Purchaser.

LET (such of) the several documents deposited by &c., in the Central Office, pursuant to the order dated &c. (as relate to &c., or are mentioned in the schedule hereto), be delivered out to the Plt [or Def't] A. [or to B. the purchaser of the (hereditaments comprised in Lot —, part of the) real estates of C., the testator in the pleadings named].

##### 2. To a Party's Solr, to be produced in Evidence.

(By consent) Let the documents deposited by the Def'ts in the Central Office, pursuant &c. be delivered out to Mr. —, the Def'ts' solr, for the purpose of producing the same before &c., on examination of witnesses before examiner, the said Mr. — undertaking to re-deposit the same within a week after the examination is closed.—Plt to be at liberty to inspect the documents meanwhile.—See *Clarke v. Brown*, V.-C. S. in Chambers, 13 Dec. 1854, A. 152.

#### NOTE.

The Court refused to allow original documents in the custody of the Court to be taken abroad for the examination of witnesses, no special case being

made: *Lafone v. Falkland Isl. Co.*, 4 K. & J. 40; *Re Stephens*, L. R. 9 C. P. 187.

As to depositing court rolls of a manor, and that the possession of the Court is that of the depositor, see *Carew v. Davis*, 21 Beav. 213.

When deeds have been left in Court under an order for production for the purpose of discovery, on that purpose being satisfied the party who left the deeds has a right to have them back: *Dunn v. D.*, 3 Drew. 17; aff., 7 D. M. & G. 25; but not where the order was for deposit, or the rights as to the deeds have been declared: *Ibid.* Nor in an action to raise portions will the Court, without the consent of the mortgagees, deliver back the deeds to the tenant for life: *Jenner v. Morris*, 1 Ch. 603.

And for the practice respecting the delivery out of documents, see "PRACTICE MASTERS' RULES."

## CHAPTER VIII.

## EVIDENCE.

1. *Leave to serve Subpoena ad Testificandum in Scotland—*  
 17 & 18 V. c. 34.

UPON motion &c., and upon reading &c., This Court doth order that the Deft be at liberty to serve the subpoenas issued in this action for the attendance of R. &c. on the trial of this action as witnesses on their behalf, by leaving copies thereof, together with a copy of this order, on the said R. &c. at — or elsewhere in Scotland.—*Archibald, Orr-Ewing & Co. v. R. Johnston & Co.*, V.-C. H., 11 Feb. 1879, A. 199: see also *Re March's Estate, McAlesman v. Coning*, Kay, J., 19 March, 1885, B. 362.

2. *Leave to prove particular Facts by Affidavit—O. xxxvii. 1.*

UPON the application &c., It is ordered that the Plts be at liberty to prove by affidavit the statements contained in paragraphs 1 to 14 both inclusive, and paragraphs 17 to 20 of the Plt's amended statement of claim, and to read such affidavit at the trial of this action; and the costs of all parties of this application are to be costs in the action.—*Briesemann v. Smith*, M. R. at Chambers, 11 Dec. 1877, A. 2182.

3. *Witness to attend to be Cross-Examined on his Affidavit—*  
*O. xxxviii. 1.*

UPON the application &c., It is ordered that A. do attend before the (Judge) at &c. at — o'clock in the forenoon, for the purpose of being cross-examined on his affidavit in support of the Plt's motion for an injunction, or whenever thereafter the said motion shall come on to be heard.

4. *Witness to attend at Chambers to be examined—O. xxxvii. 5.*

UPON motion &c., This Court doth order that the Deft L. attend at the Chambers of the Judge situate at &c., on &c., to be examined in reference to the real and personal estate which the testator was entitled to at the time of his decease, and also to the accounts and inquiries directed by the order dated &c., and also as to whether any and what

documents are in his possession or power relating to the subject-matter of this action, and referred to in the order dated &c.; And it is ordered that the Deft L. pay to the Plt F. his costs of this application, to be taxed &c.—*Re Davis's Estate, Fothergill v. Davies*, V.-C. B., 1 Feb. 1877, A. 359; and see *Gilbert v. Smith*, V.-O. M., 31 Jan. 1877, A. 174.

5. *Order directing the Governor of Holloway Prison to Produce a Witness (in Prison for Contempt).*

UPON motion &c., by counsel for A., and upon hearing counsel for W., and upon reading an order dated &c. [*order for committal*], Let the governor of H. M.'s prison at Holloway produce the said W. before Mr. Justice —, in his lordship's Court at the Royal Courts of Justice, Strand, London, on &c., at half-past ten o'clock in the forenoon precisely.—*Re Morris*, Kay, J., 5 March, 1890, B. 224.

6. *Order appointing Examiner to take Examination of a Witness—*  
O. XXXVII. 5.

UPON the application &c., It is ordered that S. of &c. be appointed examiner for the purpose of taking the examination of B. of &c. as a witness on behalf of the Deft.

This form is also applicable to an examination *de bene esse*, in which case those words must be inserted after the word "examination."

For order for the oral examination of witnesses before a district registrar, see *Brewster v. Woodall*, V.-C. H. at Chambers, 12 Nov. 1877, A. 1912.

7. *Order to take Examination of aged Witness de bene esse before the Examiner.*

UPON the application of the Plt, and upon hearing &c., and upon reading an affidavit of the Plt filed &c. whereby it appears that B. is — years of age, It is ordered that the Plt be at liberty to examine the said B. as a witness in this cause before one of the examiners of the Court *de bene esse* upon giving to the said B. and to the Deft T. forty-eight hours' notice of the time when such examination is to be taken; And the costs of the said examination are to be included in the costs of this action.—See *Peck v. Trower*, M. R. at Chambers, 4 Aug. 1877, B. 1450.

8. *Witnesses to be Examined before one of the Examiners of the Court*  
—O. XXXVII. 39.

UPON motion &c., Let all the witnesses who have made (or shall make) affidavits in this action be examined before one of the examiners of this Court.

9. *To take Evidence de bene esse in an Action to perpetuate Testimony where the Pleadings are not closed.*

UPON motion &c. by counsel for the Plt, and upon reading an affidavit of A. filed &c. of service of notice of this motion on the Deft, Let this action proceed notwithstanding the default of the Deft in not delivering a statement of defence, And let all witnesses in this action be examined *de bene esse* before one of the examiners of the Court, notwithstanding the pleadings are not closed.—*M. of Buts v. James*, V.-C. B., 25 June, 1886, A. 893; 33 Ch. D. 157.

In this order the V.-C. followed the analogy of *Coreney v. Athill*, 1 Dickens, 255.

10. *Publication of Evidence taken in an Action to perpetuate Testimony.*

UPON motion &c., This Court doth order that the depositions of G. H., B. J. &c., taken in the first above-mentioned action of V. v. V. to perpetuate testimony on &c., be published when the evidence in the secondly-mentioned action is closed, but not before the — day of —; and this order is to be without prejudice to any question as to the admissibility of such depositions in evidence at the hearing of the secondly-mentioned action, and either party in the same action is to be at liberty to apply to have the time for such publication extended; and the costs of this application are reserved till the hearing of the same action.—See *Vane v. V.*, V.-C. M., 9 March, 1876, B. 470. And see *Mogridge v. Hall*, *Lady Llanover v. Homfray*, *Phillips v. Lady Llanover*, V.-C. H., 13 Ch. D. 380; 28 W. R. 487; *affd.* C. A., 19 Ch. Div. 224; 30 W. R. 557; and *Brandon's Trusts*, M. R., 13 Ch. D. 773.

11. *Another Form.*

UPON motion &c., Let the depositions of &c. taken in this action to perpetuate testimony, and any other deposition taken in this action, and not already published, be published forthwith, but without prejudice to any exception that may be made against reading any of the said depositions as evidence; And let any persons interested be at liberty to take certified copies of such depositions, and to make such use of proceedings, interrogatories and depositions in this action as they may be advised.—*Berkeley v. B.*, Stirling, J., 24 June, 1890, A. 845.

For an order for a commission to the Tribunal Civil de première Instance du Département de la Seine to take evidence of witnesses residing in France, *see Imperial Land Co. of Marseilles v. Masterman*, L. J., 27 May, 1874, A. 1843. The object of this order was to enforce the attendance of hostile witnesses.

For an order in the nature of a mandamus to the Chief Justice and Judges of the Supreme Court of Judicature at Fort William in Bengal (now "the High Court of Judicature at Fort William in Bengal": *Wilson v. W.*, 32 W. R. 282; 9 P. Div. 88), to take the cross-examination of witnesses resident in their jurisdiction pursuant to the 13 Geo. III. c. 63, and 1 V. c. 22, see *Williamson v. Barbour*, M. R. at Chambers, 20 July, 1876, B. 1472.



For an order on motion under the 19 & 20 V. c. 113, for the examination upon oath of witnesses resident in England pursuant to rogatory letters issued by the Court of the Third Division of the Judicial Circuit of Lisbon, see *Re Duchess of Saldanha*, M. R., 5 March, 1879, B. 401.

And for subsequent order that the depositions so taken be filed in the same way as if taken in an action in this Court, and that the applicant be at liberty to take office or certified copies of them for the purpose of using them in the proceedings in Portugal, with liberty to apply to take the depositions off the file and transmit them to the Portuguese Court, if necessary, see *S. C.*, M. R., 9 May, 1879, B. 895.

For an order appointing four examiners to examine witnesses abroad, two alone to act, and providing that the others shall act in the event of the incapacity of either of the two, see *London Bank of Mexico v. Hart*, V.-C. G., 11 June, 1868, B. 1991; *S. C.*, 6 Eq. 467, where the form of the order is given.

## 12. Assistance of an Expert—by Consent.

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Deft, and all parties by their counsel consenting, Let A. B., of &c., be nominated to examine and report—

(1.) Whether any addition to the Deft's buildings on the site of Nos. — and — Street, as they now stand, to be made in accordance with the present plans of the Deft, will materially obstruct the existing access of light to the Plt's windows.

(2.) Whether the Deft's building, if completed in accordance with such plans, will interfere with the access of light to the Plt's windows as it existed before the Deft's buildings on the site of Nos. — and — Street were pulled down.

(3.) Whether any addition made to the Deft's buildings since the date of the service of the writ in this action, has materially obstructed the access of light to the Plt's windows as it existed at that time.

Let the report of the said A. B. be filed at the Central Office after the order has been made on the Plt's motion.—*Andrade v. Knowles*, Stirling, J., 27 June, 1890.

## NOTES.

Under 17 & 18 V. c. 34, s. 1, a Judge of any of the Superior Courts of England, Ireland, or Scotland may order that a writ of *subpoena ad testificandum* shall issue in special form to compel the personal attendance at any trial of any witness who is not within the jurisdiction, and the service of any such writ in any part of the United Kingdom shall be as valid as if served within the jurisdiction; and 47 & 48 V. c. 67, s. 16, gives power to any Judge of the High Court to make such an order, even when the Court is not sitting.

By O. XXXVII. 1, "in the absence of any agreement in writing between the solrs of all parties, and subject to the rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *vid voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

By r. 5, "the Court or a Judge may, in any cause or matter where it shall

appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct."

Under r. 1 the Court may, in an admon action, and after the chief clerk has made his certificate, receive, if it think fit, fresh affidavit evidence on further consideration: *May v. Newton*, 34 Ch. D. 347; and see *Re Revill, Leigh v. Rumney*, 55 L. T. N.S. 542; *Re Michael, Dessau v. Lewin*, 52 L. T. N.S. 609.

By O. xvi. 21, "in all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure, shall, if given with the consent of the Court or a Judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the L. C. or Lords Justices sitting in Lunacy."

Where in an agreement to take evidence by affidavit at the hearing the word "only" was not used, it was not such an agreement under O. xxxvii. 1, as to prevent a witness being examined at the trial: *Glossop v. Heston, &c. Local Board*, 26 W. R. 433; 44 L. J. Ch. 536.

The consent must be a formal consent in writing: *New Westminster Brewery Co. v. Hannah*, 1 Ch. D. 278; but a guardian (*Fryer v. Wiseman*, 24 W. R. 205), or a guardian *ad litem* (*Knatchbull v. Fowler*, 1 Ch. D. 604), may consent on behalf of infants without an order.

As to the power of the Court to exclude the affidavit evidence altogether, and direct oral examination of the witnesses, see *Lovell v. Wallis*, 53 L. J. Ch. 494; 46 L. T. N.S. 593.

Where, after consent given, a party finds that necessary witnesses are reluctant to give evidence, the Court, on his application to be relieved from his consent, will direct the examination of such witnesses *vivâ voce*, and, at the option of the other party, discharge the agreement, and order all the evidence to be taken *vivâ voce* at the trial: *Warner v. Mosses*, 16 Ch. Div. 100.

By O. xxxviii. 25, "within fourteen days after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon, or the Court or a Judge may allow, the Plt shall file his affidavits and deliver to the Deft or his solr a list thereof."

By r. 26, "the Deft, within fourteen days after delivery of such list, or within such time as the parties may agree upon, or the Court or a Judge may allow, shall file his affidavits and deliver to the Plt or his solr a list thereof."

By r. 27, "within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the Plt shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the Deft or his solr a list thereof."

Affidavits not strictly in reply will be disregarded at the trial: *Gilbert v. Comedy Opera Co.*, 16 Ch. D. 594.

By r. 28, "when the evidence is taken by affidavit any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production."

The penalty of having his affidavit rejected does not relieve the deponent from the obligation to attend at his own expense: *Re Baker, Connell v. B.*, 29 Ch. D. 711.

By r. 29, "the party to whom the notice mentioned in r. 28 is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined."

A witness cannot refuse, after being sworn, to give evidence until his expenses are paid: *Re Working Men's Mutual Society, Limited*, 25 Ch. Div. 297.

A Plt having called the Deft as a witness has no right to cross-examine him except by leave: *Price v. Manning*, 42 Ch. Div. 372; overruling *Clarke v. Saffery*, *Ryan & Moo*. 126.

It is for the Judge to decide whether a witness is so hostile as to justify his cross-examination by the party calling him: *Price v. Manning, sup.*; *Rice v. Howard*, 16 Q. B. D. 681.

By O. xxxvii. 21, "evidence taken subsequently to the hearing or trial is to be taken as nearly as may be in the same manner as evidence taken at, or with a view to, the hearing or trial;" and by O. xxxvii. 22, "the practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial is to extend and be applicable to evidence taken in any cause or matter at any stage." The effect of these rules, read together with O. xxxviii. 28, is that the expense of producing a deponent who has made an affidavit either previously (*Mansel v. Clanricarde*, 54 L. J. Ch. 982), or subsequently to (*Backhouse v. Alcock*, 28 Ch. D. 669), the trial cannot be demanded in the first instance from the party requiring such production.

The notice to produce a witness should state the occasion or place at which the examination is to take place. If the notice is insufficient the penalty of exclusion of the affidavit will not take effect: *De Mora v. Concha*, 32 Ch. Div. 133; *S. C.*, *H. L.*, *Concha v. C.*, 11 App. Ca. 541.

It appears doubtful whether r. 28 applies where a witness is out of the jurisdiction: *De Mora v. Concha*, 32 Ch. Div. 133; and see same case *sub nom. Concha v. C.*, 11 App. Ca. 541.

Liberty was given to use the affidavits of persons who by death, lunacy, or illness could not be cross-examined, saving just exceptions: *Ridley v. R.*, 34 Beav. 329; *Braithwaite v. Kearns*, 34 Beav. 202; *Davies v. Otty*, 35 Beav. 214; *Tanauell v. Scurrah*, 11 L. T. N.S. 761; *Lautour v. A. G.*, 43 L. J. Ch. 313; *secus*, where the illness and death of a witness were concealed: *Evans v. Cook*, 22 W. R. 252 (Ir.); or the witness had left the country: *Bingley v. Marshall*, 6 L. T. N.S. 682; and nothing short of absolute necessity justifies the Court in relaxing the rule: *Parker v. M'Kenna*, 43 L. J. Ch. 802.

As to demanding the expenses of witnesses on production under the old practice, see *Richards v. Goddard*, 10 Ch. 288.

A Plt, though entitled to costs generally, had to pay the expenses of witnesses whom he had declined to cross-examine at the hearing, after obtaining leave to do so: *Guilfoyle v. Hutchinson*, Ir. Rep. 8 Eq. 298.

On the cross-examination, on a petition for winding up, of the secretary of a co. as to accounts, the Petitioner was entitled to have the books produced: *Re Emma Mine*, 10 Ch. 194.

An affidavit cannot be withdrawn in order to avoid cross-examination: *Clarke v. Law*, 2 K. & J. 28; 4 W. R. 35; *Pike v. Dickinson*, 21 W. R. 862; *Re Quartz Hill, &c. Co., Exp. Young*, 21 Ch. Div. 642.

As to time for giving notice to cross-examine, see *Ranken v. Alfaro*, 24 W. R. 54.

As to cross-examination on accounts, *v. inf.* Chap. XLIII., "ACCOUNT"; and see *Connell v. Baker*, 29 Ch. D. 711.

By O. xxxviii. 30, "when the evidence under this order is taken by affidavit such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these rules provided after the close of the pleadings; provided that other affidavits may be printed if all parties interested consent thereto, or the Court or a Judge so order."

But where the evidence is, by order made after notice of trial, taken by affidavit, evidence may be filed after the notice of trial: *Waring v. Lacey*, 24 W. R. 318.

Any party may, without leave of the Court, issue a subpoena for the examination of a witness at any stage of an action: *Raymond v. Tapon*, 22 Ch. Div. 430.

As to the power of the Court to order issue of subpoena to compel attendance of witnesses before an arbitrator or referee, see 52 & 53 Vict. c. 49, s. 18, and *inf.* Chap. XXVI., "ARBITRATIONS."

There is no power to grant a writ of *habeas corpus* to bring up a party to an action who is in prison in order that he may conduct his case in person: *Weldon v. Neal*, 15 Q. B. D. 471.

In order to bring up a witness who is in prison it is not the proper course to move for a writ of *habeas corpus*, but the visiting justices require an order on the governor of the prison, who will comply with it.

Where on replication new issues were raised by the Plt's affidavits, the Deft had leave to file evidence in reply: *Leech v. Bolland*, 10 Ch. 362; and affidavits ready but omitted to be filed, were admitted: *Armstrong v. A.*, 1r. Rep. 7 Eq. 84. It is not of course to give an opportunity of answering evidence filed by leave after the proper time: *Poupard v. Fardell*, 18 W. R. 59.

A motion for leave to use further evidence could not be made *ex parte*: *Richards v. Curlewis*, 18 Beav. 462; and the leave had to be applied for before the hearing: *Smith v. Pilgrim*, 2 Ch. D. 127.

As to using fresh evidence on appeal, *v. inf.* Chap. XXXVI., "APPEALS."

As to going into further evidence in Chambers to dispute the Plt's debt after an order for admon, see *Cardell v. Hawke*, 6 Eq. 464.

The outlawry of the Plt, though not pleaded, was an answer to his motion to enlarge the time for closing the evidence: *Knowles v. Rhydedefed Co.*, Joh. 514.

By O. LXIV. 7, the Court or a Judge may abridge or enlarge the time fixed for doing any act, or taking any proceedings, upon such terms, if any, as the justice of the case may require, although the application is not made until after the expiration of the time appointed or allowed.

The usual practice, when a party is out of time, is to enlarge the time, on his paying the costs of the application: *Eaton v. Storer*, 22 Ch. Div. 91.

As to giving leave to give notice to read affidavits (already filed) after the proper time, see *Lautour v. A. G.*, 43 L. J. Ch. 313.

After the time for closing the evidence had expired, the Court would only extend it under special circumstances: *Thompson v. Partridge*, 4 D. M. & G. 794; *Poupard v. Fardell*, 18 W. R. 37; and the subsequent discovery of an important witness was not enough: *Thexton v. Edmonston*, 5 Eq. 373; but in *Watson v. Cleaver*, 20 Beav. 137, Deft having, seven months after notice of motion for decree, given material evidence in another cause, Plt, applying immediately under Cons. Ord. 33, r. 8 (now obsolete), had leave to use it, subject to Deft having an opportunity of explaining it; and in *Wilson v. Gann*, 23 W. R. 546, the evidence of a new witness was allowed to be used. But Defts were allowed to file affidavits in answer to specific charges as to character made in affidavits filed immediately before: *Scott v. Corporation of Liverpool*, 1 D. & J. 369; and a Plt was allowed, under special circumstances, to read an affidavit filed after the time, reserving the right to cross-examine: *Hope v. Threlfall*, 1 S. & G. xxi.; and see *Douglas v. Archbutt*, 23 Beav. 293.

A Judge may, at any period of a case, for his own satisfaction, allow further evidence to be called by either party, even though it be doubtful whether it is admissible, on the request of the party desiring it as a right: *Budd v. Davison*, 29 W. R. 192.

#### READING EVIDENCE TAKEN IN ANOTHER CAUSE OR MATTER.

By O. XXXVII. 3, "an order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a Judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

By r. 24, "no affidavit or deposition filed or made before issue joined in any cause or matter shall, without special leave of the Court or a Judge, be received at the hearing or trial thereof, unless, within one month after issue joined, or within such longer time as may be allowed by special leave of the Court or a Judge, notice in writing shall have been given by the party

intending to use the same to the opposite party of his intention in that behalf."

A notice to read affidavits in the action for some other purpose should not be given in general terms, but should specify the particular passages to be relied on: *Downing v. Falmouth United Sewerage Board*, 37 Ch. D. 234.

#### EXAMINATION DE BENE ESSE.

There is jurisdiction to make an order for the examination *de bene esse* of witnesses upon *ex parte* application, the order being taken by the applicant at his peril, and subject to its being discharged upon proper grounds, but the order is not of course, merely on the ground that the witnesses are over seventy years of age: *Bidder v. Bridges*, 26 Ch. Div. 1; and the general practice will not be applied, without discrimination, in a case where the witnesses are numerous: *Ibid*.

As to examining witnesses *de bene esse* before the Jud. Acts, see *Bellamy v. Jones*, 8 Ves. 31; *Macintosh v. G. W. Ry. Co.*, 1 Ha. 328; *Shirley v. Ferrers*, 3 P. W. 77.

An affidavit was required showing the age or state of health of the witness and the materiality of his evidence; or where the application was on the ground that the person to be examined was the only witness to a particular fact, this was to be stated in the affidavit: and see *Bidder v. Bridges*, *sup*.

If the person was about to go abroad, evidence as to the matters upon which he was to be examined was not required: *Grove v. Young*, 3 D. & S. 397; *Hope v. H.*, 3 Beav. 317.

Where the witness is out of the jurisdiction a special examiner will be appointed: *Crofts v. Middleton*, 9 Ha. xviii; *Pillan v. Thompson*, 10 Ha. lxxvi; *Reeves v. Hodson*, 21 L. T. N.S. 124; but the application for such examiner or for a commission must be made as soon as the case is set down for trial: *Stewart v. Gladstone*, 7 Ch. D. 394.

As to admitting evidence taken *de bene esse* in a former suit, the issue in the two suits being the same, and there being privity of estate between the parties to the two suits, see *Llanover v. Homfray*, *Phillips v. Llanover*, 19 Ch. Div. 224.

Depositions taken *de bene esse* can only be used at the trial if it is shown that the witness is then incapable of being examined: *Barton v. N. Staffordshire Ry. Co.*, 56 L. T. N.S. 561; 35 W. R. 536.

Where the Court below refused to admit the evidence of a witness, and, pending appeal, the witness was taken dangerously ill, an order was made to take the evidence *de bene esse* upon an undertaking as to costs: *Solr. of the Treasury v. White*, 55 L. J. P. D. 79; W. N. (86) 144.

#### EXAMINATION BY COMMISSION.

For forms of order for commission to examine witnesses, see B. S. C. Appx. K. 36, 37; and for form of commission, see Appx. J. 13.

By O. xxxvii. 6a, if the Court or a Judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. For forms of request, see B. S. C. Appx. K. 37a, 37b.

In some foreign countries it is unlawful for any person not an officer of the Courts of the country, to administer an oath. This applies to Germany, to which country a request would be sent. Requests are also issued to Colonial Courts.

The request will not be issued merely to obtain the inspection of documents in a foreign country: *Cape Copper Co. v. Comptoir d'Escompte de Paris*, 38 W. R. 763.

By 48 & 49 V. c. 74, s. 2, when any commission, order, or request for the examination of witnesses is addressed to any Court or Judge in India or the colonies, or elsewhere in Her Majesty's dominions beyond the jurisdiction, such Court or Judge may nominate some fit person to take the examination in lieu of the Court or Judge.

A party is not entitled to a commission *ex debito justitiæ* upon showing that a material witness is resident out of the jurisdiction, but the matter is one for the discretion of the Court having regard to all the circumstances: *Coch v.*

in the jurat of that fact, was ordered to be taken off the file with costs: *Spittle v. Walton*, 11 Eq. 420.

By 16 & 17 V. c. 78, s. 3, the L. C. may appoint commrs to administer oaths in the Isle of Man, and in the Channel Islands.

For observations of Kay, J., as to the duty of commrs to administer oaths where a witness is swearing to the contents of an affidavit, see *Bourke v. Davis*, 44 Ch. D. 110.

By the 6 Geo. 4, c. 87, s. 20, British consuls general, and consuls abroad, were authorized to administer oaths, take affidavits and affirmations, and do all notarial acts there.

By O. xxxviii. 6, all examinations, affidavits, declarations, affirmations, &c., in causes or matters depending in the High Court, and all acknowledgments required for enrolling any deed in the Central Office, may be sworn and taken in Scotland or Ireland, or the Channel Islands, or the colonies, before any Judge, Court, notary-public, or person lawfully authorized to administer oaths in such country or place, or before any of H. M.'s consuls or vice-consuls abroad. The Judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such Court, &c. As to verifying such signatures, see Dan. 622.

The certificate of a registrar of deeds in a British colony, who was not authorized to administer oaths, was not sufficient evidence of registration under sect. 22 of 15 & 16 V. c. 86, without affidavit; nor under the 14 & 15 V. c. 99, s. 14, which applies to copies, not original documents: *Baillie v. Jackson*, 3 D. M. & G. 38.

The 15 & 16 V. c. 86, s. 22, was retrospective: *Bateman v. Cook*, 3 D. M. & G. 38; but now see O. xxxviii. 6.

By the 18 & 19 V. c. 42, s. 1, every British ambassador, envoy, &c., or consul, acting-consul, &c., exercising his functions in any foreign place, is empowered to administer oaths there, or take any affidavit or affirmation, and do there all notarial acts which a notary could do here; and any such oath, affidavit, affirmation, or notarial act is to be valid as if taken or done here. Affidavits and affirmations so taken may be used in any Courts of the United Kingdom; and by s. 3 are to be admitted as evidence, without proof of such seal or signature. By ss. 4, 5, persons falsely swearing, &c., are guilty of forgery; and persons forging the seal or signature are guilty of felony.

Where a statutory declaration taken before a notary in New South Wales was not intitled in the cause, the signatures had to be verified by affidavit: *Whiting v. Hussett*, 14 Eq. 70; and see *Jearrad v. Tracey*, 11 W. R. 97.

Where an affidavit was sworn before a notary abroad, and bore his seal, his signature was required to be verified by affidavit: *Re Davis*, 8 Eq. 98, or by a British consul there: *Haggitt v. Iniff*, 5 D. M. & G. 910; followed in *Re Burnett*, M. R., 28 June, 1856; *secus*, where the fund was only £35: *Mayne v. Butler*, 13 W. R. 128; or the other side consented: *Lyle v. Ellwood*, 15 Eq. 67; *Re Lane*, 22 W. R. 39; and in a suit in which infants, jointly with their mother, were Plts, an affidavit sworn not before the consul, but a burgomaster, was allowed to be filed, the mother consenting: *Bell v. Turner*, 17 Eq. 439; and an affidavit, sworn before a notary, certified by the governor of a foreign state to be a notary public thereof, the jurat stating the date but not the place where it was sworn, was allowed to be filed: *Meek v. Ward*, 10 Ha. i.

When the deponent is outside her Majesty's dominions, and resides at a considerable distance from a British consul or vice-consul, the affidavit may be sworn before a notary public: see *Cooke v. Wilby*, 25 Ch. D. 769, where an affidavit sworn before a notary public was allowed to be filed, the nearest consul being 150 miles away: see also *Brittlebank v. Smith*, 32 W. R. 675, where the nearest British consul was 250 miles off, but certified that the clerk of a Circuit Court before whom the affidavit was sworn was authorized to administer oaths.

By O. xxxviii. 14, "the Court or a Judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect, by misdescription of parties or otherwise, in the title or jurat, or any other irregularity in the form thereof": and see 52 V. c. 10, s. 6, and *Eddowes v. Argentine Loan and Mercantile Agency Co.*, 38 W. R. 629; 59 L. J. Ch. 392, that this rule applies to the omission in the jurat of the words "before

me," where the affidavit, on the face of it, shows before whom it was in fact sworn.

#### EXAMINATION BEFORE AN EXAMINER.

The examination of witnesses, under rr. 1 and 5 of O. XXXVII., will now, unless the Judge shall otherwise direct, be taken before one of the examiners of the Court, whose appointment and proceedings are regulated by rr. 39—50 of the same Order.

By O. XXXVII. 10, the examiner is to be supplied with a copy of the writ and pleadings; and by r. 11, the examination is to take place in the presence of the parties, their counsel, solrs, or agents, and the witnesses are to be subject to cross-examination and re-examination.

By O. XXXVII. 13, "if any person duly summoned by subpoena to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a Judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be."

If a witness objects to answer any question, the question and the objection are to be taken down by the examiner and transmitted (r. 14) to the Central Office to be filed, and the validity of the objection shall be decided by the Court or a Judge; and by r. 15 the witness may be directed to pay any costs occasioned by his refusal or objection.

A witness is not bound to attend before an examiner unless served with a subpoena: O. XXXVII. 20; *Stuart v. Balkis Co.*, 53 L. J. Ch. 791; 32 W. R. 676.

If a witness when so served refuses to be sworn, the proper course is, not to move to commit him for contempt of the order directing the examination, but for an order that he do attend at his own expense: *Stuart v. Balkis Co.*, *ibid.*

The jurisdiction to appoint a special examiner still remains, but the Court is reluctant to exercise it: *Marquis of Bute v. James*, 33 Ch. D. 157.

On the application of one of several Plts, an order for an examiner was granted to examine co-Plts as witnesses abroad: *Banque Franco-Egyptienne v. Lütcher*, 28 W. R. 133.

By O. XXXVII. 16, "when the examination of any witness before an examiner is concluded, the original depositions, authenticated by the signature of the examiner, are to be transmitted by him to the Central Office, and there filed."

The examiner's omission to sign the deposition, or to take it down in his own handwriting, is not necessarily fatal: *Stephenson v. S.*, 19 Beav. 585; *Bolton v. B.*, 2 Ch. D. 217.

It is not proper to insert in the order for examination any words giving leave to give the depositions in evidence at the trial: *Barton v. N. Staffordshire Ry.*, 35 W. R. 536; 56 L. T. N.S. 601; but r. 18 provides that no deposition is to be given in evidence at the trial without the consent of the party against whom the same may be offered, unless the Court or Judge otherwise directs, or is satisfied that the deponent is dead, or out of the jurisdiction, or unable, from sickness or infirmity, to attend.

An examiner may allow a witness to be treated as hostile by the party calling him: *Ohlsen v. Terrero*, 10 Ch. 127; dissenting from *Wright v. Wilkin*, 6 W. R. 643.

There is no jurisdiction to order the examination *ex parte* of witnesses before an examiner for the purposes of trial: *Warner v. Mosses*, 16 Ch. D. 100.

The examiner may exercise his discretion as to the most convenient order of examination of witnesses: *Stuart v. Balkis Co.*, *sup.*

As to the power of adjourning the examination and recalling witnesses, see *In re Metropolitan Electric Co., Exp. Offor*, 54 L. J. Ch. 253.

On cross-examination of witnesses on application by a shareholder for rectification of the co's register, the shareholder's witnesses should be cross-examined first: *Re Doré Gallery Co.*, 62 L. T. N.S. 758; 38 W. R. 491.

The Court, as a general rule, disapproves of the practice of chief clerks taking examinations before themselves: *M'Alister v. Walters*, W. N. (90) 204; and see *Ib.* 224.

As to correction of error in transcript of shorthand notes of evidence before examiner in Adm. Div., see *The Knutsford*, (1891) P. 219.

#### BANKERS' BOOKS.

According to the provisions of the Bankers' Books Evidence Act, 1879 (42 V. c. 11), s. 3, a copy of an entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded; and by sect. 4, a copy of such an entry is not to be received in evidence under the Act, "unless it be first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by affidavit."

The copy must also (sect. 5) be further proved in the same manner to have been examined with the entry, and to be correct: *Harding v. Williams*, 14 Ch. Div. 197.

The effect of sect. 3 is to make the entries admissible against any one, *e. g.*, entries in Deft's bankers' books admissible against Plt. *S. C.*

As to production of bankers' books, *v. sup.* Chap. VII., p. 72.

D. W. F. MCDONALD

SOLICITOR

VANCOUVER, B.C.



## CHAPTER IX.

## CHANGE AND REPRESENTATION OF PARTIES.

## SECTION I.—CHANGE OF PARTIES AND TRANSMISSION OF INTEREST.

1. *Order to continue Proceedings against a new Party*—O. xvii. 4.

UPON motion [*or the application*] &c., and upon hearing counsel [*or the solicitor*] for the applicant, who alleged [*state the last material proceeding in the action, and the subsequent events in concise form, see inf.*], It is ordered that the proceedings in this action be carried on between the Plts [*name the continuing Plts*] and the Defts [*name the continuing Defts*] and X. [*the person on whom the interest or liability has devolved*].

The order may also be obtained in simple cases on petition of course at the Registrar's Chambers.

## COMMON ALLEGATIONS IN ORDERS TO CONTINUE OR CARRY ON PROCEEDINGS.

*Object of Action, e.g.*—This is an action to administer the real and personal estate of A. B., or for an account, or for foreclosure.

*Writ issued.*—That a writ of summons was issued in this action on &c.

*Appearance.*—That all the Defts (except A., who is out of the jurisdiction) appeared to the said writ.

*Statement of Claim.*—That on &c. the Plt duly delivered his statement of claim.

*Defence.*—That on &c. the Deft duly delivered his statement of defence.

*Reply.*—That on &c. the Plt duly delivered his reply.

*Judgment.*—That a judgment was given in this action on &c.

*Chief Clerk's Certificate.*—That pursuant to the said judgment, the Chief Clerk made his certificate dated &c.

*Order on Further Consideration.*—That an order was made on the further consideration of this action on &c.

*Grant of Probate.*—That (the Plt) A., who was [*state capacity in which he sued*], died on &c., having by his will, dated, &c. appointed B. and C. his exors, by whom the same was duly proved on &c.

*Grant of Administration.*—That (the Plt) A., who was [*state capacity in which he sued*], died intestate on &c., and letters of admon to his estate and effects were on &c. granted to B.

*Grant of Administration with the Will annexed.*—That (the Plt) A., who was [*state capacity in which he sued*], died on &c., having by his will, dated &c., appointed B. and C. exors thereof; that the said B. and C. duly renounced probate thereof, and letters of admon to the estate and effects of the said A. with the said will annexed were on &c. granted to D.

*Descent.*—That (the Plt) A., who was [*state capacity in which he sued*], died on &c. intestate, leaving B. his (only son and) heir-at-law [*or heir according to the custom of the manor of Z.*].

*Devise of Realty.*—That (the Plt) A., who was &c., died on &c., having by his will devised all &c. unto B. in fee &c.

*Marriage.*—That on &c. (the Plt) A. intermarried with B. [if so, and that by a settlement executed prior to the said marriage, all the estate and interest of the said A. in the subject-matter of this action was assigned to C. and D. as trustees of the said settlement].

*Birth of a Child.*—That since &c. (*last proceeding*) a child has been born to (the Plts) A. and B., namely, C., who was born on &c., and is a necessary party to this action.

*Bankruptcy.*—That on &c. (the Deft) A. who was entitled &c., was adjudicated a bankrupt, and B. of &c. has been appointed trustee in such bankruptcy.

*Lunacy.*—That on &c. a commission *de lunatico inquirendo* was issued, whereunder (the Plt) A. was found a lunatic from &c., and by an order in the matter of the said lunatic, dated &c., B. of &c. was appointed committee of his person and estate.

*New Committee.*—That by an order dated &c., B. of &c. was appointed committee of the person and estate of the said A.

## 2. *Continuing Proceedings against Representative of an accounting Party*—O. XVII. 4.

UPON motion [*or the application*] &c. [Form 1], It is ordered that the judgment dated &c., and the several proceedings thereunder, and the accounts and inquiries thereby directed, be carried on between the Plt and the Defts B. and C. (*represves*) in like manner as the same might have been carried on between the Plt and the Deft A. if he had not died; And it is ordered that what on taking the said accounts shall appear to have come to the hands of the said late Deft A. be answered by the said B. and C. his exors, out of his assets in a due course of admon; And in case they shall not admit assets of the said A. for that purpose, it is ordered that an account be taken of his personal estate come to the hands of the said B. and C., or either of them, or to the hands of any other person or persons, by the order or for the use of the said B. and C. or either of them.

## 3. *Infant born after Action brought*—O. XVII. 4.

UPON motion &c., Let the proceedings in this action be carried on between the Plts and the Defts, and the said infant C., And Let an inquiry be made whether any proceedings affecting the interest of the infant C., have been had in this action since his birth, and, if so, whether it will be fit and proper, and for the benefit of the said infant C., that he should be bound thereby, And if it shall be so certified, Let the said infant C. be bound accordingly.—*Peter v. P.*, Chitty, J., 27 March, 1884, B. 384; 26 Ch. D. 181.

## 4. *Continuing Proceedings against Admor of Executrix who is also Admor de bonis non of Testator.*

UPON motion &c., This Court doth order that the judgment, dated &c., and the several proceedings &c. be carried on between the Plt and the said J. in like manner as thereby directed between the original

parties to this action; 1. And it is ordered that an account be taken of the personal estate of H., the testator &c., come to the hands of the Deft J. as the admor *de bonis non* (or of the effects left unadministered) of the testator, or of any other &c.; And it is ordered that what on taking such account shall appear to be due from the Deft J., as such admor, be answered by him personally: And it is ordered that what on taking the accounts directed by the said former judgment, shall appear to be due from the estate of the late Deft S., the extrix of the testator H., be answered by the Deft J. as the admor of her effects, out of her assets, in a course of admon; 2. And in case he shall not admit assets of the late Deft S. for that purpose, then it is ordered that an account be taken of the personal estate of the said S. come to the hands of the Deft J. or of any other &c.—See *Gardner v. Hulme*, M. R., 21 March, 1843, A. 1125.

5. *Order to substitute a Registered Public Officer, under 7 Geo. IV. c. 46, s. 9.*

UPON motion, &c., and upon hearing counsel for the — Banking Co., who alleged that A., one of the public registered officers of the said co., having on behalf of the said co. &c. [*state the proceedings in the action concisely*]; that it appears by the affidavit of &c., that the said A. is dead [*or has resigned, or has been removed*]; and that B. is one other of the public officers of the said co., and is duly registered and appointed to sue and be sued on behalf of the said co.; And upon reading the said affidavit, This Court doth order, that this action be continued, carried on, and prosecuted in the name of the said B., as one of the public registered officers of the said co., in the room of the said A., as the nominal Plt in this action.—See *Percival v. Roberts*, V.-C. E., 28 Mar. 1849, B. 703; *Meek v. Burnley*, M. R., 12 Jan. 1863, B. 6; *Scott v. Moorhouse*, V.-C. M., 22 June, 1872, B. 1714.

By 7 Geo. IV. c. 46, s. 9, suits instituted by or against a banking co. in the name of the registered public officer, may, in case of his decease, resignation, or removal, be continued by or against any other public officer of the co. for the time being; and such orders may now be obtained in Chambers.

NOTES.

The practice as to change of parties by marriage, death, or transmission of interest, pending litigation, has been greatly simplified by the Rules of Court under the Jud. Acts.

By O. XVII. 1, a cause or matter shall not become abated by reason of the death, marriage, or bankruptcy of any of the parties, if the cause of action survive or continue; and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*.

This rule has been held to apply only when the cause of action survives or continues in some person who is before the Court: *Eldridge v. Burgess*, 7 Ch. D. 411; *Jackson v. N. E. Ry. Co.*, 5 Ch. D. 844; *In re Shephard, Atkins v. S.*, 43 Ch. Div. 131.

Accordingly, the marriage, death, or bankruptcy of a sole Plt or Deft will still cause an abatement, or render the action defective: *Eldridge v. Burgess*, *sup.*; but not the bankruptcy &c. of one or more out of several Plts or Defts jointly and severally interested: *Lloyd v. Dimmack*, 7 Ch. D. 398.

In cases within the rule the action may be continued between the sur-

viving Plts and Defts without any such order as would in general have been necessary under the former practice of the Court of Chancery: *Lloyd v. Dimmack*, *sup.*; and see *Hinde v. Morton*, 2 H. & M. 368; *Fallowes v. Williamson*, 11 Ves. 306; *Boddy v. Kent*, 1 Mer. 381; *Mitt. Pl.* [56—60]. The rule at Common Law, as regulated by the C. L. P. Act, 1852, ss. 135, 141, 142, and C. L. P. Act, 1854, s. 92, was similar, though the procedure was different.

Where the death or bankruptcy of a Plt or Deft terminates the cause of action, or the interest of the party, so as to leave no subject for litigation remaining, the action is necessarily at an end: see *Twycross v. Grant*, 4 C. P. Div. 40; *Chapman v. Day*, 49 L. T. N.S. 436; *Wymer v. Dodds*, 11 Ch. D. 438; unless by amendment a cause of action can be shown: *Ashley v. Taylor*, 10 Ch. D. 768.

As to the application of the maxim "*actio personalis moritur cum persona*," see *Phillips v. Homfray*, 24 Ch. Div. 456; *Re Batthyany, B. v. Walford*, 36 Ch. Div. 278; *Concha v. Murrietta*, 40 Ch. Div. 543; *Finlay v. Chirney*, 20 Q. B. Div. 494; and that it does not apply to the equitable right to a mandatory injunction in respect of obstruction of light to freeholds of the deceased, see *Jones v. Simes*, 43 Ch. D. 607.

Where Deft in action of tort dies before judgment, and at a date later than six months after the last of the acts complained of, further proceedings cannot be carried on against his legal pers. represes: *Kirk v. Todd*, 21 Ch. Div. 484.

Where the cause of action survives or continues in a person not a party to the record, he may, if proceedings are to be carried on by him, bring himself, or if they are to be carried on against him, be brought before the Court in the manner provided by the subsequent rules of O. XVII.: *Twycross v. Grant*, *sup.*; *Jackson v. N. E. Ry. Co.*, 5 Ch. D. 844; *Wright v. Swinden, &c. Ry. Co.*, 4 Ch. D. 164.

By r. 2, "in the case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, pers. represve, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice thereof in such manner and form as is prescribed (see r. 4), and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the cause or matter as may be just."

By r. 3, "in case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved."

Where the Plt *pendente lite* has validly assigned his interest, and the assignee has obtained leave to carry on the proceedings in like manner as the Plt might, the statement of claim should be amended by adding a new title to the action showing that the assignee is the real Plt, and an averment showing the devolution of the original Plt's interest: *Seear v. Lawson*, 16 Ch. Div. 121.

Where a garnishee order absolute has been made in favour of a judgment creditor of the Plt, there is a devolution of estate by operation of law within r. 2, and the creditor is entitled to be added as co-Plt, but not to the conduct of the action: *Wallis v. Smith*, 51 L. J. Ch. 577.

Where sole Plt becomes bankrupt and his trustee declines to proceed, the action may be stayed by order in Chambers: *Warder v. Saunders*, 10 Q. B. D. 114; *Jackson v. N. E. Ry. Co.*, 5 Ch. D. 844.

The Plt cannot, after his discharge, claim to have the stay removed on the ground that he has purchased the assets from the trustee: *Selig v. Lion*, 39 W. B. 254.

That the intention and effect of an order of revivor against a trustee in bankruptcy is to substitute him for, and place him in the exact position of, the original Deft, see *Chorlton v. Dickie*, 13 Ch. D. 160; and see *Johnston v. English*, 55 L. T. N.S. 55; *Cockshott v. London General Cab Co.*, 26 W. B. 31.

The trustee of an uncertificated bankrupt who had sued for remuneration and damages upon an agreement prior to his bankruptcy, was added as co-Plt, with conduct of the action: *Emden v. Carte*, 17 Ch. D. 768.

As to the right of assignee of Plt's trustee in bankruptcy to continue the action, see *Seear v. Lawson*, 15 Ch. Div. 426; and as to the right of an un-

discharged bankrupt to sue, &c., if the trustee does not interfere, *Jameson v. Brick and Stone Co.*, 4 Q. B. D. 208; *Cohen v. Mitchell*, 25 Q. B. Div. 262.

Trustee in bankruptcy, substituted for bankrupt Deft, by asking for a statement of claim adopts the whole action, including a pending appeal, and becomes liable for costs: *Borneman v. Wilson*, 28 Ch. Div. 53.

Where sole Deft in an action on a bill of exchange became bankrupt, the action could not be continued against the trustee, as the debt could be proved in the bankruptcy: *Barter v. Dubeux*, 7 Q. B. Div. 413; *secus*, where the action was in respect of a debt incurred by fraud, and it was possible Plts might obtain some relief against the trustee: *Hale v. Boustead*, 8 Q. B. D. 453, citing *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

Where trustee in bankruptcy, suing in his official name, is removed and a new trustee appointed, the new trustee must obtain an order to continue the action and give notice to the other parties under rr. 4, 5: *Pooley's Trustee v. Whetham*, 28 Ch. Div. 38.

By r. 4, "where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

The order to continue or carry on proceedings under these rules may be obtained in Chambers, or by petition of course at the Registrar's Chambers, or by motion of course handed in to the Registrar in Court: see *Roffey v. Miller*, 24 W. R. 109; *Crane v. Loftus*, 24 W. R. 93; *Walker v. Blackmore*, W. N. (76) 112; *Middleton v. Pollock* (No. 1), W. N. (76) 250; *Twyecross v. Grant*, 4 C. P. D. 40; *Jackson v. N. E. Ry. Co.*, 5 Ch. D. 844-9.

On a motion or petition of course, proof of the allegations is not required, though the order may be discharged for erroneous statements in the petition: see *Brignall v. Whitehead*, 8 Jur. N.S. 183.

Rule 2 does not apply where there is no transmission of interest; thus, husband petitioner in divorce action having died after decree *nisi*, his res-prieve could not revive: *Stanhope v. S.*, 11 P. Div. 103.

It is doubtful whether r. 4 is applicable after final judgment: *Arnison v. Smith*, 40 Ch. Div. 567; *Guy v. Churchill*, 40 Ch. D. 481.

Where two out of fifty-four Plts in an action for deceit died before judgment, an application after judgment by the exors of the two for an order under the rule was refused: *Arnison v. Smith*, *sup.*

Leave to revive under r. 4, for the purpose of appealing against a final decree twelve years old was refused, and (*semble*) such an order should not, in the absence of fraud, collusion, or irregularity, be made after the expiration of the year now limited for appealing: *Fussell v. Dowding*, 27 Ch. D. 237.

Where a sole Plt who has given notice of appeal dies before it is heard, an order of course to carry on the appeal may be made: *Ranson v. Patton*, 17 Ch. Div. 767.

The exor and devisee of a sole deceased Plt was allowed to carry on an action for a mandatory injunction in respect of obstruction of light to free-hold premises of the deceased: *Jones v. Simes*, 43 Ch. D. 607.

On the death of a sole Plt, a person who has had leave to attend the proceedings may apply for leave to prosecute the action: *Burstall v. Fearon*, 24 Ch. D. 126.

Where exor, sole Deft in creditor's action, died pending application for a receiver, an interim receiver was appointed, Plt undertaking that *admon de bonis non* should be taken out with all speed: *Re Parker, Cash v. P.*, 12 Ch. D. 293; but where, pending an application for a receiver by way of equitable execution, the judgment debtor died, an order for such receiver could not be made in the absence of any person to represent the debtor's estate: *Re Shephard, Atkins v. S.*, 43 Ch. Div. 131.

Where exor, after judgment in favour of his testator and notice of appeal,

obtains an order for revivor, he becomes a substantive party, and is personally liable for costs: *Boynnton v. B.*, 4 App. Cas. 733.

On death of counter-claiming Deft, his exors were entitled to obtain an *ex parte* order against Plts who had obtained an order against them: *Andrew v. Aitken*, 21 Ch. D. 175.

In case of the decease of a lunatic Plt suing by and with his committee, the order for the exor, &c., to carry on proceedings discharges the committee from the action, and (unless otherwise directed) from all liability for costs: *Harland v. Garbutt*, W. N. (81) 8.

On the death of a sole petitioner before the hearing (see *Re Dynevor Collieries Co.*, W. N. (78) 199) pending the other inquiries directed by the order made on the hearing, the petition may be ordered to be carried on by the representatives of the petitioner: *Re Atkin's Estate*, 1 Ch. D. 82.

An assignment of his debt by a petitioning creditor does not give the assignee the right to obtain a winding-up order: *Re Paris Skating Rink Co.*, 25 W. B. 701.

On default in pleading, and subsequent bankruptcy of a sole Plt, notice of motion by the Defts to dismiss for want of prosecution was ordered to be served on his trustees in bankruptcy: *Wright v. Swindon, &c. Ry. Co.*, 4 Ch. D. 164.

Where proceedings have been taken after an action has become defective by birth of an infant, he should be made a party by the common order under r. 4, and the order should go on to direct an inquiry whether any proceedings affecting his interest have been taken in the action since his birth, and if so whether it will be for his benefit to be bound thereby (see form 3, *sup.* p. 102), and if so certified he is to be bound accordingly. If the inquiry is answered in the negative, the Plt or person having conduct can still proceed by supplemental action (as in *Capps v. Capps*, 4 Ch. 1). The advantages of making the infant a party in the first instance are that an appearance can be entered for him, and that if he refuses to appear the order can be worked out: *Peter v. P.*, 26 Ch. D. 181.

Where Plts refused to apply to add infants born after judgment, Defts were entitled to an order, under r. 4, to add them: *Wicks v. W.*, W. N. (87) 15.

Infant co-Plt having attained twenty-one, and become co-trustee with Deft, was added as co-Deft on an *ex parte* application: *Re Gould, G. v. G.*, 51 L. T. N.S. 416.

By O. xvii. 5, the order when made is to be served upon the continuing and new parties to the action, or their solrs, and every person served not already a party to the action is bound to enter an appearance in the same time and manner as if served with a writ of summons.

By r. 6, any person not under disability, or under any disability other than coverture, but having a guardian *ad litem*, may apply to the Court or Judge to discharge or vary such order within twelve days from the service of it; and by r. 7, any person under such disability, not having a guardian *ad litem*, may apply within twelve days from the appointment of a guardian or guardians *ad litem* for him; and until such period has expired, the order is to have no force or effect against him.

By O. xvii. rr. 1—4, the former technical distinctions between supplemental bills, bills of revivor and supplement, and original bills in the nature of bills of revivor and of supplemental bills, are finally abolished.

By O. xvii. 8 (adapted from Cons. Ord. 32, r. 4), "when the Plt or Deft in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the Deft (or the person against whom the cause or matter may be continued) may apply by summons to compel the Plt (or the person entitled to proceed) to proceed within such time as may be ordered: and in default of such proceeding, judgment may be entered for the Deft, or, as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the Plt has died, execution may issue as in the case provided for by O. xlii. 23."

SECTION II.—DISPENSING WITH AND APPOINTING REPRESENTATIVES.

1. *Order to carry on Proceedings without a Represve*—O. XVI. 46.

UPON motion, &c. by counsel for all parties, and upon reading the order dated, &c., and an affidavit of &c., whereby it appears that J. and H., two of the grandchildren of G., the testator in the writ named, are dead, and that there is no legal pers. represve to either of them, This Court doth order, that the proceedings in this action, and the inquiries and several other matters directed by the order, dated &c., be carried on and prosecuted, notwithstanding the absence of any person representing the respective estates of the said J. and H.—*Gladwin v. Gladwin*, M. R., 8 Feb. 1853, A. 422.

For admon order, dispensing with the represves of deceased exors and trustees, where persons not *sui juris* were interested, see *Whittington v. Gooding*, 10 Ha. xxix.

2. *Order appointing Plt to represent deceased Plts*—O. XVI. 46.

UPON motion, &c. by counsel for the Plts, and upon reading an affidavit of &c., This Court doth order, that the Plt. W. be appointed to represent the estates of the Plts G., E. &c., respectively deceased, for the purposes of this action.—*Vince v. Walsh*, V.-C. W., 11 June, 1853, B. 893; *Walker v. Daniell*, V.-C. B., 5 Nov. 1874.

3. *Order at the Hearing appointing a Deft to represent deceased Defts.*

THIS action coming on &c., This Court doth order that the (trial of this action) do stand over; and the Deft E. by his counsel consenting hereto, It is ordered that the Deft E. be appointed to represent the estate of the Deft H., deceased, and also the estate of the Deft D., deceased, for all the purposes of this action.—See *Joint Stock Discount Co. v. Brown*, V.-C. J., 24 May, 1870, A. 1499; 8 Eq. 376.

4. *Appointment of Persons to represent various Classes in order to decide Questions of Construction*—O. XVI. 32.

UPON motion for judgment &c., Let the following &c.: 1. An inquiry whether any of the persons who were the next of kin, according to the Statutes for Distribution &c., of the testator P., died before the — day of — (*period for distribution of the estate*), and if so, whether any of such next of kin left any child or children them respectively surviving, who died before the said — day of —, and any child or children who survived that date; And in case it shall appear that any of the said next of kin so dying left any such child or children who died before the said — day of —, then Let the Plt be at liberty to apply in Chambers to have a proper person appointed to

represent such child or children so dying, for the purpose of obtaining the judgment of the Court upon the construction of the will of the said testator; And in case it shall appear that any of the said next of kin so dying left any such child or children who survived that date, then Let the Plt be at liberty to apply in Chambers to have one of the said last-mentioned children, if any are still living, and if they are all dead, then a proper person, appointed to represent such last-mentioned children for the purposes aforesaid;—Inquiry as to death and preserves of legatees; and Let the Plt be at liberty to apply in Chambers for the appointment of proper persons to represent, for the purpose of obtaining the judgment of the Court on the construction of the testator's will, the following persons and classes respectively, that is to say, 1. The persons who were at the death of the testator his next of kin according to the Statutes for Distribution, &c.; 2. The heir-at-law of the testator at the time of his death; 3. The children, if any, of the said heir-at-law, who died before the said — day of —; 4. The children, if any, of the said heir-at-law, who survived the said — day of —; — Certificate in respect of the matters aforesaid to be made independently of the certificate in respect of the inquiries hereinafter directed. Usual admon judgment of personal estate. See *Re Peppitt's Estate, Chester v. Phillips*, V.-C. B., 16 Dec. 1876, B. 3544; 4 Ch. D. 230.

## NOTES.

By O. XVI. 9, "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf, or for the benefit, of all persons so interested."

This rule adopts the practice of the Court of Chancery, that where several persons are interested in establishing and contesting a particular right, individuals may be selected on the one side as Plts to assert, and on the other as Defts to contest, the claim, and the right may be finally determined in an action thus constituted, so as to bind all parties, though not actually present as parties to the action: see *Comrs. of Sewers v. Gellatly*, 3 Ch. D. 610, 615; and see Dan. 267.

Under this rule a part owner of a ship may sue on behalf of himself and his co-owners: *De Hart v. Stevenson*, 1 Q. B. D. 313.

When numerous persons have the same interest, if one of them is sued as a Deft an order should be obtained in the form "It appearing that the residuary legatees [or other class] are numerous, and that A. is one of them, order that A. do defend on behalf of or for the benefit of all persons so interested," and when such an order is made the absent parties are bound as though they had been present throughout: *May v. Newton*, 34 Ch. D. 718.

In a bondholders' action, an order having been made in favour of the class represented by the Plt, a dissentient member of the class could not appeal; but, *semble*, his proper course was to apply to the Court below to be made Deft: *Watson v. Cave*, 17 Ch. Div. 19. Where Plts sued on behalf of a class except Deft, but did not obtain an order enabling the Deft to be sued as representing dissentients, another member of the class was at his own instance made Deft to represent all such dissentients: *Fraser v. Cooper, Hall & Co.*, 21 Ch. D. 718.

In the case of the ordinary action by a creditor for admon of a deceased debtor's real and personal estate, the writ must be indorsed with a claim on behalf of himself and all other the creditors: *Re Royle, Fyer v. R.*, 5 Ch. D. 540; *Worraker v. Pryor*, 2 Ch. D. 109; *Re Vincent*, 26 W. R. 94; not following *Cooper v. Blissett*, 1 Ch. D. 691; *secus*, where admon of personal



estate only is sought: *Re Blount, Naylor v. B.*, 27 W. R. 865; *Re Greaves, Bray v. Tofteld*, 18 Ch. D. 554.

By r. 32, "in any case in which the right of an heir-at-law, or the next of kin, or a class, shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain, who is or are such heir-at-law, or next of kin, or class, and the Court or a Judge shall consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before such heir-at-law, next of kin, or class, shall have been ascertained by means of inquiry or otherwise, the Court or Judge may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin, or class so represented."

In illustration of this rule, see *Re Peppitt's Estate, Chester v. Phillips*, 4 Ch. D. 230, Form 4, *sup.*, in which case questions as to the meaning of the words "heirs" and "children" arose on a will, and great difficulty in discovering the heir was apprehended; and see *Re Gardiner*, W. N. (87) 59.

On the decease of an interested person without a legal pers. reprieve, the Court, under O. xvi. 46, may proceed in the absence of a reprieve, or appoint one for the purposes of the cause, matter, or proceeding, on such notice, if any, as it thinks fit. And the order so made, and any consequent orders, are to bind the deceased's estate as if a duly constituted legal pers. reprieve had been a party to the cause, matter, or proceeding.

The rule is adapted from 15 & 16 V. c. 49, s. 44 (now repealed), which was held to be generally applicable only in cases where, from insolvency or some other cause, there was difficulty in obtaining representation to the deceased: *Long v. Stone*, Kay, App. xii.; *Davies v. Boulcott*, 1 Dr. & Sm. 23; *Bliss v. Putman*, 29 Beav. 20.

The application is usually made by *ex parte* motion, but the order may be obtained at the hearing: *Mendes v. Guedalla*, 10 W. R. 485; *Hewitson v. Todhunter*, 22 L. J. Ch. 76; *Re Peppitt, Chester v. Phillips*, 4 Ch. D. 230, Form 4, *sup.*; and see Dan. 210; D. C. F. 64, 65; or, if required in respect of matters pending at Chambers, by *ex parte* summons: and see *Ashley v. Taylor*, 10 Ch. D. 768.

Before drawing up the order, notice should be given to the person entitled to administer: *Davies v. Boulcott*, 1 Dr. & Sm. 23; *Joint Stock Discount Co. v. Brown*, 8 Eq. 376, 380.

Under 15 & 16 V. c. 86, s. 44, now repealed by 46 & 47 V. c. 49, the intention being that the Court should have power either to appoint a person to represent the estate, or to go on without a reprieve, if it considered that the interests of the estate were sufficiently protected (see *Joint Stock Discount Co. v. Brown*, 8 Eq. 380), a wide discretion was given and exercised as to appointing or dispensing with a reprieve: *Tarratt v. Lloyd*, 2 Jur. N.S. 371; *Hewitson v. Todhunter*, 22 L. J. Ch. 76.

Accordingly the Court has dispensed with the reprieve of a person in the same interest with the Plt: *Cox v. Taylor*, 22 L. J. Ch. 910.

—with the represves of some members of classes of children entitled under a will *per stirpes* or *per capita*: *Abrey v. Newman*, 17 Jur. 153.

—with a reprieve of one of two exors who had died intestate and insolvent, and to whom representation could not be obtained: *Moore v. Morris*, 13 Eq. 139; *Band v. Rundle*, 2 W. R. 331; *Rogers v. Jones*, 1 Sm. & G. 17.

But a reprieve could not be dispensed with:

—where the estate of the deceased person was that which was being administered, or against which relief was sought in the action: *Silber v. Stein*, 1 Drew. 295; *Rowlands v. Evans*, 33 Beav. 202; *Bruiton v. Birch*, 22 L. J. Ch. 911; or, being subject to liability, was not otherwise represented in the action: *Cox v. Stephens*, 11 W. R. 929.

—nor where the reprieve of the deceased person had active duties to perform: *Fowler v. Bayldon*, 9 Ha. App. lxxviii.

—nor to enable the solrs of a sued party to receive a small sum out of Court: *Rawlins v. M'Mahon*, 1 Drew. 225.

—nor where Deft in a foreclosure action died insolvent before foreclosure absolute: *Aylward v. Lewis*, (1891) 2 Ch. 81.

The Court would not appoint a person against his will to represent the

estate of a deceased person : *P. of Wales Co. v. Palmer*, 25 Beav. 605 ; *Hill v. Bonner*, 26 Beav. 372 ; *Joint Stock Discount Co. v. Brown*, 8 Eq. 380 ; and see *Re Curtis and Betts*, W. N. (87) 126 ; nor where there was personal responsibility attached to the position : *Fyfe's Case*, 17 W. R. 870.

The proper person to be appointed was the person who would be appointed *admor ad litem* : *Dean of Ely v. Gayford*, 16 Beav. 581 ; and where the will was disputed, the person named as exor : *Hill v. Ld. Bexley*, 15 Beav. 340 ; *Robertson v. Kemble*, W. N. (67) 305.

The reprieve of a policy holder who died insolvent and intestate was dispensed with in an action by an equitable mortgagee of the policy against the insurance co., the next of kin disclaiming and declining to take out admon : *Curtius v. Caledonian Ins. Co.*, 19 Ch. Div. 534 ; but *quere*, whether the mere fact of the insolvency of the assured would be sufficient : *Webster v. British Empire Ass. Co.*, 15 Ch. Div. 169.

Where a sole Plt died insolvent and intestate, a person to represent his estate was appointed, so that the Deft might have some one against whom to move for dismissal for want of prosecution : *Wingrove v. Thompson*, 11 Ch. D. 419.

## CHAPTER X.

## CONSENT AND COMPROMISE.

1. *Judgment or Order made by Consent.*

AND the Plt and the Defts A. and B. [or all parties] by their counsel consenting to the following judgment [or order], This Court doth order &c.

This form is to be used where the judgment or order contains several directions, all of which are consented to; in other cases the words "by consent" should preface the particular direction, as in Form 2, and every order made by consent should show that fact on its face: *Michel v. Mutch*, 34 W. R. 251.

2. *Direction inserted by Consent in Judgment or Order.*

AND it is by consent ordered, &c.

For forms of waivers, undertakings, or submissions prefatory to decrees, judgments, or orders, see *inf.* Chap. XIV., "FRAME OF JUDGMENTS."

3. *Stay of Proceedings on the Terms of a Compromise.*

UPON motion &c. that the Defts might be restrained &c., And upon reading &c., And the Defts having paid to the Plt the sum of £— (*agreed sum*) in full satisfaction of all damages and costs, This Court doth by consent order [*state terms of the proposed compromise,—as that the Defts be at liberty to carry up and build their building &c. to the top of the third storey from the ground, and to roof the same in with a slanting roof as shown in the plan made by P., in the Plt's affidavit mentioned, the Defts by their counsel undertaking not to carry the said building higher than the top of the said third storey from the ground with such slanting roof as aforesaid*]; And it is ordered that all further proceedings in this action be stayed, except such as may be necessary for enforcing this order.—See *Fawcett v. Neville, Greenlay v. Neville*, Lush, J., for V.-C. H., 23 Oct. 1878, A. 2013, 2033.

For orders to stay proceedings upon terms imposed by the Court, see *inf.* p. 116.

## NOTES.

By the Jud. Act, 1873, s. 49, no order made by the High Court of Justice, or any Judge thereof, by the consent of the parties, shall be subject to any appeal, except by leave of the Court or Judge making such order.

*Prima facie* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them: *Stannard v. Harrison*, 19 W. R. 811; *Harrison v. Rumsey*, 2 Ves. 488; *Moss v. Leatham*, 2 Moo. P. C. 73, and cannot be varied or dis-

charged unless obtained by fraud, or collusion, or by an agreement contrary to the policy of the Court: see *Buck v. Fawcett*, 3 P. W. 242; *Bowker v. Hunter*, 2 Dick. 611, where agreements not to appeal were held bad; or if the consent was given without sufficient materials, or in misapprehension or ignorance of material facts, or for reasons which would enable the Court to set aside an agreement: see *Holt v. Jesse*, 3 Ch. D. 183, 4; *Davenport v. Stafford*, 8 Beav. 508; *Furnival v. Bogle*, 4 Russ. 142; *Exp. Banner, Re Blythe*, 17 Ch. Div. 480; and see *Carew v. Cooper*, 12 W. R. 767; *A. G. v. Tomline*, 7 Ch. D. 388; and though the mistake was on one side only: *Mullins v. Howell*, 11 Ch. D. 763. And the admission of an exor as to his testator's liability, if made *bonâ fide*, is binding on the residuary legatee: *Re Youngs, Doggett v. Revett*, 30 Ch. Div. 421.

Even on application of both parties a judgment by consent cannot be set aside, if a third person would thereby be prejudiced, *e.g.*, an alleged joint contractor with Deft: *The Belcairn*, 10 P. Div. 161; *Hammond v. Schofield*, (1891) 1 Q. B. 452.

As a general rule both the solr in the action (not, however, it seems, his clerks, unless specially authorized, see *Hodson v. Drewry*, 7 Dowl. Prac. Ca. 569) and counsel have power to bind their client by a contract or compromise, or abandonment of claim made in Court, unless the compromise includes matters not within the scope of the action, or their authority to compromise has been expressly restricted or prohibited, or the terms consented to by the client have, by misapprehension, been departed from: see *Lewis v. Lewis*, 45 Ch. D. 281; *Matthews v. Munster*, 20 Q. B. Div. 141; *Strauss v. Francis*, L. R. 1 Q. B. 379; *Rumsey v. King*, 33 L. T. N.S. 728; *Butler v. Knight*, L. R. 2 Ex. 109; *Re Wood*, 21 W. R. 104; *Thomas v. Harris*, 27 L. J. Ex. 353; *Prestwich v. Poley*, 18 C. B. N.S. 806 (limiting and explaining *Swinfen v. S.*, 2 D. & J. 381; 1 C. B. N.S. 364; 18 C. B. 485; *Fray v. Voules*, 1 Ell. & E. 839); *Pulling*, 103; *Cordery, Solicitors*, 54; and counsel has authority to consent not to appeal: *Re West Devon Great Consols Mine*, 38 Ch. Div. 51.

Until the judgment or order by consent has been drawn up, passed, and entered—but not afterwards—it is open to any of the parties to withdraw a consent given under mistake, misapprehension, or ignorance of material facts: *A. G. v. Tomline*, 7 Ch. D. 388; *Craven v. Stanley*, M. R., 5 May, 1876, Reg. Min. fo. 39; *S. C.*, 4 Ch. D. 251; and see *Rogers v. Horn*, 26 W. R. 432; but the consent, once given, cannot be withdrawn arbitrarily: *Harvey v. Croydon Union*, 26 Ch. Div. 249; *Elsas v. Williams*, 54 L. J. Ch. 336; *West Devon Great Consols Mines*, 38 Ch. Div. 51; *Holt v. Jesse*, 3 Ch. D. 177; or on the mere allegation that the consent was given inadvertently, without evidence of mistake or misapprehension: *Davis v. D.*, 13 Ch. D. 861.

A co. or corporation may be bound by consent to an order, or by the compromise of an action or claim in the same way as a private person: *Bath's case*, 8 Ch. D. 334; *Dixon v. Evans*, L. R. 5 H. L. 606, 618; but in order to bind a co., there ought, it seems, to be some formal proceeding, either by the action of the directors sitting as such, or something equivalent to a resolution of the shareholders in general meeting: *Miles v. New Zealand Alford Estate Co.*, 32 Ch. Div. 268.

An agreement by a local board compromising an action not being a contract necessary for carrying the Public Health Act, 1875, into execution, was enforceable though not under seal: *A. G. v. Gaskill*, 32 Ch. D. 537.

In the case of infants, the Court, though it has power to sanction a compromise on their behalf (*v. inf.* Chap. XXXVIII., "INFANTS"; *Hopgood v. Parkin*, 11 Eq. 80), will not make an order affecting their interests, by arrangement, unless satisfied that it will be for their benefit, and that it has been consented to by their next friend or guardian *ad litem*, and also by their solrs or counsel: *Re Birchall, Wilson v. B.*, 16 Ch. Div. 41 (where Jessel, M. R., stated the practice adopted by himself and his predecessor). A next friend has no authority to bind the infant by a compromise which is only for the next friend's benefit, as by agreeing after non-suit not to appeal in consideration of the Deft not asking for costs: *Rhodes v. Swithinbank*, 22 Q. B. Div. 577. An inquiry may be directed to ascertain whether the compromise is for the benefit of the infant.

A trustee in bankruptcy, suing in that capacity, has the right of an

ordinary litigant to compromise the action: *Leeming v. Lady Murray*, 13 Ch. D. 123.

As to incapacity of reprieve Defts to consent to judgment against those whom they represent, see *Rees v. Richmond*, 62 L. T. N.S. 427.

As to the effect of an order of compromise in an admon action made in the presence of the parties and sanctioned by the Court, and rescinding a contract for the purchase of land by the testator, on the terms that the vendor should retain the deposit money, see *In re Cockcroft, Broadbent v. Groves*, 24 Ch. D. 94, 101.

A *bonâ fide* compromise of a real claim is a good consideration, whether the claim would have been successful or not: *Miles v. New Zealand Alford Estate Co.*, 32 Ch. Div. 266; approving *Cook v. Wright*, 1 B. & S. 559; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Ockford v. Burelli*, 20 W. R. 116; and questioning *Exp. Banner, Re Blythe*, 17 Ch. Div. 480.

There is no rule that parties may not compromise an action without the intervention of their solrs, but they must do so honestly, and not with intent to cheat the solrs of their proper charges: *The Hope*, 8 P. Div. 146; and see *Dunthorne v. Bunbury*, 24 L. R. Ir. 6; and the solr's lien for costs attaches to money received by way of compromise, where it is in substance the fruit of the action: *Ross v. Burton*, 42 Ch. D. 190; *Moxon v. Sheppard*, 14 Q. B. D. 627; and see *inf.* Chap. XL., "SOLICITORS." Where an order was made directing taxation of costs and staying all proceedings, except for the purpose of enforcing a compromise, as the parties were the only persons who could apply to enforce the agreement, the solr could not obtain payment of his costs under it: *Rowlands v. Williams*, 53 L. T. N.S. 135.

A compromise entered into after Plt's death and before grant of admon was enforceable by the admix, as the admon related back to the death: *Baker v. Blaker*, 55 L. T. N.S. 723.

Where proceedings are compromised, an order may be made by consent in the terms of the agreement of compromise, at the trial, or on any interlocutory application, or on appeal: see *Fawcett v. Nevile*, Form 3, *sup.* p. 111; *Re Briscoe's Trusts*, 20 W. R. 504; *Hopgood v. Parkin*, 11 Eq. 80.

Or an independent application may be made to stay proceedings on the terms of the agreement: *Eden v. Naish*, 7 Ch. D. 781.

Such an application may be made by summons or motion: *S. C.*; or in cases of complication, by petition: *Dawson v. Newsome*, 8 W. R. 725; *Dan.* 1543.

Upon such an application the Court will enforce the agreement against an unwilling party to it, even though it includes proceedings in different Divisions: *Eden v. Naish*, *sup.*; *Scully v. Lord Dundonald*, 8 Ch. D. 658; *et v. inf.* Chap. L., "SPECIFIC PERFORMANCE."

An order by consent dismissing an action for want of prosecution, unless it proceeds upon a compromise of the action, is no bar to another action between the same parties in respect of the same subject-matter: *Magnus v. Nat. Bk. of Scotland*, 58 L. T. N.S. 617; but see *Parker v. Simpson*, 18 W. R. 204.

Proceedings to set aside a judgment or order by consent, on the ground of fraud or misrepresentation, should be taken by commencing an original action, as in other cases of judgments obtained by fraud, and not by interlocutory application in the action compromised, even though it be still pending: *Gilbert v. Endean*, 9 Ch. D. 259, 266; *Emeris v. Woodward*, 43 Ch. D. 185; and see *Flower v. Lloyd*, 6 Ch. D. 297.

A compromise of divorce proceedings was made an order of Court in Q. B. D.: *Smythe v. S.*, 18 Q. B. D. 544; and as to the jurisdiction of the Court under Jud. Act, 1875, s. 24 (7), to enforce a compromise in the winding up of a company, see *Re Gaudet Freres Steamship Co.*, 12 Ch. D. 882.

## CHAPTER XI.

## DISCONTINUANCE AND DISMISSAL.



## SECTION I.—DISCONTINUANCE OF ACTION.

1. *Judgment after Notice of Discontinuance*—O. xxvi. 3.

THE Plt having by a notice in writing wholly discontinued his action, and the Taxing Master having taxed the costs of the Deft at £—, as by the certificate of taxation dated &c. appears, It is this day adjudged that the Deft B. do recover against the Plt A. the said sum of £—.

2. *Order to Discontinue*—O. xxvi. 1.

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Defts, and upon reading &c., this Court doth [*if so, by consent*] order that this action be discontinued; And it is ordered that the Plt A., do on or before &c., pay to the Defts B. and C. their costs of this action, to be taxed [*if so, where discontinuance is as to one of several Defts, add:*] And such discontinuance and payment of costs are to be without prejudice to the question by whom, or out of what fund, such costs shall be ultimately borne.

3. *Counter-claim dismissed by Consent.*

UPON the application &c., It is, by consent, ordered that the counter-claim delivered by I. stand dismissed out of this Court as against B. without costs.—*Union Bank of London v. Ingram*, M. R. at Chambers, 19 April, 1877, B. 798.

## NOTES.

By O. xxvi. 1, "the Plt may, at any time before receipt of the Deft's defence, or after the receipt thereof, before taking any other proceeding in the action (save any interlocutory application), by notice in writing wholly discontinue his action against all or any of the Defts, or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such Deft's costs of the action, or, if the action be not wholly discontinued, his costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule provided, it shall not be competent for the Plt to withdraw the record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or

any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a Deft, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn, or struck out; but it shall not be competent to a Deft to withdraw his defence, or any part thereof, without such leave."

By Cons. Ord. 23, r. 13, upon which the above order was founded, a dismissal of the bill, upon the Plt's own application after the cause was set down to be heard, or, on his default at the hearing, was, unless the Court otherwise ordered, equivalent to a dismissal on the merits, and might be pleaded in bar to a second suit for the same matter.

Under this rule, the Plt, notwithstanding a pending motion for an injunction, was entitled to dismiss his bill with costs: *Markwick v. Pawson*, 4 N. R. 528; and see *Curtis v. Lloyd*, 4 My. & Cr. 194.

By O. xxvi. 3, a Deft may enter judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn if the action be not wholly discontinued, in case such costs are not paid within four days after taxation.

The application to discontinue or to dismiss may, if the Deft consents, be by petition of course, but otherwise by motion or summons.

An application to dismiss certain Defts with their costs, but without prejudice to the question by whom, or out of what fund, such costs should ultimately be paid, may be made by motion *ex parte*: see *Berndston v. Churchill*, W. N. (66) 8; *Clements v. Clifford*, 14 W. R. 22.

The parties by whom, and to whom, the costs are to be paid should be named in the order, with a view to suing out process under O. xlii. 17; and see *Re Leeds Banking Co.*, 1 Ch. 150.

A written notice by the Plt's solrs stating that they are "instructed not to proceed further with the action," is a sufficient notice of discontinuance: *The Pomerania*, 4 P. D. 195; but see *Moore v. Dickinson*, 38 W. R. 278; 63 L. T. N.S. 371.

The words "taking any other proceeding in the action," refer to a proceeding which is with the view of continuing the action, not of putting an end to it, as by taking out of Court money paid in satisfaction of claim: *Spencer v. Watts*, 23 Q. B. D. 350.

Discontinuance of action puts an end to an appeal, which will be simply struck out: *Conybeare v. Lewis*, 13 Ch. Div. 469.

An amendment which entirely alters the ground of action cannot be treated as a discontinuance: *Bourne v. Coulter*, 53 L. J. Ch. 699; 50 L. T. N.S. 321.

Plt is not entitled to discontinue his action after it has been entered for trial: *Matthews v. Antrobus*, 49 L. J. Ch. 80.

After a finding of the arbitrator in favour of the Deft on all material points, the Plt will not be allowed to discontinue his action: *Stahlschmidt v. Walford*, 4 Q. B. D. 217.

Where Plt is induced to discontinue by improper action of Deft (e.g., by adducing false evidence), the remedy for consequent loss is by an independent action: *United Telephone Co. v. Tasker*, 59 L. T. N.S. 852.

Discontinuance by Plt does not put an end to a counter-claim by Deft: *McGowan v. Middleton*, 11 Q. B. Div. 464; overruling *Vavasour v. Krupp*, 15 Ch. D. 474.

By O. xxvi. 4, "if any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the Court or a Judge may, if they or he think fit, order a stay of such subsequent action until such costs have been paid."

An action in the High Court, where the subject-matter is under 10*l.*, will be dismissed with costs; the High Court having now only the jurisdiction the Court of Chancery and Courts of Common Law had before the Judicature Act: *Westbury-on-Severn Rural Sanitary Authority v. Meredith*, 30 Ch. Div. 387.

Under O. xix. 7, a further and better statement of the nature of the claim or defence, or further and better particulars, may be ordered upon such terms as to costs or otherwise as may be just; and r. 8 provides that an order for particulars shall not operate as a stay of proceedings, unless the order otherwise provides.

For forms of orders for particulars, see R. S. C. Appx. K, Forms 11, 12, 12a, 13; and as to particulars generally, *v. sup.* pp. 36, 37.

## SECTION II.—STAY OF PROCEEDINGS.

1. *Proceedings stayed until Satisfaction of Judgment in another Division.*

UPON motion &c., This Court doth order that all further proceedings in this action be stayed until after the Plt shall have paid to the Defts the sum of £—, which by the judgment of the Q. B. Division, dated &c., in an action wherein &c., was awarded to be paid by the Plt C. to the Defts M. and G. for their costs of the defence of the said action in the Q. B. Division.—Direction for taxation and payment by the Plt C. of the costs of the Defts M. and G. of this motion.—*Cannot v. Morgan*, V.-C. M., 16 Dec. 1875, A. 1937.

2. *Stay of Proceedings until Payment of Costs by Plt.*

UPON motion &c. for the Defts, And upon hearing counsel for the Plts, and upon reading &c. (*order directing taxation and payment of costs by Plts, the Taxing Master's certificate, &c.*), This Court doth order that all further proceedings in this action be stayed until the costs by the said order directed to be taxed and paid be paid by the Plts W. &c. to the Defts B. &c.; And the Defts' costs of this application, and consequent thereon, are to be costs in the action.—*White v. Bromige*, V.-C. H., 4 Aug. 1877, B. 1620.

For the subsequent order to dismiss the action for want of prosecution without further order, in default of payment of such taxed costs by a day specified, see *S. C.*, SECT. III., *inf.* 119.

For order upon adjourned summons staying all further proceedings in an action, on the ground that it was frivolous, vexatious, and an abuse of the process of the Court, see *Edmunds v. A. G.*, V.-C. M., 9 March, 1878, A. 627; 26 W. R. 550.

3. *Stay of Proceedings without Costs on Submission by Defts to Plt's Demand.*

UPON motion &c. for the Defts &c., and the Defts (*exors of a will under which Plt claimed an annuity*) by their counsel undertaking to pay to the Plt the sum of £—, and it appearing that the Defts have set apart a sufficient sum to meet the annuity of £— in the statement of claim mentioned, This Court doth order that all further proceedings in this action be stayed, but without costs to either party.—See *Rudd v. Rowe*, V.-C. J., 30 June, 1870, B. 1936; 10 Eq. 610.

4. *Stay of Proceedings on Terms.*

UPON the application of the Deft &c.; And both parties by their solrs consenting to this order, and the Plt, by his solr, undertaking, after payment of his costs, hereinafter mentioned, to vacate the registration of the charge registered by him &c., and to enter up satisfaction of the judgment and execution in the action in the Q. B. Division, It is



ordered that upon the Deft paying to the Plt B. the sum of £— due to the Plt upon an agreement dated &c., and interest thereon at the rate of £— p. c. per ann. from the — day of —, and also the costs of the Plt as mortgagee, to be taxed &c., all further proceedings in this action be stayed.—*Beal v. Morris*, V.-C. H. at Chambers, 24 March, 1879, A. 653.

## NOTES.

Proceedings in an action may be stayed:—

(a.) If the writ of summons has been issued without the authority or privity of the solr whose name is indorsed thereon, in which case “no further proceedings shall be taken thereupon without leave of the Court or a Judge”: O. VII. 1.

(b.) If, in an action by partners in the name of a firm, the Plts or their solr fail to comply with a demand in writing by the Deft for a declaration in writing of the names and places of residence of all the persons constituting the firm—but, “when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the Plts in the writ”: *Ib.* r. 2.

(c.) If any question of law, which it would be convenient to have decided before any evidence is given, or any question or issue of fact is decided, has been directed to be raised for the opinion of the Court by special case, or in such other manner as the Court or a Judge may deem expedient, in which case “all such further proceedings as the decision of such question of law may render unnecessary, may thereupon be stayed”: O. XXXIV. 2; and see *Dixon v. Rowe*, 35 L. T. N.S. 548.

The Court has jurisdiction to restrain a creditor whose debt is *bonâ fide* disputed from presenting a petition to wind up a solvent co.: *Cercle Restaurant Castiglione Co. v. Lavery*, 18 Ch. D. 535.

An action for malicious prosecution is not necessarily frivolous and vexatious because the prosecution was by a trustee in bankruptcy brought by order of the Court: *Mittens v. Foreman*, 58 L. J. Q. B. 40.

For form of order, where repeated frivolous applications had been made, prohibiting any further applications without the leave of the Court, see *Grepe v. Loam*, *Bullel v. Grepe*, 37 Ch. Div. 168, *v. inf.* Chap. XXIV.

An action may also upon summons at Chambers be stayed as frivolous, vexatious, and an abuse of the process of the Court: *Daukins v. Prince Edward of Saxe Weimar*, 1 Q. B. D. 499; *Edmunds v. A. G.*, 26 W. R. 550; 47 L. J. Ch. 345; *Castro v. Murray*, L. R. 10 Ex. 218; and see *Lawrance v. Lord Norreys*, 39 Ch. Div. 213; *Willis v. Earl Beauchamp*, 11 P. Div. 59; *Macdougall v. Knight*, 25 Q. B. Div. 1; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

If the Plt's title to sue has, since judgment, been put an end to, *e.g.*, in an admon action by revocation and fresh grant of admon, all further proceedings may be stayed on the application of the person who has acquired the title to sue: *Houseman v. H.*, 1 Ch. D. 535.

Proceedings may also be stayed without costs where the Deft offers to comply with the Plt's demand, and would have done so if applied to before suit: *Rudd v. Rowe*, 10 Eq. 610, Form 3, *sup.*

If the Plt has been ordered to pay, or give security for costs, or to do any act, proceedings in his action may be stayed until compliance with such order, and in default the Deft may take proceedings to obtain an order to dismiss for want of prosecution.

Mere non-payment of costs of interlocutory proceedings by a Plt is not a ground for staying proceedings: *Re Wickham*, *Marony v. Taylor*, 35 Ch. Div. 272 (dissenting from *Re Youngs*, *Doggett v. Revett*, 31 Ch. D. 239, and *Re Neal*, *Weston v. Neal*, 31 Ch. D. 437); *Morton v. Palmer*, 9 Q. B. D. 89; *secus*, where payment of costs is vexatiously withheld and an application is made before trial: *Re Wickham*, *sup.*; but where a Plt having failed in one action, brings another action for the same cause, the second action must be stayed until the costs in the first have been paid: *McCabe v. Bank of Ireland*, 14 App. Cas. 413; *Martin v. Earl Beauchamp*, 25 Ch. D. 12; *Morton v. Palmer*, *sup.*; though in the second action the Plt sues in a different character,

if substantially by virtue of the same alleged title: *Martin v. Earl Beauchamp*, *sup.*; and see *Peters v. Tilly*, 11 P. D. 145; *Denis v. Gorman*, 4 L. R. Ir. 356; and where an action by a married woman by a next friend was dismissed for non-compliance with an order for security for costs, a second action by her by another next friend against same Defts, for same cause, was stayed until the costs of the first action were paid: *Re Payne, Randle v. P.*, 23 Ch. Div. 288.

For case in which proceedings have been stayed pending security for damages, see *Richards v. Howell*, W. N. (83) 159, 168.

As to staying proceedings where concurrent actions are brought in this country and in a foreign country, on the ground "*nemo bis vexari*," &c., and that such proceedings cannot be regarded as vexatious where there is a better remedy in the foreign Court, see *McHenry v. Lewis*, 22 Ch. Div. 397; *Peruvian Guano Co. v. Bockwoldt*, 23 Ch. Div. 225; *Hyman v. Helm*, 24 Ch. Div. 531; *Re Christiansberg*, 10 P. D. 141; *Thornton v. T.*, 11 P. D. 176; *Mutrie v. Binney*, 35 Ch. Div. 614.

The Court has jurisdiction, under sect. 85 of the Companies Act, 1862, to restrain *quasi* criminal proceedings against a co. by a common informer, for the recovery of penalties: *Re Briton Medical Ass. Assoc.*, 32 Ch. D. 503.

A groundless action against official liquidators in their personal capacity was stayed: *Graham v. Edge*, 20 Q. B. Div. 683.

As to staying proceedings in action for recovery of land by next friend of *non compos*, where Court is of opinion that the action is not beneficial to the *non compos*, see *Waterhouse v. Worsnop*, 49 L. T. N.S. 140.

As to staying proceedings in action by exor before probate, see *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294, following *Webb v. Adkins*, 14 C. B. 401.

As to the jurisdiction to stay proceedings for administration in this country on it appearing that proceedings equally beneficial to infant Plt are pending in a Scotch Court, see *Ewing v. Orr-Ewing*, 9 App. Cas. 34.

As to staying proceedings under foreclosure judgment against will of Deft, see *Blake v. Hurvey*, 29 Ch. Div. 827, and *inf.* Chap. XLVII. "MORTGAGES."

By O. LVIII. 16, an appeal is not to operate as a stay of proceedings under the decision appealed from except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order. As to stay of proceedings pending appeal, *v. inf.* Chap. XXXVI. "APPEALS."

As to transfer and consolidation of actions, *v. inf.* Chap. XXXIV.

### SECTION III.—DISMISSAL FOR WANT OF PROSECUTION.

#### 1. Order to dismiss for not delivering Statement of Claim—

O. XXVII. 1.

UPON motion &c. by counsel for the Defts, who alleged that the Plt issued his writ of summons in this action against the Defts, and that the Plt being bound to deliver a statement of claim, the Defts duly appeared to the writ of summons in this action, and gave notice that they required a statement of claim, but that the Plt has not delivered any statement of claim within the time limited for that purpose, as by an affidavit of &c., filed &c., appears; and upon reading &c. [*enter evidence, and if Plt does not appear, an affidavit of service of notice of the motion on him, or, and upon hearing counsel for the Plt*], This Court doth order that the Plt's action do stand dismissed out of this Court for want of prosecution, with costs to be taxed &c. And it is ordered that the Plt A. do pay to the Defts B. &c. the amount of their said costs when taxed.

2. *The Like—In Default of Answer to Interrogatories, or Discovery, or Inspection of Documents—O. XXXI. 21.*

UPON motion &c. by counsel for the Deft, who alleged that the Deft duly delivered interrogatories in writing for the examination of the Plt, and that by an order, dated &c., the Plt was directed to answer the said interrogatories [*or that by an order, dated &c., it was ordered: Recite direction for Plt to give discovery or inspection of documents*], and that the Plt having been duly served with the said order, has failed to comply therewith, as by the affidavit of &c., filed &c., appears; Whereupon, and upon reading the said order and affidavit, This Court doth order that this action do stand dismissed &c. [Form 1].

Under this rule a party failing to comply with an order to answer interrogatories, or for discovery or inspection, is also liable to attachment, *et v. sup.* Chap. VIII., "EVIDENCE."

3. *The Like—In Default of giving Notice of Trial—O. XXXVI. 12.*

UPON the application of the Deft &c., And upon hearing the solrs for the applicant and for the Plt, It is ordered that the Plt S., do on or before &c., give notice to the Deft of the trial of this action; And in default thereof, it is ordered that this action do stand dismissed out of this Court for want of prosecution, without further order, with costs, to be taxed &c.

For like order, with direction that the costs are to include the Deft's costs of an application for injunction and receiver, see *Crick v. Hewlett*, Pearson, J., 24 July, 1884, A. 1147; 27 Ch. D. 354.

4. *Plt out of Jurisdiction—Dismissal for Want of Prosecution in Default of Security for Costs.*

WHEREAS by an order, dated &c., it was ordered that the Plt should, on or before &c., procure some sufficient person on her behalf to give security, according to the course of the Court, by bond to the Deft, in the penal sum of £100, conditioned to answer costs, in case any costs should be awarded to be paid by the Plt M., or in lieu thereof the Plt M. was to be at liberty to lodge in Court, to the credit of &c., "Security for Costs," the sum of £100; Now upon the application of the Deft H., and upon hearing the solrs for the applicant and for the Plt, and upon reading &c., It is ordered that the Plt M. do give security for costs, or lodge the said sum of £100 in Court, as directed by the said order, within one month from the date of this order, or in default thereof it is ordered that this action do, without further order, stand dismissed out of this Court for want of prosecution, with costs to be taxed; And it is ordered that in that case the Plt M. do pay to the Deft H. the amount of her costs when taxed; And it is ordered that in the meantime all further proceedings in this action be stayed.—*Patritzke v. Harris*, V.-C. H. at Chambers, 27 April, 1878, B. 1132.

### 5. Dismissal in Default of Payment by Plt of Costs under former Order.

Uxor motion &c., by counsel for the Defts, who alleged that the Plts had not paid to the Defts the sum of £—, the amount of the costs taxed under the order dated &c.; And upon reading an affidavit of &c., of service of notice of this motion, an order dated &c. (*directing taxation and payment of costs by the Plts*), the certificate of taxation filed &c., an affidavit of &c., This Court doth order that the Plts A. &c., do on or before the — day of —, pay to the Defts B. &c., the said sum of £—, being the amount of the said taxed costs; And it is ordered that in default of such payment this action do, without further order, stand dismissed out of this Court, with costs, including the costs of this application, such costs to be taxed &c.; And it is ordered that the Plts A. &c., do pay to the Defts B. &c., the amount of their said costs when taxed.—*White v. Bromige*, V.-C. H., 31 Jan. 1878, B. 290; 26 W. R. 312.

Unless the words “without further order” are inserted, a further order to dismiss upon default being made will be necessary.

#### NOTES.

##### DISMISSAL FOR WANT OF PROSECUTION.

A Deft may obtain an order to dismiss the Plt's action for want of prosecution—

(a) If the Plt being bound to deliver a statement of claim does not deliver the same within the time allowed for that purpose (six weeks from Deft's entry of appearance, see O. xx. 1 (a)): O. xxvii. 1.

(b) If the Plt fails to comply with an order to answer interrogatories or for discovery or inspection of documents: O. xxxi. 21.

(c) If the Plt fails to give notice of trial within six weeks after the close of the pleadings, or within such extended time as may be allowed: O. xxxvi. 12. And so if in London or Middlesex notice is given, but the trial is not entered within six days, as required by O. xxxvi. 16, so that the notice is “no longer in force”: *Crick v. Hewlett*, 27 Ch. D. 354.

It seems that in the Chancery Division the application to dismiss for want of prosecution should be made at Chambers rather than by motion in Court: per Jessel, M. R., in *Freason v. Lowe*, 26 W. R. 138; but if there is reason to expect a contest the motion is properly made in Court: *Evelyn v. E.*, 13 Ch. D. 138. If notice of motion is given, and Plt does not at once submit to speed the cause, and tender the costs of the notice, the Deft, if the usual order is made, will have his costs of the motion in Court: *Ibid.*; and see *Pascoe v. Richards*, 29 W. R. 330; *Thomas v. Palin*, 21 Ch. D. 360.

If the Plt, who has made default in pleading, has become bankrupt, the trustee in bankruptcy must be served with notice of the application to dismiss: *Wright v. Swindon Rail. Co.*, 4 Ch. D. 164.

And see *Price v. Richards*, 9 Eq. 35, where the trustee of a creditor's deed of assignment executed by Plt pending suit was ordered within three weeks to take proper proceedings for the purpose of prosecuting the suit, and in default that the bill be dismissed without further order.

Where the Plt appears and gives an explanation of his delay, he is generally put under an undertaking to take further proceedings within some short limited period (a week or fourteen days), and ordered to pay the costs of the application: see *Higginbottom v. Aynsley*, 3 Ch. D. 288; *Sutton v. Huggins*, W. N. (75) 235; and the order ought to provide that in default of his taking the particular step within the period limited, the action shall stand dismissed without further order.

If at the end of such extended time the required step has not been taken, the action is at end, and cannot be restored by subsequent order: see *Whistler v. Hancock*, 3 Q. B. D. 83; *Script Phonography Co. v. Gregg*, 59 L. J. Ch. 406; nor will the consent of the parties to enlarge the time avail: *King v. Davenport*, 4 Q. B. D. 402.

Filing interrogatories for the examination of the Plt did not affect the Deft's right to dismiss for want of prosecution: *Jackson v. Iviney*, 1 Eq. 693; nor an order on Plt to give security for costs, with stay of proceedings, obtained by the Deft: *Le Grange v. McAndrew*, 4 Q. B. D. 210.

A Deft who has become bankrupt may move to dismiss: *Levi v. Heritage*, 26 Beav. 560; *secus*, a Deft in contempt, until his contempt is cleared: *Vowles v. Young*, 9 Ves. 173; or unless the Plt has so acted as to waive the contempt: *Herrett v. Reynolds*, 2 Giff. 409.

And non-compliance with an order to make a further affidavit of documents, obtained, but not served on him, does not prevent a Deft from moving to dismiss: *Howe v. Grey*, 16 L. T. N.S. 345.

Where an action has been dismissed for want of prosecution, the same not having been set down, the Plt may bring a new action, but must pay the costs of the old one first: *Re Orrell Colliery Co.*, 12 Ch. D. 681; 28 W. R. 145; and see *Magnus v. National Bank of Scotland*, 36 W. R. 602.

The costs of an action dismissed for want of prosecution are in the discretion of the Court or Judge under O. LXV. 1; and by sect. 49 of the Judicature Act, 1873, the exercise of that discretion is not the subject-matter of appeal, except by leave of the Court or Judge making the order: *Snelling v. Pulling*, 29 Ch. Div. 85.

On a motion to dismiss for want of prosecution under O. XXXVI. 12, or that the Plt should give security for costs, the Court has discretion to order the Plt to give security: *Willmott v. Freehold House Property Co.*, 33 W. R. 554.

One Deft cannot move to dismiss for want of prosecution for non-delivery of reply where Plt has, with his knowledge, consented to an extension of time as to other Defts, so that the pleadings are not closed: *Ambrose v. Evelyn*, 11 Ch. D. 759.

## SECTION IV.—DISMISSAL AT THE HEARING.

### 1. Dismissal of Action.

THIS action coming on &c. [*Recitals as in Form 1, p. 124*], This Court doth order that this action do stand dismissed out of this Court [*if so*, without costs as against the Defts B. and C., and] with costs as against the [other] Defts, such costs to be taxed by the Taxing Master (in case the parties differ); And it is ordered that the Plt A. do pay unto the Defts [*name all the Defts who are to have costs*] the amount of their said costs when taxed.

For various usual directions as to costs, see Chap. XVII. For costs out of a fund in Court, see Chap. XVI.

### 2. Judgment for Deft.

THIS action coming on &c., This Court doth order and adjudge that the Plt do recover nothing against the Deft; and that the Deft do recover against the Plt the sum of £— for his ascertained costs of defence [*or his costs of defence to be taxed &c.*].

### 3. Dismissal of Action when Plt does not appear—O. xxxvi. 32.

THIS action coming on for trial [the — day of — and] this day before this Court, in the presence of counsel for the Deft, no one appearing for the Plt, although the Deft has been served by the Plt with notice of trial; And upon hearing counsel for the Deft, This Court doth order that this action do stand dismissed out of this Court with costs, &c. [Form 1].

### 4. Judgment dismissing Action in Default of Plt's Appearance set aside, and Action restored on Payment of Costs of the Day—O. xxvii. 15; xxxvi. 33.

UPON motion &c., and upon hearing counsel for the Deft, It is ordered that the judgment in this action, dated &c., whereby it was ordered that the Plt's action should stand dismissed out of this Court with costs, be set aside; And it is ordered that the Plt C. do pay unto the Deft J. his costs occasioned by this action being placed in the paper of causes for hearing on the — day of —, and of this application, such costs to be taxed &c.; And upon payment of the said costs it is ordered that this cause be restored to the list of actions for trial before this Court.—*Cockle v. Joyce*, Fry, J., 16 Nov. 1877, A. 2010; 7 Ch. D. 56.

#### NOTES.

By O. xxxvi. 31, "if when a trial is called on, the Plt appears and the Deft does not appear, then the Plt may prove his claim so far as the burden of proof lies upon him."

In order to complete such proof the Plt will be required to prove service of notice of trial on the Deft: *Cockshott v. London Cab Co.*, 26 W. R. 31; but see *Chorlton v. Dickie*, 13 Ch. D. 160; 28 W. R. 228.

If the Plt (having given notice of trial) does not appear when the action is called on for trial, the Deft is entitled, under O. xxxvi. 32, to judgment dismissing the action with costs: see *Farrell v. Wale*, 36 L. T. N.S. 95; and will not be required to prove that he has been served with notice of trial: *James v. Crow*, 7 Ch. D. 410 (not following on this point *Cockle v. Joyce*, *ib.* 56); and see *Erp. Lows*, *ib.* 160; *Re Palmer, Skipper v. S.*, 32 W. R. 83.

If the Deft has a counter-claim he must, in order to obtain judgment on it, prove the claim so far as the burden of proof lies on him: see O. xxxvi. 32.

Where one of several Defts has, in default of notice of trial by the Plt, given notice of trial under O. xxxvi. 12, his co-Defts cannot, it seems, have the action dismissed as against them, at least if they have not been served with the notice of trial: see *Tatton v. Lond. & Lanc., &c. Co.*, 8 Eq. 450.

As to notice of trial, and entering the action for trial, see Chap. XII.

On payment of the costs of the day and of the application, an action which has been dismissed for non-appearance of the Plt, or in which judgment has been obtained by the Plt in the absence of the Deft, through mistake on the part of his solr, may be restored to the paper: *Birch v. Williams*, 24 W. R. 700; *Burgoine v. Taylor*, 9 Ch. D. 1; and see *Southampton Steamboat Co. v. Rawlins*, 11 Jur. N.S. 230.

The application to set aside a judgment obtained in default of appearance at the trial, must be made within six days after the trial: O. xxxvi. 33; and see *Walter v. James*, 34 W. R. 29; but an extension of time has been granted when the default was that of the solr and not of the party who applied within six days after hearing that the trial had taken place: *Michell v. Wilson*, 25 W. R. 380.

An appeal to set aside such a judgment will not be encouraged: *Vint v. Hudspeth*, 29 Ch. Div. 322.

An application to set aside a judgment by default was refused, the defence of the Deft making the application having been struck out for wilfully refusing production of documents: *Haigh v. H.*, 31 Ch. D. 478.

A judgment dismissing an action with costs carries the costs of a motion by the Plt which stood over until the trial, and was not then brought on: *Gosnell v. Bishop*, 38 Ch. D. 385.

Where a solr brings an action without authority, the order will be that he pay the costs of the Plt as between solr and client, and those of the Deft as between party and party, following the common law practice as preferable to the old Chancery practice: *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. Div. 310; *Nurse v. Durnford*, 13 Ch. D. 764; and *quare*, whether solr and client costs might not, in special cases, be given to Deft as well as Plt: *Andrews v. Barnes*, 39 Ch. Div. 133.

As to dismissal of third party, when the whole matter cannot be disposed of at one trial, see *Schneider v. Batt*, 8 Q. B. Div. 701.

Where the decision on a point of law under O. xxv. 2, substantially disposed of the whole action, the action was dismissed: *Percival v. Dunn*, 29 Ch. D. 128; *O'Brien v. Tyssen*, 28 Ch. D. 372.

#### RES JUDICATA.

As to the requisites to constitute *res judicata*, see *The Duchess of Kingston's case*, 2 Sm. L. C., 8th ed. 832; *Caird v. Moss*, 33 Ch. Div. 133, at p. 28 (per Kay, J.).

An unsuccessful litigant cannot be allowed to commence the litigation anew upon the mere allegation of an additional fact; he must be able to show that such fact entirely changes the aspect of the case, and that information of it was not, and could not by reasonable diligence be obtained by him before: *Phosphate Sewage Co. v. Malleon*, 4 App. Cas. 801.

An unsatisfied judgment against one joint contractor is a bar to an action against the other joint contractor on the original judgment: *Cambefort & Co. v. Chapman*, 19 Q. B. D. 229; *Kendall v. Hamilton*, 4 App. Cas. 504, including a *feme covert* bound only as to her separate property: *Hoare v. Niblett*, 39 W. R. 491.

Where damage to goods and injury to person are caused by one and the same wrongful act, distinct causes of action arise, and judgment in respect of the damage to the goods is no bar to a subsequent action in respect of the personal injury: *Brunsdon v. Humphrey*, 14 Q. B. Div. 141.

In pleading *res judicata*, it is not necessary to set forth in detail the pleadings in the previous action; but the Court will look at them in order to judge whether the same questions were at issue: *Houston v. Marquis of Sligo*, 29 Ch. Div. 448.

Whether a previous judgment obtained before trial, but after writ issued, can operate as *res judicata*, *quare*: *Houston v. Marquis of Sligo*, *sup*.

After money had been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement, on the ground that such construction was contrary to the intention of all parties, could not be maintained: *Caird v. Moss*, 33 Ch. Div. 22.

There can be no *res judicata* in respect of an issue the finding of which was not necessary to the decision in the previous case, but which was merely decided incidentally: *Concha v. C.*, 11 App. Cas. 541; and as to the meaning of "incidentally," see *Priestman v. Thomas*, 9 P. Div. 210.

As to the effect of a previous county court judgment, see *Clarke v. Yorke*, 52 L. J. Ch. 32; *Webster v. Armstrong*, 54 L. J. Q. B. 236.

A petitioner in divorce proceedings is not precluded from repeating charges of adultery contained in a previous petition which has been dismissed: *Hall v. H.*, 48 L. J. P. D. 57.

## CHAPTER XII.

## TRIAL AND JUDGMENT.

## SECTION I.—TRIAL.

1. *Judgment at Trial by Judge without a Jury.*

[Date and Title.]

THIS action coming on for trial [the — day of —, and] this day, before this Court, in the presence of counsel for the Plt and for the Defts [if any persons not named in the title appear, name them, or, if some of the Defts do not appear, for the Plt and the Deft B., no one appearing for the Defts C. and D., although they were duly served with notice of trial as by the affidavit (if filed before date of judgment, of &c., filed the — day of —) appears], upon reading the pleadings, an affidavit of the Deft B., in answer to interrogatories, the admissions in writing, dated &c., and signed by the solrs for the Plt and the Deft B., and the several documents therein referred to, the exhibits marked K. and L., produced to W. on his examination taken orally before this Court this day [or on the — day of —], and upon hearing the evidence of the said W. upon such examination, and what was alleged by counsel on both sides [or for &c.]: This Court doth declare &c. And this Court doth order and adjudge &c.

See R. S. C. Appx. F., Form 6. For forms of entering evidence, and for schedule of witnesses and exhibits when they are numerous, *v. inf.* pp. 127, 128 *et seq.*

2. *If Standing for Judgment.*

THIS Court did order that this action should stand for judgment, and this action standing for judgment this day in the paper, in the presence of counsel for the Plt and the Defts: This Court doth &c.

For forms of orders as to trials of issues or questions of fact, or of fact and law before a Judge with or without jury or assessors, *v. inf.* Chap. XXII., "ISSUES;" or by a referee, Chap. XXVI., "REFERENCES."

MODES OF STATING UNDERTAKINGS, &C., AND OF READING  
EVIDENCE IN JUDGMENT.

3. *Waiver and Undertaking.*

THE Deft B. having by his counsel waived and relinquished [or by his counsel waiving &c.] his right, if any, to charge or be allowed



compound interest under or by virtue of the several instruments in the pleadings mentioned, or any or either of them, and having also undertaken [*or, and also undertaking*] not to take any proceedings against the Defts C. &c., or either of them, under or in respect of such instruments, or any or either of them, without the leave of this Court, Let &c.: see *Moss v. Bainbrigge*, 6 D. M. & G. 335, 344; L. JJ., 17 Feb. 1855, B. 485.

#### 4. *Submission and Waiver.*

THE Plts by their counsel submitting to account as this Court may direct, and the Deft by his counsel waiving all claim to compensation for delay alleged to have been occasioned by the Plts in the execution of the works in, &c., done, or to be done, Let &c.—*E. L. Ry. v. Hattersley*, V.-C. W., 6 July, 1849, A. 1923; 8 Ha. 95.

#### 5. *Acts of Parliament.*

An Act of Parliament passed in the 9th year of the reign of her present Majesty Queen Victoria, intituled, "An Act" &c.

#### 6. *Wills, Probates, Letters of Administration.*

The will of A., dated &c. [Thirty years from the date of the death of the testator.]

The probate of the will of A., granted on the — day of — to B.

Letters of admon to the estate of A., granted on the — day of —, 18—.

Letters of admon to the estate of A., with his will annexed, granted on the — day of — to B.

A certified official extract of the will of A., proved by B. on the — day of —.

The confirmation of the nomination of B. and C., as exors of the will of A., granted by the Commissary Court of Aberdeenshire, on the — day of —, 18—, and re-sealed by the Probate Division on the — day of —, 18—.

Testament dative of A. granted by the Commissary Court of B. on the — day of —, 18—, to C., and re-sealed &c.

#### 7. *Opinion of Scotch Court on Case.*

A certified copy of the opinion, pronounced at Edinburgh, on the — day of —, by the Lords of the (First Division of the) Court of Session in Scotland, on the case and questions set forth in the Schedule to the order dated, &c.—*Trappes v. Meredith*, L. C., 24 Dec. 1871, B. 3301.

#### 8. *Extract from the Land Registry.*

An official extract from the record of title to lands on the Register of the office of Land Registry, of estates with an indefeasible title No. 327.—*Re Winter*, M. R., 25 Jan. 1873, B. 158; 15 Eq. 156.

9. *Institution of Clerk.*

An official extract from the Registry of the Diocese of L., of the admission and institution of C. (Clerk), M.A., to the rectory of H., in the county of G., diocese of L.—*Re Rector of Hallingbury*, V.-C. W., 30 June, 1871.

10. *Receipt for Legacy Duty on Residue.*

The residuary account of the estate of A., deceased, Reg. A. 1872, folio 59, and the official receipt for legacy duty indorsed thereon, dated &c.

11. *Receipt for Duty on Legacy.*

The official receipt, dated &c., Reg. A. 1872, folio 52, for legacy duty payable in respect of the legacy of &c., under the will of &c.

12. *Receipt for Succession Duty.*

The official receipt, dated &c., Reg. A. 1872, folio 52, for duty, payable in respect of the succession of &c., arising on the death of &c., under the will of &c.

13. *An Indenture.*

The indenture in the pleadings mentioned, dated &c., and made between &c. [and *if not thirty years old*, an affidavit of A., filed &c. proving the execution thereof by &c.].

14. *A Deed Poll.*

The deed poll in the pleadings mentioned, dated &c., under the hand and seal of &c. [and *if not thirty years old*, an affidavit of &c.].

15. *Power or Letter of Attorney.*

A deed poll [*or power of attorney*] under the hand and seal of A., and an affidavit of &c., proving the execution thereof [*or if so*, verifying the signature of the said A. to the said power of attorney].

16. *Pleadings.*

The statement of claim.

The statement of defence of the Deft B.

The statement in reply of the Plts, but the usual mode is to enter them as "the pleadings" simply.

Where the order is made upon admissions of fact in pleadings under O. xxxii. 6, the pleadings are entered as read.

17. *Affidavit in Answer.*

The affidavit of the Deft B. filed &c. in answer to the interrogatories delivered by &c.

18. *Depositions.*

The depositions of C. filed &c., and the exhibits therein referred to, the exhibit marked X. being &c. [*or the proofs taken in this action*].

19. *Evidence Rejected.*

The deposition of C., except paragraph No. —, the said paragraph of the deposition of the said witness and the exhibit marked X. therein referred to, having been tendered as evidence on behalf of the Defts, and rejected by this Court.—See *Moseley v. Baker*, V.-C. W., 19 Feb. 1848, B. 1163.

20. *Affidavits in Schedule where Parts Rejected.*

The several affidavits of the deponents named in the Schedule hereto, and the exhibits therein referred to, except such portions of the affidavits in the first part of the said Schedule as are specified in the fourth column of the said part of the said Schedule, such portion having been tendered as evidence on the part of the Plts and rejected by the Court: *Comrs. of Sewers v. Glasse*, M. R., 24 Nov. 1874, B. 552.

SCHEDULE.

Page of Affidavit.	Names of Deponents.	Dates when Filed.	Portions rejected.	Exhibits referred to.
7	Robert Allen.	21st May, 1876.	Par. 10. To the word "but" in line 27, page 7.	E. F. G.

21. *Evidence taken vivâ voce.*

The evidence of A. on his examination [*or cross-examination*] taken orally before this Court on the — day of &c., and the exhibits marked X., Y., Z. &c., produced to the said A. upon such examination [*or cross-examination*]; the said exhibit X. being an indenture dated &c., and made between &c., and the said exhibit Y. being a letter dated &c., written by B. to C. And see Form 1, p. 124.

22. *The Like—with Schedule.*

The evidence of the several persons named in the Schedule hereto, on their examinations taken orally before this Court upon the several days set opposite their names in the second column of the said Schedule, and [upon production of] the several documents and other exhibits produced to such persons on their said examinations, and respectively marked with the marks set forth in the third column

of the said Schedule, opposite to the names of such persons respectively.

SCHEDULE.

Witnesses examined on the part of the Plt.

Names of Witnesses.	Date of Examination.	Exhibits.
John Gray. &c.	13th July, 1888. &c.	J G1

23. *Notice and Admissions of Documents*—O. xxxii. 2.

A notice, dated &c., to admit certain documents as evidence, and the admissions thereof signed by &c., and the several documents therein referred to.—See *Moss v. Gregory*, M. R., 9 March, 1860, B. 413.

24. *Notice and Admissions of Facts*—O. xxxii. 4.

A notice dated &c., to admit certain facts and the admissions thereof signed by &c.

25. *Mutual or Voluntary Admissions.*

The admissions in writing dated &c., and signed by (Mr. —, the solr for) the Plt A., and by (Mr. —, the solr for) the Deft B., and the several documents therein referred to.

26. *Documents admitted at the Trial.*

And upon hearing the following documents produced in evidence and admitted by counsel on both sides, that is to say, six documents produced by the Deft and marked one to six, both inclusive, read &c.

27. *The like*—Schedule.

The several documents mentioned in the Schedule hereto admitted by all parties.

Where there are no admissions in writing, and the documents are admitted at the trial, each document must be marked by the registrar.

28. *Order to read Evidence taken de bene esse.*

The order dated &c., for the examination *de bene esse* of B., and an affidavit of D. [*a medical man stating that witness could not attend to be examined*].—*Outram v. O.*, V.-C. M., 21 Mar. 1877.

29. *Certificates of Baptism, Marriage, or Burial.*

An exhibit marked X. being an extract from the register book of baptisms [*or marriages, or burials*] for the parish of —, in the county of —, whereby it appears that A. was baptised [*or buried, or that A. and B. intermarried*] on the — day of &c.

30. *The like, under Registration Act, 6 & 7 W. 4, c. 86, s. 38.*

An exhibit marked X. being a copy of the entry, No. — in the certified copy of entries of births [*or deaths, or marriages*] in the — district of —, in the county of —, for the year — (given under the seal of the General Register Office), by which it appears that A. was born [*or died, or that A. and B. intermarried*] on the — day of —.

Where the certificates are numerous they may be specified in a Schedule: see next form.

31. *Exhibits specified in Schedule.*

The affidavit of A. filed &c., and the several certificates therein referred to and specified in the Schedule hereto.

SCHEDULE.

Mark on Exhibit.	Place.	Marriage, Baptism, Birth, Burial, or Death.	Date.	Name as in Certificate.
A.	Marylebone Parish Church, Middlesex.	Baptism.	18 June, 1815.	Arthur Jones.

32. *Baptism in India.*

An exhibit marked X., being an extract from the entries contained in a paper kept at the India Office received by the Secretary of State in Council of India, from Fort William, in Bengal, being certified copies of the entries of baptisms at Calcutta, Fort William, Bengal, A.D. —, by which it appears that A. was baptised on the — day of —.

33. *Death in Military Service in India.*

An extract from a list of military casualties reported to Government, and received by the Secretary of State in Council of India from Fort William, in Bengal, whereby it appears that A. died on the — day of —, at —.

34. *Shorter Form of entering Exhibits referred to in Affidavits or Depositions.*

An affidavit of —, filed the — day of —, and the several exhibits marked A., B., C., D. &c., therein referred to.

*Note.*—If the exhibits are accurately described, so as to identify them in the deposition or affidavit, the above form is sufficient; if not, or if for any reason a more particular entry is desired, the exhibits should be shortly described in the more exact forms above given.

*Endorsement by Registrar on Documents produced in Evidence.*

In the High Court of Justice, Chancery Division.

Mr. Justice X.

A. v. B.

The — day of —.

This will [or indenture, or deed poll, or letter, or document] marked X., was read in evidence on the trial of this action.

C. D., Registrar.

*Where produced to a Witness in Court.*

In the High Court of Justice, Chancery Division.

Mr. Justice X.

A. v. B.

The — day of —.

This exhibit marked X. was produced at the trial of this action [or the hearing of this petition, or motion, or summons], on the (cross-) examination of —.

C. D., Registrar.

The short title of the cause or matter should be always added, whether the exhibit is to be used in Court or in Chambers.

## NOTES.

Causes or matters assigned to the Chancery Division are to be tried by a Judge without a jury unless the Court or a Judge shall otherwise order: O. xxxvi. 3; and the question whether a Chancery action shall be tried by a jury is absolutely within the discretion of the Judge: *Gardner v. Jay*, 29 Ch. Div. 50, although there are two causes of action, only one of which is specifically assigned to that division: *Sheppard v. Gilmore*, 34 W. R. 179; *Lynch v. Macdonald*, 37 Ch. D. 227; 36 W. R. 419.

As to trial by jury, see *inf.*, Chap XXII., "Issues."

## NOTICE AND ENTRY OF TRIAL.

By O. xxxvi. 11, notice of trial may be given by the Plt or other party in the position of Plt with the reply (if any), whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial; but by r. 12, if the Plt does not within six weeks after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the Deft may, before notice of trial given by the Plt, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution.

A Deft cannot set the action down on motion for judgment: *Litton v. L.*, 3 Ch. D. 794.

The six weeks is not a "time appointed for doing any act or taking any proceeding" within O. LXIV. 7, and cannot be abridged by the Court: *Saunders v. Pawley*, 14 Q. B. D. 234.

The notice of trial (ten days, except in cases by consent, see r. 14, and B. S. C. Appx. B., Form 16) must be given before entering the trial, and must state whether it is for the trial of the action, or of issues therein, and is not to be countermanded, except by consent or leave given on such terms as to costs, or otherwise, as may be just: O. xxxvi. 13, 14, 15, 19.

A notice of trial before a Judge in Middlesex, headed "V.-C. Bacon," was held sufficient: *Gaines v. Arabon*, V.-C. B., 22 March, 1879; and see *Harris v. Gamble*, 7 Ch. D. 877.

By r. 34, the Judge may postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

As to trial before referees or with assessors, see Chapter XXVI., "ARBITRATIONS."

As to directing issues of fact to be tried before a jury, see Chapter XXII., "ISSUES."

Under O. xxxvi. 1, the Plt may lay the venue where he pleases, although the action is assigned to the Chancery Division by sect. 34 of the Jud. Act,

1873: *Philips v. Beale*, 36 C. D. 62; or to any Judge (r. 1a). The place of trial must be named in the original statement of claim: *Locke v. White*, 33 Ch. Div. 308.

Where the venue was laid at Liverpool, it was held that it was no sufficient ground to change it to Middlesex that the action was specially assigned to the Chancery Division: *Philips v. Beale*, 26 Ch. Div. 621.

In order to have the venue changed, the Deft must show serious injury to his case, and no injury to the Plt: *Shroder & Co. v. Myers & Co.*, 34 W. R. (C. A.) 261.

Pressure of business at the assizes is not a sufficient ground for remitting the action to the Judge of the Chancery Division to whom it is assigned: *Fairburn v. Household*, 53 L. T. 513 (C. A.); and see *Jackson v. Braithwaite*, 63 L. T. N.S. 231.

Where the balance of convenience is that an action should be tried in London, the venue will, on the application of the Deft be changed to Middlesex, though the Plt has by his claim named another venue: *Green v. Bennett*, 32 W. R. 848; 50 L. T. N.S. 706; *Powell v. Cobb*, 29 Ch. Div. 486.

Causes will not be heard in private without the consent of both parties, except in cases which affect lunatics, or wards of Court, or where the whole object of the suit would be defeated by a public hearing: *Andrew v. Rueburn*, 9 Ch. 522; *Nagle-Gillman v. Christopher*, 4 Ch. D. 173; *Badiſche Antlin v. Levinstein*, 24 Ch. D. 156; *Mellor v. Thompson*, 31 Ch. Div. 55; *Malan v. Young*, 53 J. P. 822.

### THIRD PARTY.

Under O. XVI. 52, where a third party appears, the Deft giving the third party notice may apply for directions, and the Court or a Judge may, if satisfied that there is a question proper to be tried as to the liability of the third party, order the question, as between the third party and such Deft, "to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct; and if not so satisfied may order such judgment as the nature of the case may require to be entered in favour of the Deft giving the notice against the third party."

The rules as to third parties do not apply to originating summonses: *Re Wilson, A. G. v. Woodall*, 45 Ch. D. 266.

No question can be determined between the third party and the Deft unless the order giving directions is obtained: *Piller v. Roberts*, 21 Ch. D. 198; and see *Tritton v. Bankart*, 56 L. J. Ch. 629.

If the third party on an application for directions declines to state any defence, judgment may be given against him: *Gloucestershire Banking Co. v. Phillips*, 12 Q. B. D. 533.

In *Coles v. Civil Service Supply Association*, 26 Ch. D. 529, the form of order was that the third party, who did not admit his liability, should have liberty to appear at the trial, and take such part as the Judge should direct, and be bound by the result, and that the question of his liability to indemnify the Deft should be tried at the trial of the action, but subsequent thereto.

This form of order will be adhered to whenever it gives the third party all reasonable protection, as a Plt ought not to be embarrassed and put to expense by persons who are not necessary parties to his action being allowed to proceed as though they were Defts: *Barton v. L. & N. W. Rail. Co.*, 38 Ch. Div. 144. Where such an order has been made the third party may appear by counsel and have the question tried immediately after the trial without having obtained directions as to pleadings or otherwise, as the Deft should obtain such directions if he desires them: *Blore v. Ashby*, 42 Ch. D. 682.

As to refusal to give directions, and dismissal of third party from the action where the Plt would be embarrassed by proceedings between him and the Deft giving the notice, see *The Bianca*, 8 P. D. 91; *Schneider v. Batt*, 8 Q. B. Div. 701.

The Court has power to order the third party to pay to the Plt the costs occasioned by his defence: *Piller v. Roberts*, 21 Ch. D. 198.

Where the Deft set up a defence which failed he paid the costs of the

action, but the third party being found liable to the Deft paid the costs of the third party proceedings: *Blore v. Ashby*, *sup.*

#### ENTERING THE ACTION FOR TRIAL—MARKING "SHORT."

Actions for trial in the Chancery Division are set down at the Chancery Registrar's office upon production of a copy of the notice of trial, on the list of the Judge to whose Court the action is attached, and unless marked "short," or advanced by order, come on for trial in their turn.

Unless within six days after notice of trial is given the trial shall be entered by one party or the other, the notice of trial shall be no longer in force: O. XXXVI. 16; see *Tonsley v. Heffer*, 19 Q. B. D. 153. And when the cause is not entered for trial within the time limited, the Deft may move to dismiss for want of prosecution: *Crick v. Hewlett*, 27 Ch. D. 354.

A Deft cannot set down the action on motion for judgment: *Litton v. L.*, 3 Ch. D. 794.

By O. XXXVI. 8, the Court or a Judge may in any cause or matter at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others.

An application under this rule to have one issue in an action tried before another will only be granted on very special grounds: *Piercy v. Young*, 15 Ch. D. 475.

Under O. XXXVI. 4, 6, an action proper to be tried by a jury will be ordered to be so tried, though commenced in the Chancery Division: *Coles v. Civil Service Supply Association*, 26 Ch. D. 529; but the onus rests with the party desiring this mode of trial: *Cardinall v. C.*, 25 Ch. D. 772; and that the Court has a discretion as to the mode of trial, see *Coote v. Ingram*, 35 Ch. D. 117.

All actions in which witnesses are to be examined before the Court must be certified as such by the Plt's solr, and thereupon will be so marked in the cause book. Usually special days or certain days of the week are fixed for the trial of actions and causes so marked.

Where any cause or matter becomes abated, or in the case of any change of interest under O. XVII., the Plt's solr must certify the fact to the proper officer, who will cause an entry thereof to be made in the cause book: O. XVII. 9. And by r. 10, any cause or matter standing over generally, or marked as "abated" for twelve months, shall be struck out. But a cause may for special reasons be ordered to stand over generally, notwithstanding this rule: *Brooke v. Todd*, 6 Jur. N.S. 664; 2 L. T. N.S. 480. When a cause has been struck out under this rule, the notice of trial is no longer in force, and another notice of trial must be given before the Plt can re-enter the cause for trial: *Le Blond v. Curtis*, 33 W. R. 561; 52 L. T. N.S. 574.

Actions may be marked "short," without the consent of the solrs for the Defts, on production of the certificate of the Plt's counsel that the cause or action is fit to be so heard.

If a Deft who has not consented can show any fair reason why the cause should not be heard as short, it goes into the general list, but counsel's certificate is *prima facie* ground for setting it down as short: *Felstead v. Gray*, 18 Eq. 92. When the Deft does not appear at the hearing, an affidavit of notice that it has been marked to be heard as short is required: *Molesworth v. Snead*, 11 W. R. 934. In *Dymonds v. Croft*, 24 W. R. 700, the notice filed as against a Deft (under O. XIX. 10) who had not entered appearance was held sufficient, although it did not state that the action had been marked short.

And unless by consent of all parties, it will not be marked so as to come on before the day for which the notice of trial has been given, or in the case of causes for further consideration, until after the expiration of ten days.

A cause is not fit to be heard short unless the evidence is by affidavit. Per M. R., W. N. (75) 193.

An action for rectification of a settlement is not proper to be heard as a short cause: *Clennell v. C.*, W. N. (84) 14.



As to motions for judgment heard as short causes, *v. inf.* Chap. XIII., "MOTION FOR JUDGMENT."

By O. xxxvi. 30, the party entering the action for trial must deliver to the proper officer two copies of the whole of the pleadings, one of which shall be for the use of the Judge at the trial. The other is for the use of the registrar.

If the solr neglects to deliver the papers, he may be personally ordered to pay the costs occasioned thereby: see O. LXV. 5.

#### DEFAULT OF EITHER SIDE APPEARING AT THE TRIAL—O. xxxvi.

By O. xxxvi. 31, 32, "if when a trial is called on, the Deft does not appear, the Plt may prove his claim, so far as the burden of proof lies upon him"; and "if the Deft appears, and the Plt does not, the Deft, if he has no counter-claim, is entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him."

The Plt is always required to prove service of notice of trial on the Deft: *Cockshott v. London General Cab Co.*, 47 L. J. Ch. 126; 26 W. R. 31; W. N. (77) 214; but see *Chorlton v. Dickie*, 13 Ch. D. 160; but Deft need not prove that notice of trial was served upon him: *Re Palmer, Skipper v. S.*, 49 L. T. N.S. 553; 32 W. R. 83; *Dacres-Patterson v. Foote*, W. N. (90) 70.

An affidavit of service of notice of trial must have been filed and produced in Court when the action was called on, or at latest before the rising of the Court the same day: *Lord Milltown v. Stuart*, 8 Sim. 34; but see *Seear v. Webb*, 25 Ch. Div. 84; and now the original affidavit of service, stamped with a proper filing stamp, may be handed to the registrar, who will send it to be filed: see O. xxxviii. 15.

By a communication from Cotton, L. J., dated 29th May, 1884, "the members of the Court of Appeal, after considering the subject of affidavits of service not sworn on the date of the order, think the registrars may, until an opinion of the Court is expressed to the contrary effect, accept affidavits of service sworn and filed at any time before the order is drawn up. But if the affidavit be sworn after the date of the order, the order is not to be post-dated, and the affidavit is not to be entered formally as evidence. The registrars are in such a case to make a memorandum in the margin of the order that the affidavit has been sworn and filed, and the recital may be introduced into the order, 'no one appearing for A. B., although duly served, &c., as by affidavit appears.'"

By O. xxxvi. 33, any verdict or judgment obtained where one party does not appear, may be set aside upon such terms as may seem fit, on application made within six days after the trial.

#### ENTERING EVIDENCE AS READ GENERALLY.

Every order contains a reference to the evidence on which it is made, and particularly notices the documentary evidence; generally specifying the nature of the document and its date, if any, or if it be referred to as an exhibit, either specially noticing the exhibit mark, or identifying the exhibit by reference to the affidavit or deposition.

Where the Deft is not called upon for his defence, but the Plt's action is dismissed on his own case, the Deft is entitled to have entered in the judgment as read all the evidence on which he intended to rely: *Manby v. Bewicke*, 3 Jur. N.S. 685; 5 W. R. 867; although the Deft's witnesses have not been cross-examined, as that may be done on appeal: *Chabard v. New Russia Co.*, M. R., 26 July, 1871, A. 2362.

Where the Plt fails on his own evidence, and the action is dismissed, the usual course is not to enter the evidence as read, but provide for the costs of it by a special direction: see *Singer v. Wilson*, 2 Ch. D. 448.

Affidavits used in support of an application ought to be entered as read, notwithstanding that they have been so entered in a chief clerk's certificate: *Mutual, &c. Society (C. A.)*, 6 Aug. 1885.

It is not for the registrar to state what facts are proved, but only what evidence is admitted; and for the Court itself to say what facts are established by it: *Trulock v. Robey*, 2 Ph. 396.

And it is material that the evidence should be entered in such a way as will show precisely what was received: *Watson v. Parker*, 2 Ph. 5; *M'Mahon v. Burchell*, *Id.* 137; although the judgment only directs issues or inquiries: *Parker v. Morrell*, *Id.* 453; *Drake v. D.*, 25 Beav. 641; thus when any evidence tendered is objected to, the Court should adjudicate on its admissibility, and either receive it or reject it, in which case that circumstance should be noticed in the judgment: *Forms*, p. 127. Evidence ought not to be entered as read *de bene esse*: *Watson v. Parker*, *Parker v. Morrell*, *supra*.

The entry of the evidence, followed by a statement that both sides consent that such entry should be without prejudice to its admissibility, is improper, as the Court should adjudicate on its admissibility: *M'Mahon v. Burchell*, 2 Ph. 137. This case and *Watson v. Parker*, and *Parker v. Morrell*, were followed by C. A. in *De Mora v. Concha*, 32 Ch. D. 133.

Where, to save time, documentary evidence was to be entered as read, if the parties could agree, and they could not agree, the Court permitted a rehearing, confined to the subject of the evidence: *Wylde v. Ward*, 1 Y. & J. 536.

Documents annexed to depositions taken in India, and referred to as exhibits, but omitted to be marked by the Commr, were by order on motion on notice allowed to be used as evidence: *Impey v. I.*, V.-C. E., 20 Feb. 1845, A. 866.

An application for leave to bring an action in the nature of a bill of review may be made to the High Court, although the judgment was made by the Court of Appeal: *Fulcke v. Scottish Imperial Insurance Co.*, 35 W. R. 794; 57 L. T. N.S. 39.

In *Lopdell v. Creagh*, 1 Bli. N.S. 255, after an appeal had been lodged in the House of Lords, an order made on motion in the Court below, expunging part of the evidence as entered by mistake, was reversed as irregular, the proper course being to apply to the House for leave to move in the Court below to rectify the mistake.

But in D. P. only the evidence entered in the decree could be looked at: *Fernie v. Young*, L. R. 1 H. L. 63.

So, on a motion to rectify minutes: *Eden v. E. Bute*, 1 B. P. C. 465. Where the evidence had not been in fact read or relied on, an order for entering the evidence as read, made on motion to rectify minutes, was reversed on appeal, but leave was given to re-hear the cause: *S. C.*; but see *Manby v. Bewicke*, 5 W. R. 867.

Where evidence is improperly admitted by the Court below and not objected to, the objection cannot be taken in the Court of Appeal: *Gilbert v. Endean*, 9 Ch. Div. 259.

Under O. xxxvii. 1, the Court may, in an admon action, and after the chief clerk has made his certificate, receive, if it think fit, fresh affidavit evidence on further consideration: *May v. Newton*, 34 Ch. D. 347.

As to the power of the Court of Appeal to receive further evidence, see O. LVIII. 4, and Chap. XXXVI., "APPEALS."

#### ENTERING DOCUMENTARY EVIDENCE.

A will proves itself thirty years from its date: *Mann v. Ricketts*, 7 Beav. 93, and cases there cited; but in *Charman v. C.*, M. R., 23rd March, 1808, A. 780, the thirty years were reckoned from the death of the testator, and this seems more reasonable, as the testator might live more than thirty years after the date of the will; and since the Wills Act, 1 V. c. 26, the will speaks only from the day of the death: and see Taylor, 111. In *Bulkeley v. Jones*, M. R., 23 July, 1856, A. 1560, a will dated in July, 1813, and proved in June, 1831, was received as evidence of title to land, but this decree went by default.

A will of which probate had not been granted was held to be evidence on production of an affidavit of one of the attesting witnesses: *Re Wickens' Trusts*, 27 W. R. 880.

Letters testimonial sealed by the Supreme Court of Victoria, setting forth *verbatim* a will of real estate made in the colony, and stating that it had been duly proved, were accepted as sufficient for the purposes of the usual preliminary judgment in a partition action: *Waite v. Bingley*, 21 Ch. D. 674;

but on petition by appointee under will for payment out of Court, probate in the Supreme Court of New Zealand was not sufficient: *E. Limehouse Bd. of Works, Re Vallance*, 24 Ch. D. 177.

For the purpose of construing a will the Court is entitled to look at the original: *Re Harrison, Turner v. Hellard*, 30 Ch. Div. 390.

In a pedigree case the will of the father or reputed father of a person whose legitimacy is disputed, is admissible evidence to disprove the legitimacy: *Murray v. Milner*, 12 Ch. D. 845.

And a declaration by A., in a draft will, that B. passed as his wife, was admissible in evidence as to the marriage of A. and B., and, being relevant, was not to be excluded because the document was not complete for its primary purpose: *In re Lambert*, 56 L. J. Ch. 122; 56 L. T. N.S. 15; but where the question was not pedigree, but infancy, a declaration by a deceased parent as to his child's age could not be received: *Haines v. Guthrie*, 13 Q. B. Div. 818.

For the practice with regard to documents which prove themselves, and generally as to documentary evidence, see Dan. 586; and as to proving exhibits *vivâ voce*, or by affidavit at the hearing, see O. XXXVII. 1; and see Dan. 607; a deed impeached by the answer cannot be so proved: *Hitchcock v. Carew*, Kay, xiv.; a witness summoned on a *subpœna duces tecum* need not be sworn: per Chitty, J., *Lewin v. L.*, 9 July, 1885. As to entries against interest by persons since dead, see *Taylor v. Witham*, 24 W. R. 877; *Bewley v. Atkinson*, 13 C. D. 283, 297; *Newbould v. Smith*, 29 Ch. Div. 127; *Massey v. Allen*, 13 Ch. D. 558.

Entries by a person in discharge of his official duty are only evidence of the facts therein stated, when the facts are parts of a transaction effected by such person himself, which it is his duty to record: *Polini v. Gray, Sturla v. Freccia*, 12 Ch. Div. 411; 5 App. Ca. 623.

An entry in a stockbroker's book is not admissible in evidence, either as a declaration against interest, or as an entry in the ordinary course of business by a person whose duty it was to make it: *Massey v. Allen*, 28 W. R. 212; 13 Ch. D. 558; and an entry in an agent's diary is not admissible unless it was his duty to make the whole entry: *Trotter v. Maclean*, 13 Ch. D. 574.

An unsigned entry in a book in which it appeared to be the practice to sign the entries, was not admitted as evidence: *Fox v. Bearblock*, 17 Ch. D. 429.

An entry of a payment of interest in a deceased creditor's book, which would have the effect of reviving a statute-barred simple contract debt, is not admissible in evidence as an entry against interest: *Newbould v. Smith*, 29 Ch. D. 882; but see *S. C.*, 14 App. Ca. 423.

And as to admission of a note book from the British Museum, a document out of the Cottonian MSS., and an entry in a parish church book, see *Bidder v. Bridges*, 34 W. R. 514.

The admission by the deceased person must have been actually against interest when made; an admission by a bankrupt that a debt is due is not admissible by reason of the mere possibility of there being a surplus after paying creditors: *Exp. Edwards, Re Tollemache*, 14 Q. B. Div. 415.

As to the admissibility of declarations by testator to prove contents of a lost will, see *Woodward v. Goulstone*, 11 App. Cas. 469.

The Gen. Ord. 43, of 26th Aug. 1841, as to proving exhibits by affidavit at the hearing, was not included in the Cons. Ord. 1860; but by Prel. Ord. r. 5, and now by O. LXXII. 2, the existing practice under it has continued. A deed could be proved as an exhibit at the hearing of a motion for decree: *Woodburn v. Grant*, 22 Beav. 487; but the Court has a discretion, and will not allow important evidence to be unexpectedly slipped in at the last moment; and where an order of course, to prove in support of the main issue a letter of which no notice had been given, was obtained during the hearing of a cause, the Court refused to allow proof: *Wilson v. Thornbury*, 10 Ch. 239.

Judgments in other Courts under Cons. Ord. 19, r. 4, and office copy proceedings in other Courts (*Manby v. Bewicke*, 3 Jur. N.S. 685; 5 W. R. 867), might be read without an order; but in *Hill v. Hibbit*, 7 Eq. 421, an application that evidence taken *de bene esse* in one suit might be read in another was refused, and in *White v. Cox*, 2 Ch. D. 397, V.-C. B. held that the bill, answer, and decree in another suit must be proved by an affidavit which should also prove the identity of the first Deft in that suit with the Plt in this; and proceedings in a Sheriff's Court in Scotland were admissible as to matters of pedigree: *Lyell v. Kennedy*, 14 App. Cas. 437.

By O. XXXVII. 3, an order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or Judge, to be obtained at the time of making such application, and in any other case by the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence: And *v. sup.* Chap. VIII., "EVIDENCE."

The report of a Judge of an Irish Court, and the shorthand notes of his judgment exhibited to an affidavit, were allowed to be used as evidence of what was decided in Ireland: *Houstoun v. M. of Sligo*, 29 Ch. Div. 448, 458.

A judgment may be proved by the production of a duly certified copy of an entry in the entry book of judgments of the Court in which the judgment was recovered: *Exp. Anderson, Re Tollemache*, 14 Q. B. Div. 606.

The file of the proceedings in bankruptcy is not in the nature of a record: *Exp. Bacon, Re Bond*, 17 Ch. Div. 447.

As to admissibility and effect of previous decrees and judgments as evidence in subsequent actions brought in assertion of prescriptive rights, see *Earl de la Warr v. Miles*, 17 Ch. Div. 535; *Neill v. Duke of Devonshire*, 8 App. Cas. 135.

By Jud. Act, 1873, s. 61, all writs and documents and exemplifications and copies thereof, purporting to be sealed with the seal of the district registry, shall be received in evidence without further proof.

And by O. VIII. 2, the production of a writ of summons which has been renewed is sufficient evidence of its renewal and of its original date.

Where two causes strongly resemble each other in point of fact, but the allegations of fact are not the same in each, the record of one cannot be referred to for the purpose of explaining or supplying anything in the other: *Gann v. Johnson*, L. R. 4 H. L. 265.

A press copy of a letter, in the handwriting of the Plt, scheduled to his affidavit of documents, was admitted as evidence on the part of the Deft, though objected to by the Plt as not proved: *Wilson v. Compton*, L. JJ., 26th Feb. 1874, B. 931.

Production by a witness of a copy of a letter made by him, which letter he swore he would have posted in the ordinary course of business, was held to be evidence of posting: *Trotter v. Maclean*, 13 Ch. D. 574.

A letter from the master of a ship to the owners is admissible as evidence against them in regard to facts therein stated, but the opinion of the master expressed in such letter is not evidence: *The Solway*, 10 P. D. 137; citing *Nothard v. Pepper*, 17 C. B. N.S. 39.

Verbal declarations or written entries by a deceased person against his interest are sufficient evidence of the truth: see *Bewley v. Atkinson*, 13 Ch. D. 283, 297; *Taylor*, 588.

The 13 & 14 V. c. 35, s. 28 (repealed by 46 & 47 V. c. 49), empowered the Court, at the hearing of the cause, or on further directions, to receive proof by affidavit of all proper parties being before the Court, and of matters requiring proof, before ordering payment of moneys belonging to any married woman, and of other matters not directly in issue in the cause.

As to what matters might and might not be so proved, see *Devey v. Thornton*, 9 Ha. 233; *Bush v. Watkins*, 14 Beav. 33; *Fowler v. Reynal*, 15 Jur. 1019; *Hoghton v. H.*, 15 Beav. 278; *Bear v. Smith*, 5 D. & S. 92; *Fallows v. Dillon*, 2 W. R. 507; *Bateman v. Margerison*, 2 W. R. 607; *Delevante v. Child*, 6 Jur. N.S. 118.

Now, by O. XXXVII. 1, the Court or Judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable. But whether this applies on motion for judgment, *qu.*: *Ellis v. Robbins*, 50 L. J. Ch. 512.

The 6 & 7 W. 4, c. 86, s. 38, enacts that all certified copies of entries purporting to be sealed or stamped with the seal of the General Register Office, shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry; but the identity of the person named in such certificate must be proved. Extracts from the district registries were not formerly received by the Court, but they are now generally admitted as evidence. In *Re Bunney*, M. R., 25th Feb. 1871, certificates signed by the Registrar General of New Zealand were accepted

without verification. And so also entries of baptisms in India were admitted: *Queen's Proctor v. Fry*, 4 P. D. 231.

And as to entries of marriages in India, see *Radcliffe v. R.*, 1 Sw. & Tr. 467; *The Peerless*, 1 Lush. 42.

A certificate of birth is not evidence of the date of the birth, but only of the fact of the birth having taken place before the date of registration: *Re Wintle*, 9 Eq. 373.

An entry in a baptismal register of the date of birth, though not *per se* proof that the child was born on the day stated, will not be rejected altogether as an item of evidence upon an inquiry as to the child's legitimacy: *Re Turner*, *Glenister v. Harding*, 29 Ch. D. 985; and see Taylor, *Evid.* (8th ed.) 1507.

A description of age and birthplace in the report of a foreign government, not material for the purpose for which the report was made, is not admissible as evidence of the facts therein stated: *Sturla v. Freccia*, 12 Ch. D. 411; 5 App. Ca. 623.

By the 33 & 34 V. c. 97, s. 80, and sched., a certified copy or extract of or from any register of births, baptisms, marriages, deaths, or burials, requires an adhesive penny stamp, which is to be cancelled by the person signing the copy or extracts.

Probate or letters of admon are not received as evidence of the death, but only to show who represents the deceased.

By the 14 & 15 V. c. 99, s. 7, foreign and colonial acts of state, judgments, &c., are provable by certified copies, without proof of seal or signature, or judicial character of the person signing the same.

Foreign law is a matter of fact, to be decided on the evidence of advocates practising in the Courts of the country whose law is to be ascertained; but if the witnesses in their evidence refer to any passage in the code of their country, as containing the law applicable to the case, the Court is at liberty to look at those passages and consider what is their proper meaning: *Concha v. Murietta*, 40 Ch. Div. 543.

By sect. 8, apothecaries' certificates are admissible without proof of seal; by sect. 9, documents admissible without proof of seal, &c., in England or Wales, are equally admissible in Ireland; by sect. 10, documents admissible without proof of seal, &c., in Ireland, are equally admissible in England and Wales; by sect. 11, documents admissible without proof of seal, &c., in England, Wales, or Ireland, are equally admissible in the colonies; by sect. 12, registers of British vessels, and certificates of registry, are admissible as *prima facie* evidence of their contents, without proof of signature, &c.; by sect. 13, conviction or acquittal of a person charged, may be proved by the certificate of the clerk of the Court.

By sect. 14, whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted. The officer is to furnish such copy or extract on being paid for it at the rate there mentioned.

Under sect. 14, extracts from parish registers of marriages, &c., purporting to be signed by the incumbent or his curate, are now received without further verification: *Re Hall*, 17 Jur. 29; 9 Ha. xvi.; *Re Porter*, 2 Jur. N.S. 349; *The Queen v. Weaver*, L. R. 2 C. C. R. 5.

As to extra-parochial registers, see 3 & 4 V. c. 92; and see 21 & 22 V. c. 25.

As to extracts from registers of births and baptisms in Scotland, as evidence of the marriage of the parents, see *Lyle v. Ellwood*, 19 Eq. 98.

Scottish parochial registers and certified extracts from them are receivable in evidence in England: *Lyell v. Kennedy*, 14 App. Ca. 437.

It being shown that foreign registers of births could not be removed, the contents of an entry were proved by a copy verified by a witness who had himself compared it with the original: *Burnaby v. Baillie*, 42 Ch. D. 282.

Copies of entries of baptisms and of marriages in India transmitted to the

India Office are admissible in evidence: *Queen's Proctor v. Fry*, 4 P. D. 231; *Ratcliff v. R.*, 1 Sw. & Tr. 467; *The Pierless*, 1 Lush. 42.

The report of a committee appointed by a public department in a foreign State, though addressed to that department and acted on by the government, is not necessarily admissible here as evidence of all the facts therein stated: *Sturla v. Freccia*, 5 App. Ca. 623.

A statutory certificate under seal of execution of works entitling a co. to a charge is only *primâ facie* evidence in favour of the co.: *Land-owners' W. of England Drainage Co. v. Ashford*, 16 Ch. D. 411.

The discretion given to the Bank of England of requiring stricter evidence of proof of title than is ordinarily admitted by the Court of Chancery, will not be interfered with: see 33 & 34 V. c. 71 (National Debt Act, 1870), s. 24: *Prosser v. Bank of England*, 13 Eq. 613; see also *Riseley v. Shepherd*, 21 W. R. 782; and directors of an insurance office were entitled to further evidence of death of c. q. vie than an order under 6 Anne, c. 27: *Doyle v. City of Glasgow Life Assurance Co.*, 53 L. J. Ch. 527.

By O. LXI. 7, all copies, certificates, and other documents appearing to be sealed with the seal of the Central Office shall be presumed to be office copies, &c., issued from the Central Office, and if duly stamped may be received in evidence without further authentication.

The 17 & 18 V. c. 125, s. 26, enacts that it shall not be necessary to prove by the attesting witness any instrument "to the validity of which attestation is not requisite," and such instrument may be proved by admission or otherwise, as if there had been no attesting witness.

On unopposed applications for payment of money out of Court, any deed required to be proved is usually required to be proved by the attesting witness: *Re Ray*, 1 Jur. N.S. 222; *Pedder v. P.*, M. R., 24th Nov. 1859, Reg. Min. f. 63; *Re Rice*, 32 Ch. Div. 35. And in non-contentious cases generally it is the rule that a deed should be proved by the attesting witness: per Cotton, L. J., in *Re Felthouse*, 14 June, 1884. If the attesting witness be dead, or abroad, or cannot be found, the proper course is to prove these circumstances, and the signature of the witness. Where the attesting witness was abroad, the Court of Appeal required an affidavit that an endeavour had been made to find a witness to prove his handwriting, before allowing the deed to be proved by proving the handwriting of the grantor: *Re Rice, sup.*, overruling *Re Muir*, 21 W. R. 749. A deed under seal requires proof of the delivery by the party, not merely of the signature. A power of attorney to receive money, though usually under seal, need not be so: *v. inf.*

Where all parties are represented, sect. 26 applies, and proof by the attesting witness can be dispensed with: *Worthington v. Moore*, Chitty, J., 24 Feb. 1891; 64 L. T. N.S. 338.

A party to a deed is, of course, competent to admit or to prove his own execution thereof; but where it has to be executed with certain formalities, *quære* whether he can admit or prove more than his own signature.

Absence of seal from deeds, there being no evidence that they ever had been sealed, rendered them invalid. Though it is unimportant what a seal is made of, yet there must be something in the nature of an impression on the deed: *Nat. Prov. Bk. v. Jackson*, 33 Ch. Div. 1.

By sect. 27, disputed writing may be compared by witnesses with any writing proved to be genuine, and the writings and evidence submitted to the Court and jury.

By the Bankers' Books Evidence Act, 1879 (42 & 43 V. c. 11), s. 3, a copy of any entry in a banker's books is (subject to the provisions of that Act) to be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded, in all legal proceedings, *i. e.* (see s. 10), any civil or criminal proceeding or inquiry in which evidence is or may be given, including an arbitration. Sect. 4 provides for the proof to be given that the book from which the entry is taken is a banker's book, and sect. 5 for the mode of verification of the copy. An affidavit of the manager of a bank setting out copies of certain entries from the bank books is *primâ facie* evidence of the entries: *Harding v. Williams*, 14 Ch. Div. 197.

An order giving liberty to inspect a banker's books, and to take copies, &c., may be made under the Bankers' Books Evidence Act *ex parte* on the application of any party to the pending legal proceedings: *Arnott v. Hayes*, 36 Ch. Div. 731.

Sect. 3 is not confined to legal proceedings in which the originals would be admissible as evidence, but makes the copies admissible evidence against, *e. g.*, entries in Deft's bankers' books evidence against Plt.

For orders under the Act, see *Henry v. Lawrill*, 27 May, 1880; *Doyle v. Mulhern*, 13 June, 1884; *Re Pickering's Estate*, *Pickering v. P.*, 2 Dec., 1884.

By O. xxxi. 15, no party may put in evidence any document referred to in his pleadings or evidence which he has failed to produce for inspection after notice to do so, unless he can satisfy the Court that he has some cause for not producing it: *Webster v. Whewall*, 15 C. D. 120. The effect of this rule and r. 17 is not to take away the privilege, but merely to impose a penalty: *Roberts v. Oppenheim*, 32 W. R. 654.

As to proving proclamations, orders, and regulations, issued by her Majesty, or by the Privy Council, or by the Treasury, the Admiralty, the Secretaries of State, the Board of Trade, or the Poor Law Board, see the Doc. Ev. Act, 1868, 31 & 32 V. c. 37; to which are added, by 33 & 34 V. c. 75, s. 83, the Education Department; by 33 & 34 V. c. 79, s. 21, the Postmaster-General; by 34 & 35 V. c. 70, s. 5, the Local Government Board; and by 40 & 41 V. c. 21, s. 51 (the Prison Act, 1877), rules under that Act. By the Doc. Ev. Act, 1882 (45 V. c. 9), s. 2, documents in the above-mentioned Acts referred to, printed under the superintendence of her Majesty's Stationery Office, are to be receivable in evidence.

As to proving declarations of nationality under the Naturalization Act, 1870, and entries in any register thereunder, and proving certificates of naturalization, and of re-admission to British nationality, see that Act (33 V. c. 14), s. 12. The usual qualified certificate under the Naturalization Act, 1870, effects only a partial naturalization, and a French subject does not, by taking out such a certificate, lose his French status, as he cannot be completely naturalized, except by authority of the French Government: *Re Bourgoise*, 41 Ch. Div. 310.

By 33 & 34 V. c. 75, s. 83, orders, minutes, certificates, notices, requisitions, and documents of the Education Department may be proved by the production of a copy purporting to have been signed by a secretary or under-secretary of the department.

#### STAMPS.

Stamp duties in general are now regulated by the Stamp Act, 1870, 33 & 34 V. c. 97; and see as to stamps on stock certificates to bearer, 44 & 45 V. c. 12, s. 46; as to bonds, conveyances, mortgages, settlements, contract notes, &c., 51 & 52 V. c. 8.

By s. 14 of the Stamp Act, 1891 (54 & 55 V. c. 39), which comes into operation on the 1st. Jan. 1892, it is provided that upon the production of an instrument chargeable with any duty as evidence in any Court of civil jurisdiction, or before an arbitrator or referee, notice shall be taken by the Judge, arbitrator or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one that may legally be stamped after the execution thereof, it may, on payment to the officer of the Court, whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and a further sum of £1, be received in evidence, saving all just exceptions, on other grounds. An instrument which was held to be a bill of exchange, and not an equitable assignment, could not be stamped: *Exp. Shellard*, 17 Eq. 109; but see *Bryce v. Bannister*, *inf.*

Hitherto it has been the duty of the registrar to call the attention of the Judge to the omission or insufficiency of the stamp. The duty of taking notice thereof is, by the above-cited section, cast upon the Judge, but the registrar is to receive the stamp duty and penalty, and the sum of £1, mentioned above; but though he omits to do so, yet all documents which have to be entered in the judgment must be duly stamped before the order is passed. Since the Customs and Inland Revenue Act, 1888 (51 & 52 V. c. 8), the amounts payable on deeds unstamped, or insufficiently stamped, produced in evidence, has been as follows:—(1.) The deficient amount of the duty. (2.) £10 penalty. (3.) £1 under sect. 16 of the Stamp Act, 1874. (4.) When the unpaid duty exceeds £10, interest on the deficiency at the rate of £5 per cent. per annum from the date of the deed until payment. (5.) An additional penalty equivalent to the whole (not the deficiency) of the stamp duty thereon,

unless a reasonable excuse for the delay in stamping, or for the omission to stamp, or the insufficiency of the stamp, be afforded to the satisfaction of the Judge.

Under s. 15 of the Stamp Act, 1891, the penalties are as follows, "save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped, after the execution thereof, on payment of the unpaid duty and a penalty of £10, and also by way of further penalty, where the unpaid duty exceeds £10, of interest on such duty at the rate of £5 per cent. per annum from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty."

Receipts for payments not duly stamped were received in evidence by consent. The Stamp Act not permitting the stamp to be added *ex post facto*, either with or without a penalty, the Court held it was not bound to object under the Act: *Orange v. Pickford*, V.-C. K., 4 June, 1860, Reg. Min. f. 79; following *Thompson v. Webster*, L. JJ., 21 July, 1859, Reg. Min. f. 121; 12th Nov. 1859, Reg. Min. f. 19.

Where an instrument is capable of being viewed in two different aspects involving different rates of stamp duty, it may be admitted in evidence, if relied on in the aspect in which it is properly stamped: *Adams v. Morgan*, 12 L. R. Ir. 1; 14 L. R. Ir. 140, citing *Buck v. Robson*, 3 Q. B. D. 686; *Bryce v. Bannister*, Ib. 569; *Fisher v. Calvert*, 27 W. R. 301.

Probate or letters of admon insufficiently stamped must be properly stamped before the judgment is drawn up.

An unstamped deed was allowed to be given as evidence of an act of bankruptcy: *Exp. Squire*, 4 Ch. 47.

The Court will not receive parol evidence of a written agreement never stamped; though fraudulently destroyed by the person against whom it is sought to be enforced: *Smith v. Henley*, 1 Ph. 391. *Secus*, where the evidence was a draft or other writing admitting of being stamped: *S. C.* 395; *Blair v. Ormond*, 1 D. & S. 428; *Bousfield v. Godefroi*, 5 Bing. 418. But in the absence of evidence it will be presumed that the agreement was stamped; and see *Gilchrist v. Herbert*, W. N. (72) 33, 133; Tayl. Ev. 168, 402; *Hart v. H.*, 1 Ha. 1, where, under the circumstances, the Court directed an inquiry what had become of the agreement.

Missing instruments are generally presumed to have been duly stamped unless some evidence to the contrary be given, when the burden of proof is shifted to the person setting up the instrument: Tayl. Ev. 168; *Marine Investment Co. v. Haviside*, L. R. 5 H. L. 624; *Closmadec v. Carrell*, 2 Jur. N.S. 474; *Cole v. Binks*, Kay, J., 25 March, 1885, where the action for specific performance was dismissed with costs.

In *May v. M.*, 33 Beav. 81, an unsatisfactory copy of a lost agreement was not allowed to be stamped in order to its being put in evidence.

All instruments executed out of the kingdom are liable to stamp duty, if they relate to property, or are to be acted upon within the kingdom; and also all instruments executed within the kingdom: 33 & 34 V. c. 97, s. 17; *Wright v. Commrs. of Inland Revenue*, 11 Exch. 458; 24 L. J. Exch. 49; and see *Grenfell v. Same*, 1 Ex. D. 242; and 34 V. c. 4, as to foreign securities.

Where, as in the case of some foreign deeds which are retained by the notary abroad, the Court acts on a copy, there is no provision for levying the stamp duty by stamping a copy: *Broun v. Collins*, Kay, J., 13 and 30 July, 1883, Reg. Min. Book, fo. 155.

A mortgage deed stamped only with a deed stamp and not with an *ad valorem* stamp, is not "duly stamped" within sect. 17 of the Stamp Act, 1870: *Whiting v. Loomes*, 14 Ch. D. 822; aff. 17 Ch. Div. 10.

An allotment letter though unstamped is receivable as evidence of the allotment having been received: *Re Whitley Partners*, *Steel's case*, 49 L. J. Ch. 176.

The Stamp Act, 1870, s. 51, sub-s. 2, includes bills payable on demand. A bill drawn in France on the Bank of England was properly stamped by the holder with a penny stamp: *Re Boyse*, *Crofton v. C.*, 33 Ch. D. 612.

As to whether an instrument should be stamped as a debenture or a promissory note, see *British India Steam Navigation Co. v. Commrs. of Inland Revenue*, 7 Q. B. D. 165.

An agreement for sale of goodwill was not a conveyance on sale within sect. 70 of the Stamp Act, 1870, although in equity the purchaser thereby



became owner: *Commrs. of Inland Revenue v. Angus*, 23 Q. B. Div. 579; but see now 52 V. c. 7, s. 18.

A charter-party executed entirely abroad, and stamped within two months after it is received in this country, can be received in evidence, since it falls within sect. 15, not sects. 67, 68: *The Belfort*, 9 P. D. 215.

A promissory note insufficiently stamped is not admissible as a receipt for the money: *Ashling v. Boon*, (1891) 1 Ch. 568; and as to document requiring to be stamped as an agreement or as a promissory note, see *Yeo v. Dawe*, 53 L. T. N.S. 125.

A letter amounting to an order for payment of money cannot be admitted in evidence if unstamped: *Re Whitting, Exp. Rowell*, 48 L. J. Bkey. 46.

A settlement of contingent reversionary interests in specified sums of stock vested in trustees, with power to vary securities at discretion, is liable to duty under sect. 3: *Onslow v. Commrs. of Inland Revenue*, 24 Q. B. D. 584; (1891) 1 Q. B. (C. A.) 239.

Sect. 11 of the Customs and Inland Revenue Act, 1889 (52 & 53 V. c. 7), amending sect. 38 (c) of the Act of 1881 (44 & 45 V. c. 18), has been held to be retrospective, so that the amended construction of the expression "voluntary settlement" was to be applied although the property had passed to the beneficiaries, and the proceedings to recover the duty been taken previously to the Act of 1889: *A. G. v. Theobald*, 24 Q. B. D. 557.

As to stamp on "policy of insurance for any payment by way of indemnity against loss or damage of or to any property," see *Mortgage Ins. Co. v. Commrs. of Inland Revenue*, 58 L. T. N.S. 769.

Compensation for loss of trade on compulsory sale of land under the Lands Clauses Act (Scotland) (8 & 9 V. c. 19), was held to be part of the consideration for sale: *Inland Revenue v. Glasgow & S. W. Rail. Co.*, 12 App. Cas. 315.

Court fees are to be paid by stamps, and no document is to be received in evidence unless properly stamped; but if any such document is received, filed, or used without the proper stamp through inadvertence or mistake, the same may be stamped under the direction of the Court or the person on whom the regulations are binding, and under such conditions as may be prescribed by the regulations: 42 & 43 V. c. 58, s. 3.

#### FORM AND CONTENTS OF AFFIDAVITS.

By O. XXXVIII. 3, "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief, with the grounds thereof, may be admitted. And the costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same;" and as to costs, see O. LXV. 27 (20).

Evidence on "information and belief" is not admissible, and need not be contradicted where the application, although interlocutory in form, finally decides the rights: *Gilbert v. Endean*, 9 Ch. Div. 259.

A motion to take affidavits off the file on the ground of length and irrelevancy was refused, and the attention of the Court ought to be drawn to such matters at the hearing: *Owens v. Emmens*, W. N. (75) 210, 234. Objections for irregularity should be taken when a deposition is tendered in evidence, and not by motion to take it off the file: *De Britto v. Hillel*, 15 Eq. 213.

Affidavits by persons having no personal knowledge of the facts, and merely echoing the statement of claim, should not be filed, and the costs are to be disallowed: per M. R., W. N. (76) 59.

By O. XXXI. 24, any party may, at the trial of a cause, matter or issue; use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories without putting in the others, or the whole of such answer; but the Judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

#### ADMISSIONS IN PLEADINGS.

By O. XXXII. 1, "any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

If such admissions are contained in one of the pleadings entered as read, they need not be specially mentioned.

By O. XIX. 13, "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found": see *Hammer v. Flight*, 24 W. R. 346; *Symonds v. Jenkins*, 24 W. R. 512.

By r. 17, each party must deal specifically with each allegation of fact of which he does not admit the truth; and by r. 19 he must not do so evasively, but must answer the point of substance: see *Thorp v. Holdsworth*, W. N. (76) 159.

By r. 20, "when a contract, &c., is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the making of the express contract, &c. in fact, or of the matters of fact from which the same may be implied at law, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise."

By O. XXIV. 3, where a Deft pleads a ground of defence which has arisen after the action commenced, Plt may deliver a confession of such defence, and, unless otherwise ordered, sign judgment for his costs up to that time.

The statement of a chairman of directors to a meeting of the company cannot be used as an admission against the company: *Re Devala Provident Gold Mining Co.*, 22 Ch. D. 593.

Judgment signed by Plts for costs under the rule was set aside on motion by Defts on terms of their withdrawing the ground of defence, the Court reserving the costs of it, the signing of the judgment and the motion: *Bridge-town Waterworks Co. v. Barbados Water Supply Co.*, 38 Ch. D. 378; and see *Harrison v. Marquis of Abergavenny*, 57 L. T. N.S. 36; W. N. (87) 156.

#### ADMISSIONS, CONSENTS, SUBMISSIONS, AND UNDERTAKINGS—WAIVERS.

The Court frequently proceeds upon admissions of facts by the parties, or some of them, or by their counsel at the bar, consents, submissions, undertakings, or waivers of claim; in which case such admissions, &c., should be inserted in the judgment or order immediately before the ordering part, if they relate to the whole, or immediately before the part to which they relate, if they do not relate to the whole: see *Maybery v. Brooking*, 7 D. M. & G. 673, 679.

#### PROOF OF DOCUMENTS OR COPIES BY ADMISSION.

O. XXXII. 2, provides that "either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a Judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense."

As to form of notice, see r. 3.

By r. 9, "if a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice."

By r. 7, an affidavit of the solr or his clerk of the due signature of any such admissions, is to be sufficient evidence of them, but where both sides appear it has not been the practice in Chancery to prove the signatures.

The parties also, to save expense, often voluntarily enter into admissions in writing of facts or documents which are not in dispute; and such admissions, being signed by the parties, or by their solrs, and used at the hearing, are entered as read in the judgment.

The original admissions are endorsed by the registrar as those entered as read in the decree, and filed, pursuant to O. LXI. 15, in the Central Office, where a memorandum of the filing is made in the margin of the judgment before it is passed.

No documents are evidence in the cause unless they are put in at the trial. The mere fact that they are admitted in the admissions does not make them evidence in the cause. Every document which it is intended to use in evidence ought to be formally put in, and marked by the registrar. Per James, L. J., in *Watson v. Rodwell*, 11 Ch. Div. 153.

#### ADMISSION OF FACTS.

R. 4 provides that "any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or a Judge shall certify that the refusal to admit was reasonable, or unless the Court or a Judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also, that the Court or a Judge may at any time allow any party to amend or withdraw any admission so made, on such terms as may be just."

#### MEMORANDUM AS TO MARKING DOCUMENTS REFERRED TO IN ADMISSIONS.

The Court of Appeal having considered the dictum of Lord Justice James, in *Watson v. Rodwell*, 11 Ch. Div. 153, were of opinion that the requirements of the Court of Appeal as to the entering of documentary evidence in decrees and orders would be sufficiently met by the adoption of the following practice:—

All documents produced to witnesses, or with regard to the admissibility of which any question has been raised in the Court below, should be specially marked, even if included in the admissions.

It is not necessary that other documents referred to in the Court below, which are included in formal admissions, should be marked.

It will be sufficient, as a general rule, to enter "the admissions and the several documents therein referred to" according to the present practice.

This memorandum having been submitted to Lord Justice Cotton, in order to ascertain if it correctly embodied the effect of their lordships' observations, was returned by him to the registrar with a letter as follows:—

"I showed the memorandum which you sent me to Lords Justices Baggallay and Lindley, and they agreed with it.

"It does not provide for the case of a bundle of correspondence being put in at the trial and being admitted in evidence without proof. In such a case each of the letters must be marked, unless the solrs of the parties will go through the bundle and mark the letters so as to identify them. If they do so, it will, we think, be sufficient to enter as read, 'a bundle of letters' (giving their number) 'on each of which the solrs of Plts and Defts have signed their initials.'

"Of course these instructions are only given to apply to cases where the Judge before whom the case is heard has not given any directions as to the course to be adopted. We cannot interfere with any such directions."

No judgment or order wherein any written admissions of evidence are read, is to be passed until the admissions shall have been filed at the Central Office, and a note thereof made on the judgment or order by the proper officer: O. LXI. 15.

Letters, &c., which are not actually read, or put in, although they are in the admissions, and are set out in counsel's briefs, ought not to be entered in the judgment: per Chitty, J., in *Skipworth v. Sayle*, 18 April, 1883.

Admissions between co-Defts are not to be entered as evidence against the Plt, and cannot be included in the general costs of action: *Dodds v. Tute*, 25 Ch. D. 617.

# GROUNDS OF JUDGMENT.

Formerly the Court, in some instances, directed the reason of its decree to be specially entered therein: *Maynard v. Moseley*, 3 Swa. 653; *Onions v. Tyrer*, 1 P. W. 343; *Gibson v. Kinven*, 1 Vern. by Raith. 67, n.; *Dux Hamilton v. Dom. Mohun*, L. C., May 1710, A. 340; *How v. Garrard*, L. C., 5 May 1710, A. 301.

But this practice is not usual: *Exp. E. Ilchester*, 7 Ves. 373.

Nevertheless, the utility of it has been noticed: *Baz v. Whitehead*, 16 Ves. 24; *Gordon v. G.*, 3 Swa. 478.

And it is sometimes adopted: *Gordon v. G.*, *sup.*; *Jenour v. J.*, 10 Ves. 573; *A. G. v. Clapham*, 4 D. M. & G. 607; *Austin v. A.*, 11 Jur. N.S. 536.

# DECLARATION OF RIGHT.

The Court frequently prefaces its judgments by declarations of matters of fact, or of the rights of the parties, and then proceeds to decree the consequent relief. Thus, in judgments to execute the trusts of wills relating to real estate, the Court often declares the will to be well proved, and that the same ought to be established, and the trusts thereof performed; and so, where the Court gives effect to an agreement, or an equitable mortgage, or construes a will or other instrument, or sets an instrument aside, and in other cases.

And where a party establishes his right to property, the direction to transfer it to him is often prefaced by a declaration of his title: *Jenour v. J.*, 10 Ves. 568.

Formerly it was not the practice to make a declaration in orders on petition or motion; but in *Re St. Nazaire Co.*, 12 Ch. Div. 88, it was approved of, and it is now the usual practice.

The practice as to declaring rights and determining questions not only as between the Plt and Deft, but as between co-Defts, and also between Plt or Deft, and other persons whom it is desirable to bind once for all by the judgment in the action, has been materially altered under the new procedure: see Jud. Act, 1873, s. 24 (7); O. xvi. 48—55; xxi. 11, 12, 13; *Treleven v. Bray*, 1 Ch. D. 176; *Harry v. Davey*, 2 Ch. D. 721.

The word indemnity in O. xvi. 48 means a right arising from contract, express or implied, or under some statute, or depending upon some equitable doctrine, and must not therefore be confounded with a claim for damages: *Birmingham, &c. Land Co. v. L. & N. W. Rail. Co.*, 34 Ch. Div. 261; 35 W. R. 173.

Formerly the Court would not decide rights between co-Defts: *Thomas v. Lloyd*, 25 Beav. 620; except where necessary in order to determine the right of the Plt, or unless the evidence was clear and the case ripe for decision: *Jolly v. Arbuthnot*, 4 D. & J. 245; *Gresley v. Mousley*, 4 D. & J. 99; *Cottingham v. E. Shrewsbury*, 3 Ha. 637; but this is now altered by Jud. Act, 1873, s. 24 (7): and see O. xvi. 48—55; xxi. 11—13.

For form of order where issues are raised between co-Defts, see *Bagot v. Easton*, V.-C. B., 11 Ch. D. 392.

Formerly it was not the practice of the Court in ordinary suits to make a declaration of right, except as introductory to relief which it proceeded to administer; but by the 13 & 14 V. c. 35, s. 14, the Court was empowered, on a special case being stated for its opinion, to make such a declaration of it without administering any consequent relief. This Act is repealed by 46 & 47 V. c. 49 (Schd.), but is in substance re-enacted by O. xxxiv. 8.

By O. xxv. 5, "no action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not": and see O. xxxiv. 8.

The power conferred by O. xxv. 5, is discretionary: *Re Berens*, W. N. (88) 95; and the Court has always been reluctant to make declarations of future rights: *Langdale v. Briggs*, 4 W. R. 703; or as to rights of parties in a contingency which has not happened: *Dowling v. D.*, 1 Ch. 612; or upon a fictitious interest created for the purpose of obtaining a decision: *Bright v. Tyndall*, 4 Ch. D. 189; nor would the Court construe a mere legal devise at the request of some of the parties, where some of them were infants: *Webb v.*

*Byng*, 8 D. M. & G. 633; but where an executory gift over was void as in restraint of alienation, the Plt was entitled to a declaration as to the invalidity of the gift over: *Re Dugdale, D. v. D.*, 38 Ch. D. 176, 183; and see *Walmesley v. Foxhall*, 1 D. J. & S. 451, where persons affected by a declaration of future rights in remainder were held entitled to appeal when the remainder fell in five years afterwards; *secus*, after forty-five years: *Curtis v. Sheffield*, 30 W. R. 581; 20 Ch. D. 398; 21 Ch. Div. 1; or after twelve years: *Fussell v. Dowding*, 27 Ch. D. 237.

The Court will not declare a merely legal right: *Birkenhead Docks v. Laird*, 4 D. M. & G. 732.

## SECTION II.—JUDGMENTS.

### 1. Judgment after Trial on Circuit upon Associate's Certificate under O. xxxvi. 41, 42.

THIS action, having on the &c., been tried by (*name the Judge*) and a common jury of the county of —, and the jury having found a verdict for the Defts, and the said Judge having ordered that judgment be entered for all the Defts with costs, as by the associate's certificate appears; Therefore it is adjudged that the Plts recover nothing against the Defts, and that the Defts recover against the Plts their costs of defence, to be taxed &c.—*Owen v. Henshaw*, V.-C. H., 30 May, 1877, B. 944.

As to the form of order for the trial of an action, or any question in an action pending in the Chancery Division before a jury, see *Wood and Ivory Limited v. Hamblet*, 6 Ch. D. 113.

For form of order on motion for judgment after trial, see also *Hunt v. City of London, &c. Co.*, V.-C. H., 26 Nov. 1878, A. 2369.

### 2. Leave to enter Judgment for the Amount to be certified on an Inquiry as to Damages—O. xiii. 6; xxvii. 4.

UPON the application &c., and the Plt by his solrs not desiring to have the value of the furniture in the writ of summons (statement of claim) mentioned assessed, It is ordered that instead of a writ of inquiry to assess the damages claimed by the said writ of summons (statement of claim), the following inquiries be made, that is to say:

1. An inquiry what damages the Plt has sustained by detention of the furniture and other articles in the indorsement of the writ mentioned;
2. An inquiry what damages the Plt is entitled to recover in the nature of mesne profits for the occupation by the Deft of the dwelling-house and furniture in the indorsement of the writ mentioned; And the Plt is to be at liberty to sign judgment for what shall be certified in pursuance of this order to be due to him in respect of such damages, and for the costs of this application and consequent thereon, such costs to be taxed by the Taxing Master.—*Bundy v. Board*, M. R. at Chambers, 20 June, 1876, A. 1123.

3. *Judgment on Report of Official or Special Referee adopted by the Court—O. XXXVI. 54.*

MR. —, to whom it was referred by the order dated &c. to inquire as [official] special referee what if anything ought to be paid to the Plt by way of damages for the injury mentioned in his report dated &c., having by his report dated &c., which has, pursuant to sect. 13 of the Arbitration Act, 1889, been adopted by the Judge, assessed such damage at £—. It is this day adjudged that the Plt do recover against the Deft such sum of £—.

In this case the costs of the reference had by agreement been borne by the parties equally.

The order is drawn up as of course on the report being adopted.

4. *Judgment for Costs under O. XXIV. 3.*

THE Plt having this day confessed the defence of the Deft stated in paragraph — of the Deft's statement of defence, and in so much of paragraph — of such statement of defence as states that &c., It is adjudged that the Plt do recover against the Deft his costs of this action up to &c., the date of the delivery of the Deft's statement of defence, such costs to be taxed &c.

5. *Leave to sign Final Judgment notwithstanding Appearance—*

*O. XIV. 1.*

UPON &c. and upon reading, &c., It is ordered that the Plts be at liberty to sign final judgment in this action for the amount indorsed on the writ with interest, if any, and costs to be taxed, and that the costs of this application be £—.

6. *Final Judgment after the above.*

THE Deft having appeared to the writ of summons herein, and the Plt having by order dated &c., obtained leave to sign final judgment under O. XIV. 1, for £—, It is this day adjudged that the Plt recover against the Deft £— and costs to be taxed.

7. *Judgment by Default—O. XIII. 3; XXVII. 2.*

THE Defts [or the Deft D.] not having appeared to the writ of summons [or not having delivered any statement of defence], It is this day adjudged that the Plt recover against the Defts [or the Deft D.] £— and costs to be taxed.

8. *Judgment in default of Appearance in Action for Recovery of Land—O. XIII. 8.*

No appearance having been entered to the writ of summons, It is this day adjudged that the Plt recover possession of the land in the indorsement of the writ described as &c.

[N.B.—This judgment carries no costs.]

9. *Judgment in default of Defence in Action for Recovery of Land—*  
*O. XXVII. 7.*

No statement of defence having been delivered in this action, It is this day adjudged that the Plt recover possession of the land in the indorsement of the writ described as &c., with his costs to be taxed.

10. *Judgment in default of Appearance in Claim for Detention*  
*of Goods, or Damages—O. XIII. 5.*

No appearance having been entered to the writ of summons in this action, It is this day adjudged that the Plt do recover damages to be assessed.

11. *Judgment in default of Pleading in a like Action—O. XXVII. 6.*

No statement of defence having been delivered in this action [by the Deft D.], It is this day adjudged that the Plt do recover [against the Deft D.] damages to be assessed.

12. *Judgment in default of Appearance or Defence after Assessment*  
*of Damages—O. XIII. 7; XXVII. 9.*

THE Defts not having appeared to the writ of summons in this action, [or not having delivered a statement of defence], and a writ of inquiry dated &c. having been issued directed to the sheriff of &c., to assess the damages which the Plt was entitled to recover, and the said sheriff having by his return dated &c. returned [or such damages having by direction of the Judge been ascertained at Chambers, and it appearing by the chief clerk's certificate] or, [if any other method has been adopted, state it,] that the said damages have been assessed [or ascertained] at £—, It is this day adjudged that the Plt recover against the Defts £— and costs, to be taxed.

13. *Judgment after Order for Plt to be at liberty to sign Judgment*  
*unless Money paid into Court under O. XIV. 3.*

THE Deft not having paid into Court the sum of £— as by the order dated &c. directed, It is pursuant to the said order this day adjudged that the Plt recover against the Deft £— and costs to be taxed.

14. *Judgment in default of Appearance where Writ is indorsed with a*  
*Liquidated Demand—O. XIII. 3, 4.*

THE Deft not having appeared to the writ of summons, and the Plt having filed an affidavit of service, It is this day adjudged that the Plt recover against the Deft £—, together with interest thereon at the rate of £5 p. c. per ann., or (other rate specified, if any), and costs to be taxed.

## 15. Judgment set aside.

UPON motion, &c., by counsel for the Deft, and upon hearing counsel for the Plt in the first-mentioned action, Let the order dated &c., whereby it was ordered that the Plt sign final judgment for the amount indorsed on the writ of summons, with interest &c., be discharged, and let the judgment entered up in pursuance thereof on the day &c., be set aside. Stay further proceedings in first-mentioned action. Liberty to Plt in first-mentioned action to come in and prove for his debt and costs in the second-mentioned action, but exclusive of his costs of this motion which he is not to have or prove for in the second-mentioned action.—*Cottrell v. Briggs*, Chitty, J., 9th Dec. 1887, A. 1844; W. N. (1887) 240.

## NOTES.

## DEFAULT OF APPEARANCE.

Judgment in *default of appearance* may be entered:—

1. Where the writ is specially indorsed under O. III. 16: O. XIII. 3, 4.

2. Where it is not specially indorsed: O. XIII. 5—8.

3. For the recovery of land: O. XIII. 8.

By O. XIII. 3, “where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the Deft fails, or all the Defts, if more than one, fail, to appear thereto, the Plt may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of five p. c. per ann., to the date of the judgment, and costs.”

Under this rule judgment may be signed for the liquidated demand notwithstanding that the writ is also indorsed with a claim for an account and foreclosure: *Bissett v. Jones*, 32 Ch. D. 635.

Where the Plt has taken no step for a year, a month's notice must be given under O. LXIV. 13, before judgment can be signed: *Webster v. Myer*, 14 Q. B. Div. 231.

Where a writ of summons is indorsed under O. III. 8 (in a case, that is, of ordinary accounts, as, for instance, a partnership, exorship, or ordinary trust account), and the Deft fails to appear, the Plt may, after filing an affidavit of service, or of notice in lieu of service, as the case may be (O. XIII. 2), obtain an immediate order for the account claimed, with usual directions: O. XV. 1. But only common accounts and inquiries can be directed under this rule, and not accounts and inquiries the right to which depends on the Plt establishing a case for them at the hearing: *Re Gyhon*, *Allen v. Taylor*, 29 Ch. Div. 834. The order is to be made on an application at Chambers supported by an affidavit of the grounds of the application: O. XV. 2.

Where the writ was against a firm, and one member of the firm entered appearance as such, but the others did not appear, judgment in default of appearance could not go against the firm: *Adam v. Townend*, 14 Q. B. D. 103; and see *Jackson v. Litchfield*, 8 Q. B. D. 474.

Where the writ was served first on the firm and afterwards on an alleged partner, and judgment by default was signed against the firm within eight days after service on such partner, he was entitled to have the judgment set aside: *Alden v. Beckley*, 25 Q. B. D. 543.

By O. XIII. 4, “where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and there are several Defts, of whom one or more appear to the writ, and another or others of them fail to appear, the Plt may enter final judgment, as in the preceding rule, against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared.”



By r. 5, "where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and the Deft fails, or all the Defts if more than one fail, to appear, the Plt may enter interlocutory judgment, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or Judge may direct."

By r. 6, "where the writ is indorsed as in the last preceding rule mentioned, and there are several Defts, of whom one or more appear to the writ, and another or others of them fail to appear, the Plt may sign interlocutory judgment against the Deft or Defts so failing to appear, and the value of the goods and the damages, or either of them, as the case may be, may be assessed, as against the Deft or Defts suffering judgment by default, at the same time as the trial of the action or issue therein against the other Deft or Defts, unless the Court or a Judge shall otherwise direct. Provided that the Court or a Judge may order that instead of a writ of inquiry or trial, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or Judge may direct."

By r. 7, "where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and is further indorsed for a liquidated demand, whether specially or otherwise, and any Deft fails to appear to the writ, the Plt may enter final judgment for the debt or liquidated demand, interest and costs against the Deft or Defts failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding rules of this Order as may be applicable."

By r. 8, "in case no appearance shall be entered in an action for the recovery of land, within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the Plt shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply."

Rule 8 does not provide expressly for the case of one out of several Defts making default, but the practice has been established in the Queen's Bench Division to allow judgment to be signed as against the Deft or Defts who have made default, although there are other Defts who are not in default. The effect of the judgment is to prevent the Deft against whom judgment has been signed from entering appearance before final judgment is obtained. The final judgment being that the Plt recovers possession of the land, includes all the Defts.

By r. 9, "where the Plt has indorsed a claim for mesne profits, arrears of rent, double value, or damages for breach of contract, or wrong or injury to the premises claimed, upon a writ for the recovery of land, he may enter judgment as in the last preceding rule mentioned for the land, and may proceed as in the other preceding rules of this Order mentioned as to such other claim so indorsed."

By r. 10, "where judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just."

#### DEFAULT OF PLEADING.

Judgment in default of pleading can only be entered in actions for—

1. Debt or liquidated demand : O. xxvii. 2, 3.
2. Detention of goods and pecuniary damages, or either of them : O. xxvii. 4, 5.
3. For debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only : O. xxvii. 6.
4. For the recovery of land : O. xxvii. 7.
5. And also where the writ for the recovery of land is indorsed for mesne profits, arrears of rent, or damages for breach of contract : O. xxvii. 8.

A probate action proceeds notwithstanding the default: r. 10.

In all other actions, if the Deft makes default in delivering a defence, the

Plt may set down the action on motion for judgment: r. 11; and where Plt has not put in a defence to a counterclaim, the Deft cannot sign judgment for default of pleading, but must move for judgment: *Jones v. Macaulay*, (1891) 1 Q. B. (C. A.) 221; *Higgins v. Scott*, 21 Q. B. Div. 10.

Notwithstanding r. 13, a statement of defence delivered out of time is not to be treated as a nullity: *Gill v. Woodfin*, 25 Ch. Div. 707; *Montagu v. Land Corporation of England*, 56 L. T. N.S. 730; nor was a reply under the rules of 1875: *Graves v. Terry*, 9 Q. B. D. 170; and as to mode of dealing with such a defence on motion for judgment, see *Gibbins v. Strong*, 26 Ch. Div. 66; *Montagu v. Land Corporation of England*, *sup.*

Where an action is proceeding in default of appearance under O. XIII. 12, as if the Deft had appeared, pleadings and documents (including an amended writ: *Re Hartley*; *Nuttall v. Whittaker*, (1891) 2 Ch. 121) are to be delivered by being filed: O. XIX. 10; and the Plt can then proceed in default of pleading under O. XXVII. 2—8.

Where the Deft is personally served with statement of claim it need not also be filed: *Renshaw v. R.*, 28 W. R. 409; *Phillips v. Kearney*, 58 L. J. Ch. 344.

Notwithstanding O. XX. r. 4, which provides that the Plt may alter, modify, or extend his claim without any amendment of the indorsement of the writ, the Plt cannot, when the Deft has not entered appearance, obtain judgment for more than he has claimed by the writ: *Gee v. Bell*, 35 Ch. D. 160; *Kingdon v. Kirk*, 37 Ch. D. 141; *Law v. Philby*, 56 L. T. N.S. 522; 35 W. R. 450.

Where the Plt does not put in a reply to a counterclaim, judgment on the counterclaim must be obtained on motion for judgment.

#### MODE OF ENTERING JUDGMENT (1.) ON DEFAULT GENERALLY.

In the Chancery Division, judgments upon default, as well as all other judgments, are entered at the registrar's office. The documents required to be produced being produced and examined, and found regular and sufficient, judgment is entered.

Judgments by default are entered under date of, and take effect from, the day on which the requisite documents are left with the proper officer: see O. XLI. 4.

Two printed forms of judgment properly filled up are to be produced to the registrar.

Where the writ is specially indorsed, interest, calculated up to the day of entering judgment, should, if claimed, be added to the amount indorsed on the writ; and as no amount has been fixed for costs, the judgment will be "with costs to be taxed," and the taxing master will tax the costs with or without notice, as the case may require.

The documents being produced and found correct, both copies of the judgment will be marked as examined. In judgments for default of appearance the affidavit of service, and in judgments for default of pleading the statement of claim, must be filed by the solr, and a note of filing will be made on the judgment on which the fee stamp (10s.) is impressed.

The registrar will then pass the judgment as he would any other judgment or order by putting his initials to it, and affixing his seal to the duplicate, and it will be entered immediately at the entering seat, the duplicate being left with the clerks of entries. When entered it will be marked with the folio of the entry, indexed and transmitted to the Central Office.

#### (2.) IN DEFAULT OF APPEARANCE.

On applying in the Chancery Division to enter judgment in default of appearance there must be produced—

1. The original writ.
2. The affidavit of service. This must show when, where, and how such service was effected (see O. LXVII. 9), and must also comply with the provisions of O. IX. 15: see *sup.* Chap. II. Before the judgment is passed the affidavit must be filed, and a note of the filing marked on the judgment.

The affidavit of service cannot be dispensed with: *Ford v. Mieske*, 16 Q. B. D. 57.

Service of the writ must be personal, unless substituted or other service has

been ordered (O. IX. 2), except in cases mentioned in rr. 3, 6—8. In the case of substituted service the order for such service must be produced. In case of such service being by post the writ and order are (unless the order shall otherwise direct) to be deemed to be served on the day following the day on which a prepaid letter containing such copies shall have been posted: P. M. R. 17.

In the case of partners or a firm, or a corporation, service must be in accordance with rr. 6—8. When the Defts are sued as a firm, judgment will be against the firm, and execution will issue in accordance with O. XLVIII. 8.

On applying to enter judgment for recovery of possession of part of land under O. XIII. 8, the certificate of the Central Office of limited defence must be produced, or the notice signed by the Deft or his solr, which is referred to in O. XII. 28.

### (3.) IN DEFAULT OF PLEADING.

On applying to enter final judgment in default of pleading under O. XXVII. 2, 3, 7, 8, or interlocutory judgment under rr. 4, 5, 8, the certificate of the Central Office of appearance must be produced, and also the statement of claim, unless it appears by such certificate that the Deft did not require a statement of claim to be delivered.

If the statement of claim does not show the date of delivery, which must be ten clear days before judgment is entered (O. XXI. 6), the date must be indorsed.

Before the judgment is passed the statement of claim must be filed at the Central Office, and the filing will be noted in the margin of the judgment.

In the Queen's Bench Division judgment in default of defence against a married woman cannot be signed unless the statement of claim contains an allegation that the Deft had separate property at the date of the contract in respect of which the action is brought: P. M. R. 17.

### PROCEEDINGS IN DISTRICT REGISTRIES.

Where a cause or matter is proceeding in a District Registry, all proceedings, except where by the rules it is otherwise provided, or the Court or a Judge shall otherwise order, are to be taken in the District Registry, down to and including the entry of final judgment, and every final judgment and every order for an account by reason of the default of the Deft or by consent is to be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in the Central Office: O. XXXV. 1. Where the writ of summons is issued out of a District Registry, and the Plt is entitled to enter interlocutory judgment under any of the rules of O. XIII., or where the cause or matter is proceeding in a District Registry, and he is entitled to enter interlocutory judgment under any of the rules of O. XXVII., in either such case interlocutory judgment, and when damages shall have been assessed final judgment, is to be entered in the District Registry, unless the Court or a Judge shall otherwise order: r. 2.

Where final judgment is entered in a District Registry, costs are to be taxed there unless otherwise ordered: O. XXXV. r. 4.

Where a writ is issued out of a District Registry, if the Deft resides or carries on business there he must, and if not he may, appear in the district: O. XII. 1—5, and see O. IV. 1—3, as to issue and indorsement of writ.

When any Deft (unless a merely formal Deft, or one who has "no substantial cause to interfere in the conduct of the action") appears in London, the action proceeds in London: O. XII. 7.

If appearance by a sole Deft or by all the Defts is entered in the district the action proceeds there: r. 6.

A Deft to a district writ appearing in London must give notice the same day to the Plt: r. 9.

As to default in such a case, see O. XIII. 11, *sup.* p. 150.

"When a cause or matter in the Chancery Division is proceeding in a District Registry, all certificates of the chief clerk and taxing officer, and all other documents (required to be filed) used in London before the Judge in Chambers, or before any taxing officer or referee, and not already filed

in the District Registry, are to be filed in the same office as they would have been filed in if the proceedings had originally commenced in London, and if the Court or Judge shall so direct, office copies thereof shall be transmitted to the District Registry": O. xxxv. 21; and actions for trial elsewhere than in London or Middlesex are to be entered for trial with the Associates, and not in the District Registries: O. xxxvi. 22b; and see Jud. Act, 1873, s. 64.

As to the entry of interlocutory and final judgments in the District Registry, see O. xxxv. 2; and as to entry in Central Office, see r. 3.

When a cause or matter is proceeding in a District Registry, writs of execution for enforcing any judgment thereon, and all summonses under the Debtors Act, shall issue from the District Registry unless otherwise ordered, and where final judgment is entered in the District Registry costs are to be taxed there unless otherwise ordered: r. 4.

Where an action proceeds in a district the Registrar may exercise all such authority and jurisdiction as may be exercised by a Judge at Chambers, except such as a master or chief clerk is precluded from exercising: r. 6.

Where a cause or matter is proceeding in the District Registries of Liverpool or Manchester, the Registrar may act as a chief clerk of the Judge of the Chancery Division to whom the cause or rule is assigned, and as Registrar and taxing master according to directions to be given by the Judge, provided that no order for payment of money out of Court for an amount exceeding 50*l.* shall be made except by the Judge in person, and provided that no District Registrar who is a practising solicitor shall tax costs: r. 6a.

Applications are to be made in the same manner as at Chambers: r. 7; and to be in like manner subject to reference or appeal to and control by the Judge to whom the action is assigned: rr. 8—12.

The discretion of a Judge to order a sale, in actions where the accounts are being taken in a District Registry, to take place in his Chambers will not be interfered with by the Court of Appeal: *Macdonald v. Foster*, 6 Ch. Div. 193.

Jud. Act, 1873, s. 49, as to appeals from orders by consent, or as to costs only, does not apply to orders by a District Registrar: *Foster v. Edwards*, 48 L. J. C. P. 767.

Accounts and inquiries ought not to be taken by District Registrars unless the judgment so directs: *Re Bowen*, *Bennett v. Bowen*, 20 Ch. D. 538; *Re Smith*, *Hutchinson v. Ward*, 6 Ch. D. 692.

Certificates or reports by District Registrars should follow the form and practice of a chief clerk's certificate: *Re Bowen*, *sup.*

Payment of money into Court in an action commenced in District Registry should be under the Chancery Funds Act and Rules, not into a bank to "the credit of the District Registrar": *Finlay v. Davis*, 12 Ch. D. 735.

As to setting down on motion for judgment actions in which default has been made in a District Registry, *v. inf.* p. 158.

By Jud. Act, 1873, s. 66, the Court or a Judge may direct any books or documents to be produced, or accounts or inquiries taken or made in the office of or by any District Registrar, and may act on his report.

Actions may be removed from the District Registry:

1. In any case by an order of the Court or a Judge, or of the District Registrar: Jud. Act, 1873, s. 65; O. xxxv. 16.

2. By notice from the Deft or his solicitor, served on the other parties, and delivered to the District Registrar: see r. 14; (a) when the writ is specially indorsed under O. III. 6, and the Deft has obtained leave to defend, or has appeared, and the Plt has not for four days given notice of an application for an order against him under O. XIV.; (b) when the writ is not specially indorsed, at any time after the Deft has appeared, and before delivering a defence, or the expiration of the time for doing so: O. xxxv. 13. But a merely formal, &c. Deft, has no right to give such notice: r. 14.

Actions may by order be removed from London to a district registry: rr. 16, 17.

When an action is removed, the file and a copy of the entries in the books are transmitted: r. 20; Jud. Act, 1873, s. 65.

And as to removal from District Registry, *v. post*, Chap. XXXIV., "TRANSFER AND CONSOLIDATION."

O. xxxv. 5, provides that where an action proceeds in a District Registry

all proceedings relating to (a) leave to enter judgment under O. XVI. 50 and 51, (b) leave to issue or renew writs of execution, (c) examination of judgment debtors for garnishee purposes, (d) garnishee orders, (e) charging orders *nisi*, shall, unless the Court or a Judge otherwise order, be taken in the District Registry.

By 44 & 45 V. c. 68, s. 22, a district registrar shall not, either by himself or his partner, be directly or indirectly engaged as solicitor or agent for a party to any proceeding whatsoever in the district registry of which he is registrar.

CHAPTER XIII.  
MOTION FOR JUDGMENT.

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1. *Judgment upon Motion for Judgment—O. XL. 1.*

1. UPON motion for judgment this day made unto this Court by counsel for the Plt, and upon hearing counsel for the Deft, This Court doth order and adjudge.

2. *Judgment upon Motion for Judgment in default of Defence where Deft has not entered Appearance—O. XXVII. 11.*

UPON motion for judgment in default of the Deft delivering a defence this day made unto this Court by counsel for the Plt [*If Deft has not entered appearance*, and upon reading an office copy of the Plt's statement of claim, filed &c., as against the Deft, an office copy notice of this motion filed as against the Deft, or an affidavit of &c., of service of notice of this motion on the Deft; *Enter further evidence*], This Court doth &c.

3. *The like, where Deft has entered Appearance.*

UPON motion for judgment, &c. [see Form 2], and upon reading the Plt's statement of claim, with the certificate of the Plt's solr indorsed on such statement, showing that the Deft has not delivered a statement of defence, an affidavit of &c., of service of notice of this motion on the Deft [*Enter further evidence*], This Court doth &c.

4. *Judgment at Trial against some Defts and upon Motion for Judgment against others—O. XXVII. 12.*

THIS action coming on for trial this day before this Court against the Deft A., in the presence of &c., and counsel for the Plt this day also moving for judgment in default of the Defts B. and C. delivering a defence, upon hearing the pleadings in this action [*Enter evidence*], and what was alleged by counsel for the Plt and the Defts, This Court doth &c.

5. *Defendants not competent to consent Submitting to Judgment.*

THIS action coming on &c., for trial &c., in the presence of counsel for the Plt and Defts &c., and the Plt by his counsel withdrawing the

charges of fraud and all imputations made by her against the Defts, and the Defts A. and B. by their respective counsel consenting to this judgment, and that no order shall be made as to their costs of this action up to and including this judgment, and the Defts E. and F. by their counsel stating to this Court that they have no defence to the action, and submitting to judgment for the Plt, and the Plt by her counsel not asking for costs against the last-named Defts, Let &c.—*Rees v. Richmond*, Kekewich, J., 13 Dec. 1889, B. 1756.

In this case two Defts were defending on behalf of themselves and all other parties interested under a settlement, and were held incapable of consenting to a judgment setting aside the settlement.

#### NOTES.

##### MOTION FOR JUDGMENT.

O. XL. 1, directs that "except where by the Act or Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court is to be obtained by motion for judgment."

When the Defts are sued as a firm, judgment must be against the firm, and execution will issue in accordance with O. XLII. 10.

In the following cases (as also after trials before a jury, as to which, *v. inf.* Chap. XXII., "Issues"), judgment is to be obtained by setting down the action on motion for judgment:—

(a.) Under O. XXVII. 11, 12, in all actions other than those referred to in the preceding rules of that Order (*e.g.*, actions for debt or liquidated demand, detention of goods, pecuniary damages only, recovery of land, and probate actions) where the Deft or one of several Defts makes default in delivering a defence the Plt may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a Judge shall consider the Plt is entitled to.

(b.) Under O. XXVII. 14, in any case in which issues arise, other than between Plt and Deft, if any party make default in delivering any pleading, the opposite party may apply for such judgment, if any, as he may appear to be entitled to.

(c.) Under O. XL. 2, "where at the trial the Judge or Referee abstains from directing judgment to be entered, the Plt may set down a motion for judgment. If he does not set down such motion, and give notice thereof to the other parties within ten days after the trial, any Deft may set down a motion for judgment, and give notice thereof to the other parties."

(d.) In cases where (under O. XXXVI. 8, &c.) issues have been tried, or issues or questions of fact determined: O. XL. 7.

Here, also, the Plt must set down the action and give notice of motion within ten days, or the Deft may do so: *Id.*

(e.) By leave of the Court, in cases where some only of several issues or questions of fact have been tried or determined, and the others have become unnecessary, or may be postponed: O. XL. 8.

On motion for judgment in default of defence, under O. XXVII. 11, the Plt will only be granted such relief as is asked by his statement of claim: *Faithfull v. Woodley*, 43 Ch. D. 287.

And see, as to necessary allegations in actions of foreclosure, *Bolingbroke v. Hinde*, 29 Ch. D. 795; *Platt v. Mendel*, 27 Ch. D. 246; 32 W. R. 918; and for specific performance, *Tacon v. National Standard Land Co.*, 56 L. J. Ch. 529; *Smith v. Buchan*, 36 W. R. 631; *Law v. Philby*, 35 W. R. 450; *Wethered v. Cox*, W. N. (88) 165.

O. XXVII. 11, applies to default of pleading to counterclaim: *Street v. Crump*, 25 Ch. D. 68; *Higgins v. Scott*, 21 Q. B. D. 10; *Jones v. Macaulay*, (1891) 1 Q. B. (C. A.) 221.

On such a motion the Court cannot accept any evidence, but must give judgment according to the pleadings only: *Smith v. Buchan*, 36 W. R. 631.

Where at the hearing it is necessary to amend the statement of claim, it must be re-served on the Deft: *S. C.*

No affidavit in support of the statement of claim is required, even in specific performance actions: *Bagley v. Searle*, 35 W. R. 404.

Where minutes of judgment are not left, the notice of motion must state the precise words of the judgment asked for: *De Jongh v. Newman*, 56 L. T. N.S. 180; and see *Bagley v. Searle*, 56 L. T. N.S. 306.

Where the defence of infant Defts was withdrawn, the Court required the statement of claim to be proved by affidavit: *Fitzwater v. Waterhouse*, 52 L. J. Ch. 83; *Gardner v. Tapling*, 33 W. R. 473; but see *National Provincial Bank v. Evans*, 51 L. J. Ch. 97; 30 W. R. 177; and *Ellis v. Robbins*, 50 L. J. Ch. 512, tending to show that the Court cannot, on motion for judgment, order evidence to be taken by affidavit, and that, as there can be no implied admission against an infant (see O. XIX. 13), the proper course, in case of an infant Deft, is to give notice of trial.

In an action for infringement of a patent, the particulars of breaches delivered with the statement of claim are to be regarded as part thereof: *United Telephone Co. v. Smith*; *Same v. Mitchell*, 38 W. R. 70.

Where a Deft's defence is struck out, under O. XXXI. 21, for default in answering interrogatories, judgment may be moved for under this rule: *Haigh v. H.*, 31 Ch. D. 478; *Fisher v. Hughes*, 25 W. R. 528; *Tacon v. National Standard Land Co.*, 56 L. J. Ch. 529; 56 L. T. N.S. 165, 529.

By O. XIX. 10, "every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solr of every party who appears by a solr, or to the party if he does not appear by a solr, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

A notice of motion for judgment may be delivered or filed under this rule: *Dymond v. Croft*, 3 Ch. D. 513; *Morton v. Miller*, 24 W. R. 723; though the Deft be out of the jurisdiction: *Gardiner v. Hardy*, W. N. (76) 185; or a notice of motion for leave to sue out a writ of attachment: *Re Morris, M. v. Fowler*, 44 Ch. D. 151.

In case of default of appearance, upon the Plt filing a proper affidavit of service and (if the writ is not specially indorsed) a statement of claim, the action may proceed as if the party served had appeared (O. XIII. 12). And every pleading or document required to be delivered shall be delivered (O. XIX. 10); and all writs, notices, &c., in respect of which personal service is not requisite, may be served (O. LXVII. 4) by filing with the proper officer.

The object of the provision as to filing in O. XIX. 10 is to avoid the necessity of obtaining an order for substituted service every time a step is taken in the action: *Dymond v. Croft, sup.* (per Jessel, M. R.).

Where Deft fails to appear, Plt cannot by his statement of claim enlarge the scope of his action by claiming some relief not asked by the indorsement on the writ: *Law v. Philby*, 35 W. R. 450; 56 L. T. N.S. 522; *Gee v. Bell*, 35 Ch. D. 160.

As to dismissal of third party where the whole matter cannot be disposed of by one trial, see *Schneider v. Batt*, 8 Q. B. Div. 701.

#### ADMISSIONS ON PLEADINGS OR OTHERWISE.

By O. XXXII. 6, "any party may at any stage of a cause or matter where admissions of fact have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order, or give such judgment as the Court or Judge may think just."

The order under this rule may be obtained on summons in Chambers: *London Steam Dyeing Co. v. Digby*, 57 L. J. Ch. 505; 36 W. R. 497; but the usual course is to move for judgment, unless there are special reasons for proceeding in Chambers: *Cook v. Haynes*, W. N. (84) 75. Where the Defts wrote a letter containing admissions which would have enabled the Plts to obtain an order by summons, extra costs occasioned by proceeding by motion were disallowed: *Allen v. Oakey*, W. N. (90) 121; 62 L. T. N.S. 724.

Where there is no actual admission, but only a constructive admission by default, the motion must be set down: *Caroli v. Hurst*, 31 W. R. 839.



A Deft cannot set down the action on motion for judgment under this rule: *Litton v. L.*, 3 Ch. D. 794; but see *Pascoe v. Richards*, 29 W. R. 330.

As to the meaning of the words, "at any stage," see *Brown v. Pearson*, 21 Ch. D. 716, where Plt was allowed to move after joinder of issue and notice of trial given.

Whether admissions contained in an affidavit are within the words, "or otherwise," or whether those words refer only to cases in which notice to admit has been given under rr. 1 or 4, *quære*: *Landergan v. Feast*, 34 W. R. 469, 691; 55 L. T. N.S. 42.

Under the Rules of 1875, O. XL. 2 (not revived by Rules of 1883), the indorsement on a writ was held not to be a pleading: *Wallis v. Jackson*, 23 Ch. D. 204; 31 W. R. 519.

Unless the allegations in a statement of claim are specifically denied by the defence, the Plt is entitled to move for judgment: *Rutter v. Tregent*, 12 Ch. D. 758; and that allegations in a counterclaim must also be specifically dealt with, see *Benbow v. Low*, 13 Ch. D. 553; *Green v. Sevin*, 13 Ch. D. 589.

Where the motion was made in an action for infringement of patent, on the admission of an infringement in ten instances, the Plt was confined to an inquiry as to damages in respect of those ten instances: *United Telephone Co. v. Donohoe*, 31 Ch. Div. 399.

Where in an action for a liquidated demand the Defts admitted the claim, but counterclaimed for a larger sum, and the counterclaim was not shown to be frivolous or unsubstantial, the Plt could not sign judgment on admissions: *Mersey Steamship Co. v. Shuttleworth*, 10 Q. B. D. 468; 11 Q. B. Div. 531; but see now O. XXVII. 9, providing that where defence goes to a separable part of Plt's claim, and judgment is entered, if there is a counterclaim execution shall not issue without leave of the Court. In *Showell v. Bouron*, 52 L. J. Q. B. 284; 31 W. R. 550, Plts were held entitled to judgment, but on terms that, if counterclaiming Deft brought the debt into Court, execution should be stayed.

The rule is to be read as if the words "if any" were inserted after the word "question;" so that the Plt may move for the whole relief sought by his statement of claim: *Clutton v. Lee*, 24 W. R. 607. Where the order is equivalent to a decree, further consideration should be adjourned: *Bennett v. Moore*, 1 Ch. D. 692.

Husband and wife having put in a joint defence, which was no defence as regarded the husband, Plt was entitled to final judgment against him: *Jenkins v. Davies*, W. N. (76) 49.

Orders have been made on motion under this rule—for partition: *Gilbert v. Smith*, 24 W. R. 568; against Defts admitting a partnership, and that they had not accounted, but alleging that Plt was indebted to them: *Turquand v. Wilson*, 1 Ch. D. 85; in a partition action for sale and an account of rents and profits received by the Plt in possession: *Burnell v. B.*, 27 W. R. 749; against an agent on his admission of the agency: *Rumsey v. Reade*, 1 Ch. D. 643; and in a suit against a trustee for a breach of trust, his statement that he did not know and could not set forth whether the Plts were, &c., was a sufficient admission of title of the Plts as c. q. ts., and payment into Court of the amount was ordered: *Symonds v. Jenkins*, 24 W. R. 512; *Bennett v. Moore*, 1 Ch. D. 692.

In an action for specific performance of an agreement for purchase of land the Plt, after reply, moved for judgment upon admissions of fact in the statement of defence, and was held not to be too late, but to be entitled to the order: *Brown v. Pearson*, 21 Ch. D. 716.

As to setting down the action against one Deft, under this rule, and against others on default of pleading, see O. XXVII. 12, and *Bridson v. Smith*, 24 W. R. 392; *Gillott v. Ker*, 24 W. R. 428.

By O. XXIV. 3, where a Deft pleads a ground of defence which has arisen after the action commenced, Plt may confess it, and, unless otherwise ordered, claim costs up to that time.

#### SETTING DOWN—MARKING "SHORT."

After some conflicting decisions as to hearing motions for judgment as interlocutory motions (see *Bowen v. B.*, 24 W. R. 246; *Pearce v. Spickett*, W. N. (76) 109; *Hale v. Snelling*, *ib.* 77), the Judges directed that "motions

for judgment in actions shall not be brought on as ordinary motions, but shall be set down in the cause book.

"They can be marked short on production of the usual certificate of counsel, and will then be placed in the paper on the day for which notice is given, if a short cause day, or on the first short cause day after the notice expires. If not marked short, they will come into the general paper in their regular turn.

"It will be advisable that the notices of motion for judgment should, if it is intended to mark them short, contain a statement to that effect, and also a statement that no further notice will be given of their having been so marked. Such statements will dispense with the necessity for giving Defts further notice that motions for judgment have been marked short:" Judges' Notice of 11th April, 1876. In *Meakin v. Sykes*, 24 W. R. 293, the Court fixed an early day for the hearing on motion for judgment in default of pleading.

An action for rectification of a settlement will not, it seems, be heard as a short cause: *Clennell v. C.*, W. N. (84) 14.

Where an action proceeds in a district registry, and it is necessary to set it down on motion for judgment, the proper course is for the District Registrar to forward to the senior Chancery Registrar a formal notification or certificate that he has set down the action on motion for judgment, together with a copy of the notice, and the two copies of the pleadings, which have to be left on setting down (*v. sup.* pp. 132, 151): see *Birm. Waste Co. v. Lane*, 24 W. R. 292.

By O. XL. 9, except by leave, no motion for judgment is to be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

And by r. 10, upon a motion for judgment, the Court may give judgment, or may direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit.

As to motions for judgment, where issues or questions of fact have been tried, *v. inf.* Chap. XXII., "ISSUES."

## CHAPTER XIV.

## USUAL DIRECTIONS.

SECTION I.—FURTHER CONSIDERATION ADJOURNED—  
LIBERTY TO APPLY.1. *Usual Directions adjourning Further Consideration.*

AND the further consideration of this action [or matter] is adjourned; And any of the parties are to be at liberty to apply [to this Court, or in Chambers] as they shall be advised.

The rule that an order carries with it liberty to apply, although not expressly reserved, only applies where the order is not of a final character: per Chitty, J., in *Penrice v. Williams*, 23 C. D. 353; and see Dan. 6th ed. 789, 790.

2. *The Like—with Liberty to apply in Chambers as to particular Matter.*

AND let any of the parties be at liberty to apply in Chambers for the appointment of a receiver [or for, or as to &c., as the case may be], and otherwise (generally) to apply as they may be advised.

3. *The Like—where Order is made on Interlocutory Motion under O. XXXII. 6.*

AND this Court, not requiring any trial of this action other than this motion, Let the further consideration &c.—Liberty to apply.—And see *Brassington v. Cussons*, 24 W. R. 881.

4. *The Like—on Application in Chambers under O. xv. 1, where Order equivalent to a Judgment.*

“And the Judge not requiring any trial of this action other than the hearing of this application,” Let the further consideration &c.—Liberty to apply.

For observations on the use of the words “the Judge not requiring, &c.,” see *Gatti v. Webster*, 12 Ch. D. 771.

### 5. *If Costs are partly dealt with by the Judgment.*

AND the further consideration of this action, and of the costs of this action not hereinbefore [otherwise] provided for [or disposed of] is adjourned.—Liberty to apply.

#### NOTES.

#### ADJOURNMENT.

The adjournment of further consideration will be continued from time to time, if necessary; and see O. xxxvi. 21, 39.

For the mode of setting down causes for further consideration, *v. r.* 21.

Where on further consideration there are further accounts and inquiries to be taken, but no further question of law to be decided, the practice is not to adjourn the further consideration for the Court, but to give general liberty to apply in Chambers: *Gilbert v. Russell*, W. N. (75) 225.

Where under O. xxxii. 6, a judgment or order is made, the further consideration may be adjourned, although such judgment or order is made on interlocutory motion: *Bennett v. Moore*, 1 Ch. D. 692. So, also, where an order is made on summons under O. xv.: Form 4, *sup.*

The usual direction for the adjournment of the further consideration of the action, pending an account or inquiry directed to be made in Chambers, does not in terms include the reservation of costs; but they are in effect thereby reserved.

Where, however, the question of costs is partly disposed of at the hearing, the further consideration of the costs undisposed of should be expressly reserved: *Horsfall v. Garnett*, V.-C. W., 5 March, 1858, Regr. Min. 246; *Chilton v. Crosby*, V.-C. W., 6 March, 1858, Regr. Min. 270; Form 5, *sup.*

Trustees were held entitled to their proper costs of carrying out transactions after order on further consideration, though without the sanction of the Court: *Re Mansel, Rhodes v. Jenkins*, 54 L. J. Ch. 883.

Where costs are given by the judgment or order generally, subsequent costs are included: *Quarrell v. Beckford*, 1 Mad. 286; *Krehl v. Park*, 10 Ch. 236; and see *Clutton v. Pardon*, T. & R. 304; and this notwithstanding a reservation of subsequent costs "not provided for by the judgment or order," there being other costs by which these words might be satisfied: *Quarrell v. Beckford*, *sup.*; and where subsequent costs are not intended to be given, the direction should be confined to costs up to the judgment or order: *S. C.*

Liberty to apply is, in the absence of express reservation, implied in all orders which are not of a final nature: *Penrice v. Williams*, 23 Ch. D. 353; *Fritz v. Hobson*, 14 Ch. D. 561.

The usual direction for liberty to apply did not extend to an application for costs, as to which no express direction was given in the judgment or order: *Kendall v. Marsters*, 2 D. F. & J. 200.

But where accounts or inquiries are directed, and the further consideration is adjourned, the Court rarely gives any costs until the further order; except where some part of the action or some of the Defts are dismissed at the hearing, or an improper defence has been set up by the Defts or some of them; in such cases it is the more usual course at once to deal with the costs relating to those matters: see *inf.* Chap. XVII., "Costs."

## SECTION II.—DIRECTIONS FOR PAYMENT.

### 1. *Payment of Money by one Party to Another.*

LET the (Def't) B., on or before the — day of — (or [if so, subsequently] within — days after service of this judgment [or order]) pay to the (Pl't) A. the sum of £— appearing by &c. [or certified &c.]

to be due to him in respect of &c. [or on taking the accounts directed by &c.].

2. *Payment of Money by Instalments, the whole to become due on Default.*

UPON the application of the Plts, and upon hearing the solrs for the applicants and for the Deft, Let the Deft J. pay to the Plt M. the sum of 50*l.* by the several instalments mentioned in the first column of the Schedule hereto on or before the several dates set opposite to the amounts in the second column thereof, but, on default being made by the Deft in payment of any one of such instalments, Let the Deft J. forthwith pay to the Plts M. the whole balance of the said sum of 50*l.* then remaining unpaid: *Morris v. Jones*, M. R. at Chambers, 21 Jan. 1878, B. 154.

SCHEDULE.

First Column.	Second Column.
Instalments.	Dates when payments are to be made.
£10 - - - - -	22 February, 1878.
5 - - - - -	8 April "
5 - - - - -	8 July "
5 - - - - -	8 October "
5 - - - - -	8 January, 1879.
5 - - - - -	8 April "
5 - - - - -	8 July "
5 - - - - -	8 October "
5 - - - - -	8 January, 1880.
£50	

NOTES.

As to attachment and the mode of enforcing judgments and orders for payment by one person to another, see Chap. XXVII., "EXECUTION AND CONTEMPT," *inf.*; and O. XLII., XLIII., and XLIV.; and as to the attachment of debts, see O. XLV., O. XXVIII. 9, and Chap. XXVIII., "CHARGING ORDERS," *inf.*

By the 1 & 2 V. c. 110, s. 18, and 27 & 28 V. c. 112, s. 2, it was enacted that decrees and orders of Courts of Equity, whereby any sums of money or any costs, charges, or expenses are payable to any person, should have the effect of judgments at law, when registered pursuant to sect. 19. This does not apply to a chief clerk's certificate: *Mansfield v. Ogle*, 4 D. & J. 38; nor to an order for taxation: *Shaw v. Neale*, 6 H. L. C. 581; 6 W. R. 635. By the 2 V. c. 11, s. 4, judgments must be re-registered every five years; and by the 3 & 4 V. c. 82, s. 2, and 18 & 19 V. c. 15, ss. 4, 5, until registered, notice thereof does not affect purchasers, mortgagees, or creditors; and see the 23 & 24 V. c. 38, ss. 1—5; and by 27 & 28 V. c. 112, no judgment entered up after the passing of the Act shall affect any land "until such land shall have been delivered in execution by virtue of a writ of elegit or other lawful authority."

Land which cannot be delivered in execution by the sheriff could be by "other lawful authority," *i.e.*, the decree of the Court of Chancery: *Hatton v. Haywood*, 9 Ch. 229, and cases there; *Re South*, 9 Ch. 369; *Wells v. Kilpin*, 18 Eq. 298; *Tillett v. Pearson*, 22 W. R. 209; *Exp. Evans, Re Watkins*, 13 Ch. Div. 252; and as to "equitable execution" by appointment of receiver, *v. inf.*, Chap. XXXII., "RECEIVERS." And as to the effect of the 1 & 2

V. c. 110, as giving a direct charge upon land and otherwise, and as to judgments generally, *v. inf.*, Chap. XLVII., "MORTGAGES."

Where money had been paid under an order, and the order was reversed on appeal, repayment was ordered with interest at 4l. p. c.: *Rodger v. Comptoir d'Escompte de Paris*, L. R. 3 P. C. 465; *Merchant Banking Co. v. Maud*, 22 W. R. 874. But this has not been usual in Chancery unless a special case for interest has been made out: *Parker v. Morrell*, 2 Ph. 453, 469; and see Dan. 1312.

As to orders for taxation and payment of costs, *v. inf.*, Chap. XVII., "Costs."

## CHAPTER XV.

PASSING, ENTERING, CORRECTING, ADDING TO, AND ENROLLING  
JUDGMENTS AND ORDERS.

## SECTION I.—PASSING AND ENTERING.

*Motion to vary Minutes refused.*

UPON motion &c. that the minutes of the judgment [or order] dated &c. be varied by &c. [*state proposed variations*]; And upon hearing &c., This Court doth not think fit to make any order upon this motion, but doth order &c.—Directions as to costs.

## NOTES.

## DRAWING UP JUDGMENTS AND ORDERS.

When a judgment is pronounced, or an order made by the Court, a note of it is taken down by the registrar, and a similar note is indorsed by counsel on the briefs; and from these notes the draft or minute of the formal judgment or order is prepared.

The party entitled to the carriage of the order should, immediately after it is pronounced, leave his papers at the registrar's office, otherwise the registrar may draw it up at the instance of any other party.

By O. LXII. 4, "at the time of bespeaking a judgment or order, the party bespeaking the same shall leave with the registrar his counsel's brief, and such other documents as may be required by the registrar for the purpose of enabling him to draw up the same."

By r. 5, "every judgment or order shall be bespoken, and the briefs, and such other documents as are mentioned in r. 4 shall be so left within seven days after the judgment or order is pronounced or finally disposed of by the Court or Judge"; otherwise, by r. 6, "the registrar may decline to draw up the judgment or order without the leave of the Court or Judge."

A separate copy of the draft or minutes is prepared and delivered out to each party represented by a separate solr.

By r. 7, "at the time of delivering out the draft of any judgment or order, which requires to be settled by the registrar in the presence of the parties, the registrar shall deliver out to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the same."

As a general rule all judgments and orders deciding the rights of parties *inter se* will require to be settled in the presence of the parties, notwithstanding that they are of a simple character. Thus, a judgment simply dismissing the action with costs may require such settlement, as the entry of evidence is material for the consideration of the taxing master, and the judgment itself may be of importance as a document of title or as evidence of *res judicata*.

By r. 8, notice of the appointment is to be served on the opposite party one clear day at least before the time fixed thereby for settling the draft, and

the parties are to attend the appointment, and produce to the registrar their briefs, and such other documents as may be necessary to enable him to settle the draft.

By r. 9, service of the notice of appointment is to be effected by leaving it at the place for service of the party to be served, or by transmitting it by post to such party at such place for service; and by r. 10, at the time fixed for settling, the registrar is to satisfy himself in such manner as he may think fit that service of the notice of appointment has been duly effected.

By r. 11, "when the draft judgment or order has been settled by the registrar, he shall name a time in the presence of the several parties, or else deliver out an appointment in writing of a time for passing the judgment or order, and in the latter case notice of the appointment shall be served on the opposite party in like manner as directed by rr. 8 and 9 of this order with reference to an appointment to settle the draft judgment or order."

Where, under r. 11, the time for passing an order is named verbally, this must be done by the registrar personally in the presence of the parties; but where an application is made to his clerk, the clerk should give an appointment in writing: see *London, &c. Association, Exp. Pulbrook*, 17 W. R. 1075.

By r. 12, "if any party fails to attend the registrar's appointment for settling the draft of or passing any judgment or order, or fails to produce his briefs and such other documents as the registrar may require, the registrar may proceed to settle the draft, or pass the judgment or order in his absence, and shall be at liberty to dispense with the production of counsel's briefs, and to act upon such evidence as he may think fit of the actual appearance by counsel of the party failing to attend or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the Court or Judge."

A party not producing his briefs when required under r. 12, was ordered to do so within a limited time; and in default the order was to be drawn up without them: *Yeatman v. Read*, 14 W. R. 123.

By r. 13, "the registrar may adjourn any appointment for settling the draft of or passing any judgment or order to such time as he may think fit, and the parties who attended the appointment shall be bound to attend such adjournment without further notice."

By r. 14, "notwithstanding the preceding rules of this order, the registrar shall be at liberty, in any case in which he may think it expedient so to do, to settle and pass the judgment or order, without making any appointment for either purpose and without notice to any party."

A solr who has been discharged before the passing and entry of an order will not be allowed, by withholding papers on which he claims a lien, to prevent the drawing up or entry of the order: *Simmonds v. G. E. Rail. Co.*, 3 Ch. 797; *Clifford v. Turrill*, 2 D. & S. 1.

#### VARYING MINUTES.

The registrar in drawing up any order may introduce such alterations as from his experience he believes the Court would sanction, and these alterations are binding on the parties: see *Davenport v. Stafford*, 8 Beav. 503; *Hargrave v. H.*, 3 Mac. & G. 348.

But questions of difficulty sometimes arise which the registrar himself may require to be mentioned to the Court.

After, but not before, the draft or minutes have been settled by the registrar, if any party should feel dissatisfied with the draft as so settled, and wish to bring the matter before the Court, an application, at the peril of the party as to costs, must be made by motion specifying the matters complained of in the proposed judgment or order; and the registrar should be previously informed of the application: *Prince v. Howard*, 14 Beav. 208; *Hood v. Cooper*, 26 Beav. 373; *Tennant v. Trenchard*, 4 Ch. 537, 545 (where, per L. C., the practice of setting down the cause upon the minutes was disapproved); *British Dynamite Co. v. Krebs*, 25 W. R. 846; *General Share, &c. Co. v. Welley Brick, &c. Co.*, 20 Ch. Div. 130; and such application can be made at any time before the judgment, &c. is passed and entered: 1 Turn. & Ven. 319; Dan. 806.

The party moving should apply to the registrar, who will forward a copy of his note to the Judge.



Upon such a motion the only question to be argued is what was the actual order made, except in cases where both parties consent to an addition being made, or where it cannot be ascertained what order was pronounced, in which case the matter will be allowed to be put in the paper and re-argued: *Mem.*, W. N. (76) 296.

Any variation made by the Court in the draft settled by the registrar is embodied in the judgment, &c., originally made; and except where the costs of the application are ordered to be paid, no further order need be drawn up by any party.

The drawing up of another order as to the costs of an application to vary minutes may be obviated by adding a clause to the direction in the minutes as to costs as follows: "including the costs of an application to vary the minutes of this order"; and this is useful where it is undesirable to post-date the order in question.

If there is fair ground for the application, and there has been no improper opposition, the costs are usually made costs in the action; and the judgment, &c., is often post-dated so as to include the costs of the day.

The practice as to varying minutes applies to orders made by the Court of Appeal, as well as to those made by the Court below: *General Share, &c. Co. v. Welley Brick, &c. Co.*, 20 Ch. Div. 130; 30 W. R. 695.

Where a party instead of adopting the proper course of applying to vary minutes, applied after the order had been passed and entered, he was ordered to pay the costs of the application: *Re Swire, Mellor v. Swire*, 30 Ch. Div. 239.

And as to the practice generally, see Dan. 805, 806.

#### PASSING AND ENTERING JUDGMENTS AND ORDERS.

When the draft has been finally settled, the registrar causes it to be engrossed.

Orders to be acted upon by the Chancery Paymaster are printed: S. C. F. R. 23; and in these cases the draft order, instead of being engrossed, is sent by the registrar to the Queen's printers for proof.

The proof on being returned is examined by the registrar and the solrs, and the number of copies required is then struck off.

The judgment or order is said to be passed when the registrar has signed his initials in the margin at the foot of the last page of the engrossment or print, as an authority to the clerk of entries to enter it in the registrar's book; the registrar stamps each leaf with his official stamp: S. C. F. R. 24.

When passed, the order is left by the registrar for entry.

Even under the former practice an abatement of the suit did not prevent a decree from being passed and entered before the suit was revived: see *Man v. Ricketts*, 2 O. P. Coop. 36, 37 (notwithstanding the authority for the contrary of *Bertie v. L. Falkland*, 1 Dick. 25); *Willmott v. Ogilby*, M. R., 28 June, 1832, 23 Jan. 1833, Reg. Min.

So also when the suit abated between the hearing and the judgment: *Preston v. Meux*, M. R., 20 Nov. 1839, B. 341; *Belsham v. Percival*, 8 Ha. 157; *Collinson v. Lister*, 20 Beav. 355, and O. XII.

#### ENTRY OF JUDGMENT.

By O. XII. 1, every judgment is to be entered by the proper officer (who in the Chancery Division is the registrar) in the book to be kept for the purpose, and the party entering the judgment is to deliver to him a copy of the whole of the pleadings in the cause other than any petition or summons; such copy to be in print, except such parts (if any) of the pleadings as may be written: but no copy need be delivered of any document a copy of which has been delivered on entering any previous judgment in such cause.

Under this rule, when the judgment has been drawn up by the registrar, the engrossment, together with the pleadings to be filed, must be taken to the Writ, Appearance, and Judgment Department of the Central Office (see P. M. Rules, r. 15), and the officer receiving the same is to make a note in the margin of the engrossment that the pleadings have been filed, and to authenticate such note with the small seal of the office, and return the engrossment

to the solr. The registrar before passing the judgment requires to be satisfied that the pleadings have been duly filed.

By r. 3, where the judgment is pronounced by the Court, or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or a Judge shall otherwise order, and the judgment takes effect from that date.

In all other cases (as for instance where judgment is entered by default) the entry is to be dated on and take effect from the day on which the requisite documents are left for entry: *Ib.* r. 4.

By r. 6, where any judgment may be entered upon the filing of any affidavit or production of any document, the officer is to examine the affidavit or document produced, and if the same be regular, and contain all that is by law required, he is to enter judgment accordingly.

And by r. 7, where any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

#### ENTERING ORDER NUNC PRO TUNC.

By Gen. Ord. of 4 Dec. 1691, all orders pronounced in Mich. and Hil. Terms, or the vacations following, were to be entered before the first day of the ensuing Mich. Term, and all orders pronounced in Easter or Trinity Terms, or the following vacations, were to be entered before the first day of the ensuing Easter Term. This order is not expressly included in the Cons. Ords., but leave to enter *nunc pro tunc* after the expiration of the above periods is still necessary.

Orders to enter *nunc pro tunc* have been made after an interval of eighteen years: *Donne v. Lewis*, 11 Ves. 601; and of twenty-three years: *Lawrence v. Richmond*, 1 J. & W. 241.

Formerly, where the time for entering a judgment or order had expired before the entry was actually effected, it was necessary to obtain an order of course for entry *nunc pro tunc*; but now, by O. LII. 15, it is provided, that it shall not be necessary to obtain an order to enter a judgment or order *nunc pro tunc*; but in all cases in which such entries were formerly made under orders of course, the solr applying to have a judgment or order so entered shall leave with the clerk of entries a memorandum in writing, countersigned by the Chancery registrar, and bearing a stamp according to the scale of Court fees for the time being in force.

In *Re Jones, Brillis v. J.*, W. N. (91) 114, the order was made on an *ex parte* application.

#### TIME OF ENTRY.

O. LXV. 19b, provides, that "the proper officer, by whom an order directing a taxation of costs shall be drawn up, shall certify upon the order the date on which it was signed, entered, or otherwise perfected."

This rule was intended to afford information to the taxing masters, but in practice every order is now, by means of a stamp, marked on the back with the date on which it is actually entered on the records of the Court.

#### EFFECT OF ENTERING JUDGMENTS AND ORDERS.

Both under the former practice, and by O. XLI. 3, judgments relate back to, and take effect from, the day on which they are pronounced, and the entry is to be dated as of that day, unless for some particular reason it is ordered to be ante-dated or post-dated.

Proceedings under a judgment or order before it has been entered are irregular and voidable: see *Tolson v. Jervis*, 8 Beav. 366; and an attachment for contempt will not be granted for disobedience to an order not entered: *Ballard v. Tomlinson*, 31 W. R. 563; but in the case of injunctions and restraining orders parties are bound by notice of the order, however received, from the time when it is pronounced: *inf.*, Chap. XXXI., "INJUNCTIONS"; and see *Re Bryant*, W. N. (76) 252.

## CORRECTION OF MISTAKES IN JUDGMENTS OR ORDERS.

By O. xxviii. 11, "clerical mistakes in judgments or orders, arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal": see *Blake v. Harvey*, 29 Ch. Div. 827; 33 W. R. 602.

By the S. C. F. R. 27, "clerical mistakes or errors, or accidental omissions in printed orders may be amended in writing, and every such amendment is to be stamped by the clerks of entries, or other proper officer, with the official seal, as evidence that the duplicate or record has been also amended; but no amendment is to be made to provide for a new state of circumstances arising after the date of the order, nor is any order to be amended for the purpose of extending the time thereby limited for making any lodgment of funds in Court."

The judgment or order has been rectified, where it contained some material omission, on payment of costs of the application by the party to whom the omission was attributable: *Hughes v. Jones*, 26 Beav. 24; *Williams v. Carmarthen, &c. Ry. Co.*, 17 W. R. 346; see also *Tiel v. Barlow*, 3 D. J. & S. 426.

So also for non-compliance with the provisions of O. LXII. 11, as to notice to the parties of the time for passing the judgment or order: *Re London, &c. Assoc., Exp. Pulbrook*, 17 W. R. 1076.

Orders have been corrected under the rule where error arose from an inadvertent statement by Deft that interest already allowed was due: *Barker v. Purvis*, 56 L. T. N.S. 131; and where a trustee in default was erroneously allowed costs: *Stanier v. Evans*, 34 Ch. D. 470.

For cases in which directions as to payment of costs have been corrected, see *Re Tiel*, 11 W. R. 351; *Viney v. Chaplin*, 3 De G. & J. 282; *Fritz v. Hobson*, 14 Ch. D. 542; *Blakey v. Hull*, 35 W. R. 592; 56 L. T. N.S. 400.

Where an order on appeal had been passed and entered, and expressed the intention of the Court at the time when it was made, it could not be varied by giving the successful appellant additional costs: *Glasier v. Rolls*, 38 W. R. 113; 59 L. J. Ch. 63.

And for earlier instances in which decrees after being passed and entered have been rectified in matters of course on motion, see *Wallis v. Thomas*, 7 Ves. 292; *Pickard v. Mattheson*, *Id.* 293; *Newhouse v. Milford*, 12 Ves. 456; *Lane v. Hobbs*, *Id.* 458; *Skrymsher v. Northcote*, 1 Swa. 573, n.; *Askew v. Peddle*, 14 Sim. 301; *Turner v. Hodgson*, 9 Beav. 265.

But alterations in, or additions to, a judgment or order, on materials not found in the pleadings and evidence (see *King v. Savery*, 8 D. M. & G. 311), or involving new directions, not claimed in the pleadings and not asked at the hearing, will not usually be made without an appeal: *Brookfield v. Bradley*, 2 S. & S. 64; *Willis v. Parkinson*, 3 Swa. 233; *British Dynamite Co. v. Krebs*, 25 W. R. 846; *Glasier v. Rolls*, 38 W. R. 113; 59 L. J. Ch. 63.

And it is no sufficient ground for the application that a decision in point was not cited at the hearing: *Exp. Vicar of St. Sepulchre*, 11 W. R. 456.

An alteration made without any motion or summons for the purpose is irregular and will be discharged: *Blake v. Harvey*, 29 Ch. Div. 827.

As a general rule, the Court has no power to vary or alter a perfected judgment except under this rule: *Re Suffield*, 20 Q. B. Div. 697; *Re St. Nazaire Co.*, 12 Ch. D. 88; *Glasier v. Rolls*, 59 L. J. Ch. 63; 38 W. R. 113; 62 L. T. N.S. 305; but where a winding-up order had been pronounced, but not passed or entered, the Court by consent dismissed the petition: *Re Crown Bank*, 44 Ch. D. 634.

There is jurisdiction to correct the error, though the time for appealing has expired: *Barker v. Purvis*, 56 L. T. N.S. 131.

A decree made in 1871 was corrected in 1890 by inserting words omitted: *Shipwright v. Clements*, W. N. (90) 134; 38 W. R. 746.

The rectification of a judgment or order is, where practicable, made by altering the judgment or order itself; though in *Wallis v. Thomas*, 7 Ves. 292; *Lane v. Hobbs*, 12 Ves. 458, the alteration was by separate supplemental order; and this is frequently necessary: see *Eckersley v. E.*, W. N. (84) 133; and in *Stanier v. Evans*, 34 Ch. D. 470, an erroneous order (made on further consideration) was corrected by a new order made "notwith-

standing" the previous order: see also *Re Blackwell, Bridgman v. Blackwell*, W. N. (86) 97; *Re Clinton, Jackson v. Slaney*, W. N. (82) 176.

Irrespective of any rule or order, the Court has a general inherent jurisdiction to alter the record of its order in such a way as to carry out its own meaning: *Lawrie v. Lees*, 7 App. Cas. 35; *In re Swire, Mellor v. Swire*, 30 Ch. Div. 239 (where the applicant was put upon an undertaking that he would not take any objection to the certificate by reason of the alteration made in the record): *Tucker v. New Brunswick Co.*, 44 Ch. Div. 249. In such a case application should be made to the Court of first instance, and extra expense occasioned by coming to the Court of Appeal may be disallowed: *Tucker v. New Brunswick Co.*, *sup.*

As to the distinction between setting aside a judgment obtained through some slip on the part of the Deft and one obtained by the Plt irregularly, and that in the latter case the Deft is entitled *ex debito justitiæ* to have the judgment set aside, and the Court has no power to impose terms upon him except as a condition of giving him his costs, see *Anlaby v. Pretorius*, 20 Q. B. Div. 74.

## SECTION II.—ADDING TO JUDGMENT OR ORDER.

### 1. *Additional Accounts and Inquiries*—O. XVI. 40.

UPON the application of &c., And upon hearing &c., And upon reading &c., It is ordered that in addition to the accounts and inquiries directed by the judgment dated &c., the following further accounts and inquiries be made and taken, that is to say [*number the further accounts and inquiries consecutively after the numbered directions of the original judgment*].

### 2. *Order to add Direction for Sale of Realty*—O. XVI. 40.

UPON the application of &c., It is ordered that in addition to the directions contained in the said judgment [*or order*], the real estate of A. the testator &c. be sold with the approbation of the Judge, free from &c.—Directions for payment of purchase-money into Court. And if such money &c.

For form of order for sale of real estate, *v. inf.* Chap. XIX., "SALES BY THE COURT."

### 3. *Order adding to an Account and Inquiry directed*—O. XVI. 40.

UPON the application of &c., It is ordered that in taking the account numbered 1, and in making the inquiry numbered 5, directed by the judgment, dated &c., such parts of the testator's estate as have arisen from, or were connected with land in England and Wales, be distinguished from the other parts of his personal estate.—*Re Andrews, Mercer v. Mayhew*, V.-C. H. at Chambers, 24 March, 1879.

## NOTES.

By O. XXXIII. 2, "the Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special

or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

By O. xvi. 40, "wherever in any action for the admon of the estate of a deceased person, or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made—(a) under O. xv.; (b) under O. xxxiii.; (c) affecting the rights or interests of persons not parties to the action—the Court or a Judge may direct that any persons interested in the estate, or under the trust, or in the hereditaments, shall be served with notice of the judgment or order; and after such notice such persons shall be bound by the proceedings in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or Judge to discharge, vary, or add to the judgment or order."

That accounts on the footing of wilful default will not in general be directed where such default was not originally pleaded, see *Barber v. Mackrell*, 12 Ch. Div. 534, 538; *Mayer v. Murray*, 8 Ch. D. 424; *Job v. J.*, 6 Ch. D. 562; *Lake v. Tonkin*, 21 Ch. D. 757, and *inf.*, Chap. XLI., "TRUSTEES."

After the usual judgment in a partnership action, the Court declined to add an inquiry or direction as to return of premium, it not appearing that any further facts had come to the knowledge of the Plt since the hearing: *Edmonds v. Robinson*, 29 Ch. D. 170.

### SECTION III.—ENROLMENT OF JUDGMENT OR ORDER.

By O. lxi. 8, "it shall not be necessary to enrol any judgment or order, whether dated before or since the commencement of the principal Act."

Under the practice before the Jud. Acts, a decree did not, strictly speaking, become a record of the Court until it had been enrolled, and until enrolment it was liable to be altered by the Court itself upon a rehearing.

The effect of enrolling a decree or order of the M. R. or V.-C. (whether interlocutory or final, and whether made in Chambers or in Court) was to make it the decree or order of the L. C., and consequently prevented a rehearing of the cause before the M. R. or such V.-C., or an appeal to the Court of Appeal, and such decree or order could only be reversed or altered, either by appeal to the House of Lords, or by bill of review. On the other hand, the House of Lords would not hear an appeal against any decree or order of the Court of Chancery until it had been enrolled.

With respect to judgments and orders made since 2nd Nov. 1875, enrolment has no longer the effect of preventing an appeal to the Court of Appeal established by the Jud. Acts, and is now (except in the case of enrolment under special statutes) a useless ceremony: *Hastie v. H.*, 2 Ch. 304, 307; because appeals to the House of Lords are not from the High Court of Justice, but from any order or judgment of Her Majesty's Court of Appeal in England: see the Appellate Jurisdiction Act, 1876 (39 & 40 V. c. 59), s. 3.

And for the former practice as to enrolling decrees and orders, see Seton (3rd ed.), 1145—1149.

As to the enrolment of schemes under the Railway Cos. Act, 1867 (30 & 31 V. c. 127), v. Chap. LIV.

### VACATING ENROLMENTS.

As to the former practice of vacating enrolments, see Seton (4th ed.), p. 1650.

#### SECTION IV.—ENROLLING OR ENTERING ORDERS OF OTHER COURTS.

##### 1. *Order of the High Court of Justice in Ireland enrolled on Petition of Course to the Lord Chancellor*—41 G. III. c. 90.

UPON the petition of the Plt this day preferred unto the Rt. Hon. the L. C. &c., His Lordship doth order that the decree made on the further consideration of this cause by the (*now* Chancery Division of the High Court of Justice in Ireland) dated &c., whereby it was ordered &c. [*state decree, or the part of it to be inrolled in this Court*], and a copy of which said decree has been exemplified and certified to this Court under the Great Seal of Ireland, pursuant to the provisions of the Act of Parliament made in the 41 G. III. c. 90, be enrolled on the rolls of this Court.—*Ferguson v. F.*, L. C., 22 July, 1875, A. 1134.

This order is obtained on petition of course.

For subsequent orders in this case, see *S. C.*, V.-C. H., 22 July, 1875, A. 1181; L. JJ., 4 Aug. 1875, A. 1828, 10 Ch. 661; and see *Pennefather v. Short*, W. N. (66) 102, 126.

#### NOTES.

By 41 G. III. c. 90, s. 6, where, in any suit between party and party any decree shall be pronounced, or any order made for payment or for accounting for money, by the High Court of Chancery in Ireland, the L. C. of Ireland for the time being is, upon application to him, to cause a copy of such order or decree to be exemplified and certified to the Court of Chancery in England under the great seal of Ireland; and the L. C. of England is forthwith to cause such order or decree, when presented to him so exemplified, to be enrolled in the rolls of the High Court of Chancery in England, and is to cause process of attachment and committal to issue against the person of the party against whom the order or decree shall have been made to enforce obedience to and performance of the same as fully and effectually as if such order or decree had been originally pronounced in the Court of Chancery in England.

By 5 G. IV. c. 111, these provisions are extended to orders made in any matter or proceeding by petition in cases of minors, bankrupts, idiots, or lunatics.

By 12 & 13 V. c. 77, s. 14, a similar provision was made in the case of orders of the Landed Estates Court in Ireland; but the jurisdiction of that Court is now transferred to the Irish High Court of Justice.

Even before the 35 & 36 V. c. 57, abolishing imprisonment for debt in Ireland, it seems that the English Court could not enforce an Irish decree by attachment in a case which in England would be within the Debtors Act, 1869 (32 & 33 V. c. 62): *Ferguson v. F.*, 10 Ch. 661.

The jurisdiction to order enrolment of decrees of other Courts under 41 G. III. c. 90, and 2 & 3 W. IV. c. 93, appears to have been formerly exercisable by the V.-C.: 53 G. III. c. 24, s. 2; 5 V. c. 5, s. 22; or by the L. JJ.; 14 & 15 V. c. 83, s. 5; or one of them: 30 & 31 V. c. 64; but not by the M. R., and appears now to be exercisable by any Judge of the Chancery Division: see *Jud. Act*, 1873, ss. 16, 34 (2), 39.

There is no jurisdiction to enrol a decree of a Scotch Court: *Re The Dundee Suburban Rail. Co.*, 58 L. J. Ch. 5; 59 L. T. N.S. 720; 37 W. R. 50; W. N. (88) 205; except decrees in the course of winding up a co.; or for "any debt, damages, or costs" under the Judgments Extension Act (31 & 32 V. c. 54).

2. *Order of the Arches Court of Canterbury enrolled—*  
2 & 3 W. IV. c. 93.

UPON the petition &c., setting forth that by the decree of the Arches Court of Canterbury, dated &c., sentence was pronounced, and the Court pronounced against the appeal made in this cause on behalf of the Reverend C., and affirmed the order or decree of the Worshipful P., the Official Principal of the Consistory Court of —, and condemned the said C. in costs; that the said costs were on the — day of — taxed to that date at £—; that the said C., after having been duly monished, has wholly neglected to comply with such monition, and to pay the said costs, and has since been duly pronounced contumacious and in contempt, It is therefore ordered that a copy of the exemplification of the said decree, dated &c., and the several proceedings thereunder, be enrolled in the rolls of this Court, pursuant to the Act of Parliament of 2 & 3 W. IV. c. 93, s. 2.—*Craig v. Watson*, L. C., 21 June, 1871, A. 1873.

For subsequent order for sequestration, see *S. C.*, *inf.* Chap. XXVII., "EXECUTION."

NOTES.

By 2 & 3 W. IV. c. 93, s. 1, provision is made for enforcing decrees of Ecclesiastical Courts by the writ *de contumace capiendo* in cases not within 53 G. III. c. 127.

As to the proceedings on this writ, see *Hudson v. Tooth*, 2 P. D. 125.

By sect. 2, when any person has been ordered by the order or decree, final or interlocutory, of any Ecclesiastical Court to pay any sum or sums of money, and after having been duly monished, shall refuse or neglect to comply with such monition and to pay the said sums therein ordered to be paid by him, or a peer or lord of Parliament or member of the House of Commons shall in any way neglect to perform or shall not perform any decree or order of such Courts, it shall be lawful for the Judge or Judges who shall have made such order or decree to pronounce the person so neglecting or refusing to comply contumacious and in contempt, and within ten days to cause a copy of such order or decree under the seal of the Court to be exemplified and certified to the L. C., who shall forthwith cause such copy to be enrolled in the rolls of the (Chanc. Div. in England), and shall thereupon cause process of sequestration to issue against the real and personal estate in England of the party against whom the order or decree shall have been made, in the same manner as if the cause had been originally instituted in the (Chanc. Div.), and as if the process antecedent to process of sequestration had been duly issued and returned in the last-mentioned Court.

It was held sufficient if the exemplification was signed by the Ecclesiastical Judge within ten days: *Cooper v. Dodd*, 15 Jur. 69.

3. *Order of the Chancery Court of the County Palatine made an*  
*Order of Court—*13 & 14 V. c. 43, s. 15.

WHEREAS by an order, dated &c., made in the Chancery of the County Palatine of Lancaster (— District), it was ordered &c. [*Recite order verbatim*]; Now upon motion &c., and upon reading a transcript of the said order under the signature of the registrar of the said Court, and an affidavit &c. (*evidence that the order cannot be fully enforced in the County Palatine Court*), This Court doth order that the said order,

dated &c., be made an order of this Court.—*Re The Albion Bank and Discount Co., Limited*, Kekewich, J., 19 Nov. 1887, A. 1647; *Smith v. Lewis*, V.-C. B., 12 Oct. 1875, B. 1578.

For like order, see *Re Prescott Masonic Hall Co.*, V.-C. H., 15 March, 1877, B. 426.

And for like order as against contributories named in a schedule, see *Re Liverpool and Dublin Steam Co.*, V.-C. W., 4 Dec. 1866, B. 2461.

#### NOTES.

##### ORDERS OF THE COUNTY PALATINE COURTS.

By 13 & 14 V. c. 43, s. 15, whenever a Plt or Deft in any suit or proceeding, in which a decree or order has been made by the County Palatine Court, shall reside or withdraw his goods or person out of the jurisdiction of that Court, and whenever any decree or order of that Court cannot be fully enforced by reason of the non-residence of any person to be bound thereby within the jurisdiction of the said Court, then it shall be lawful for the (Chanc. Div.), upon the application of any person entitled to the benefit of such decree or order, and upon the production of a transcript of such decree or order, or such part thereof respectively as cannot be enforced for the reasons aforesaid, under the signature of the registrar of the County Palatine Court, and an affidavit that by reason of such non-residence, or removal as aforesaid, such decree or order, or such part thereof, cannot be enforced, to make such decree or order, or such part thereof respectively as cannot be enforced, a decree or order of the (Chanc. Div.); and thereupon such decree or order, or such part thereof respectively, may be enforced, and proceedings had thereon, as if such decree or order had been originally made by the (Chanc. Div.); and the costs of and consequent upon such application may be recovered as if the same were part of such decree or order.

By 17 & 18 V. c. 82, s. 10, these provisions were extended to decrees or orders made by the Court of Appeal in Chancery of the County Palatine thereby established.

By s. 7, the Court of Appeal in Chancery of the County Palatine (now her Majesty's Court of Appeal) is empowered to make orders according to the practice of the (Chanc. Div.) in all cases in which by reason of any person being out of the jurisdiction of the County Palatine Court, or otherwise, effectual protection cannot be given to any ward of that Court, or to any exor, admor, officer of Court, or other person entitled to its protection, or in which for the same reason, or otherwise, any contempt of the said Court cannot be effectually punished; and every such order shall have the same effect as an order of the (Chanc. Div.): and see *Downes v. Jackson*, 14 W. R. 907.

By s. 8, where the parties are out of the jurisdiction of the Court of the County Palatine, the Court of Appeal may either direct the cause or matter to be transferred to the (Chanc. Div.), or order service to be effected out of the jurisdiction of the Court of the County Palatine.

On an application to serve a writ on a sole Deft out of the jurisdiction of the Court of the County Palatine of Lancaster, the Plt was put on terms to submit to a transfer of the action to the Chanc. Div. if the Deft applied for it; and on the Deft so applying the Plt had to pay the costs: *Re Watmough, Sergenson v. Beloe*, 24 Ch. Div. 280. In this case it was questioned whether sect. 8 applies to the case of a sole Deft.

The Palatine Court of Durham Act, 1890 (52 & 53 V. c. 47), s. 4, contains, in respect to that Court, provisions similar to those of 13 & 14 V. c. 43, s. 15, and 17 & 18 V. c. 82, s. 11, above stated.

##### ORDERS OF THE STANNARIES COURT.

By 18 & 19 V. c. 32, s. 10, where any decrees or orders, whether for payment of money or not, made in causes on the Equity side of the Court of the Vice-Warden, cannot be conveniently or effectually enforced by the ordinary process of the Court of the Vice-Warden within the jurisdiction thereof,



it shall be lawful for the (Chanc. Div.), or any Judge thereof sitting in Court or at Chambers, upon the application of the party entitled to the benefit of such decree or order, and production of a certificate from the registrar of the Court of the Vice-Warden under the seal of the Court of the said decree or order, or so much thereof as cannot be enforced, and a satisfactory affidavit of the ground of the application, to make the said decree or order, or so much thereof as cannot be enforced, a decree or order of the (High Court); and thereupon such decree or order, or such part thereof, may be enforced by such proceedings and writs as would have been taken or issued if the same had been originally made by the (High Court), and the costs of and consequent upon such certificate and application shall and may be recovered as if the same were part of such decree or order.

4. *Order in Irish Winding-up made an Order of Court as against Contributories resident in England.*—25 & 26 V. c. 89, s. 122.

WHEREAS by an order of the Hon. Judge M., one of the Judges of the Court of Bankruptcy and Insolvency in Ireland, made in this matter, dated &c., It was ordered &c. [*Recite call order verbatim without the schedule*]; And whereas the schedule referred to in the said order is as set forth in the first part of the schedule hereto; Now upon motion &c., And upon reading an office copy of the said order and the schedule thereto, this Court doth order that the said order of the said Court of Bankruptcy and Insolvency, dated &c., be made an order of this Court as against such of the persons named in the first part of the schedule hereto as are named in the second column of part 2 of the same schedule.—*Re Hollyford Copper Mining Co.*, L. J. G., 11 Dec. 1869, A. 3081, 5 Ch. 93.

In this case the proceedings had been transferred to the Bankruptcy Court under the Cos. Act, 1861 (25 & 26 V. c. 89), s. 81.

For like order to make a similar order of the Court of Session at Edinburgh an order of the Court, see *Re Scottish Farmers' Co.*, M. R., 11 Dec. 1877, B. 2128.

5. *Order of the High Court of Justice in Ireland made an Order of Court.*

WHEREAS by an order dated &c., made in the High Court of Justice in Ireland, Chancery Division, It was ordered &c. Now upon motion &c., by counsel for A. B., Let the said order, dated &c., be made an order of this Court. And Let.—[*Repeat the order*].—*Re Slaney Woollen Mills Co., Lim.*, Kay, J., 12 April, 1888, B. 866, P.

NOTES.

By the Cos. Act, 1862 (25 & 26 V. c. 89), s. 122, orders, interlocutors, and decrees made by the Court of Session in Scotland for or in the course of winding up a company, are to be enforced in England and Ireland, and orders made by the Court in Ireland for or in the course of winding up a company are to be enforced in England and Scotland by the Courts which would respectively have had jurisdiction in the matter of such company if its registered office were situate in that division of the United Kingdom where the order is to be enforced, and in the same manner as if such order had been made by the Court required to enforce the same in the case of a company within its own jurisdiction.

By sect. 123, an office copy of the order to be enforced is to be produced to the proper officer of the Court required to enforce it, and the production of such office copy is to be sufficient evidence of such order having been made; and thereupon such last-mentioned Court shall take such steps in the matter as may be requisite for enforcing such order.

In cases under these sections the order to be enforced is to be made an order of the Court required to enforce it: *Re Hollyford, &c. Co.*, 5 Ch. 93, Form 4, *sup.*

The Court to enforce such an order is the Chanc. Div., although the matter may be pending in the Irish Court of Bankruptcy: *S. C.*

## CHAPTER XVI.

### LODGMENT AND PAYMENT OF FUNDS.



#### SECTION I.—LODGMENT.

[NOTE.—For Lodgment Schedule Forms, see pp. 178 *et seq.*]

##### 1. *Lodgment in Court.*

LET the Deft B., on or before the — day of — (or subsequently within seven days after service of this judgment [*or order*]), lodge the sum of £—, admitted by &c., to be in his hands, as the exor of the will of the testator A., in Court, as directed in the schedule hereto.— [Add Lodgment Schedule, Form No. 1.]

For order on motion in an admon action for payment into Court by Deft of money stated by Plt to be in his hands, and not disputed by Deft, who did not appear on the motion, see *Freeman v. Cox*, 8 Ch. D. 148.

An unregistered judgment debt ranks as a simple contract debt bearing interest: *Van Gheluive v. Nerinckx*, 21 Ch. D. 189; *q. v.* as to effect of 23 & 24 V. c. 38, s. 3; *Re Illidge, Davidson v. I.*, 27 Ch. Div. 478.

##### 2. *Voluntary Lodgment in Court.*

LET the Deft B. be at liberty [*if so*, on or before the — day of —] to lodge the sum of &c., in Court, as directed in the schedule hereto.— [Add Lodgment Schedule, Form No. 1.]

##### 3. *Lodgment in Court with Interest.*

LET the Deft B., on or before &c., lodge in Court &c., the sum of £—, due from him &c., and Let the Deft B., on or before &c., lodge in Court interest on the said sum of £—, at the rate of £5 p. c. per ann. from the — day of — to the day for payment, as directed in the schedule hereto.—[Add Lodgment Schedule, Form No. 3.]

This form has been framed as above in consequence of *Re Hickey, Hickey v. Colmer*, 35 W. R. 53.

##### 4. *Lodgment in Court—Investment.*

LET the Deft B., on or before &c. [Form 1], lodge £1,000 £2 15s. p. c. Cons. Stock (admitted by his said affidavit to be), standing in his

name in the books of the Bank, in Court, as directed in the schedule hereto. And Let the Deft B. receive any dividends now due on the said stock, and on or before &c. [Form 1], lodge such dividends in Court as directed in the said schedule. [*If the day for closing the Bank books, under 24 V. c. 3, ss. 7, 10, will intervene, add,* And Let the Deft B. also receive any dividends on the said stock which may become payable to him after such transfer, and within fourteen days after such dividends shall have become payable, lodge the same in Court &c. *If to be invested and accumulated, add,* to be dealt with as thereby directed.]—[Add Lodgment Schedule, Forms Nos. 2 and 1.]

### 5. *The Like.*

LET the Deft B., on or before &c. [Form 1], lodge £1,000 £2 15s. Cons. Stock, standing &c., in Court &c., and receive any dividends on the said stock now due, or to become payable to him before or after such transfer, and within &c., after such receipt, lodge such dividends in Court, as directed in the schedule hereto, to be dealt with as thereby directed.—[Add Lodgment Schedule, Forms Nos. 2 and 1.]

### 6. *Leave to Lodge from Time to Time—Investment.*

LET the Deft B. be at liberty, from time to time, to lodge in Court, as directed in the schedule hereto, any sum or sums of money (amounting to not less than £100) which may hereafter be received by him on account of the estate of the testator A.—[Add Lodgment Schedule, Forms Nos. 4 and 1.]

### 7. *Deposit of Exchequer Bills.*

LET the Deft B., on or before &c. [Form 1], lodge in Court, as directed in the schedule hereto, the exchequer bills in the said schedule mentioned, and admitted by his said affidavit to be in his hands, as exor of the will of the testator C., and amounting in the whole to £—, or any other bills for which the same may be exchanged; subject to further order.—[Add Lodgment Schedule, Form No. 6.]

### 8. *Deposit in Court of Securities passing by Delivery, other than Exchequer Bills.*

LET the Deft B., on or before &c., lodge in Court, as directed in the Lodgment Schedule hereto, the bonds in the said schedule mentioned, amounting together to the nominal amount of £10,000, with the coupons thereto attached, as directed.—[Add Lodgment Schedule, Form No. 9.]

By S. C. F. R. 1886, r. 76, money arising from payment off of securities will be placed on deposit, upon a request, without a direction in the order.

### 9. *Deposit in Court of Securities passing by Delivery and Deed.*

LET the Deft B. deposit in Court, as directed in the schedule hereto, the securities specified in the schedule hereto, and execute and procure

to be registered a transfer of such securities to the account of the Paymaster General, for and on behalf of the Supreme Court of Judicature, as directed in the said schedule.—[Add Lodgment Schedule, Form No. 9.]

10. *Deposit in Court of Plate or Jewels, or such Securities as must be placed in a Box.*

LET the Deft B., on or before &c., place in a box, in the presence of the solrs for the Plt the several articles of plate [or jewellery, or the certificates and other documents of title of the 200 shares in the B. A. Society in the &c. mentioned], specified in the schedule hereto; and such box is to be endorsed "In the High Court &c., A. v. B. 1876, A. 100, Plate [or Jewellery or Securities]." And Let the Deft B., within the time aforesaid, lodge such box in Court as directed in the Schedule hereto. [*If required*: And Let such box be delivered out within fifteen days after the 1st Jan., 1889, and the 1st July, 1889, and the same days in every succeeding year, to the Deft B., for the purpose of receiving the dividends on such securities, as directed in the schedule hereto. (See Payment Schedule, Form No. 75.) And Let the Deft B. replace the said securities in such box in the presence of the solicitors for the Plt. And Let the Deft B., on or before the 20th Jan., 1889, and the 20th July, 1889, and the same days in every succeeding year, re-deposit such box in Court to the same credit, as directed in the said schedule. And Let the Deft B. receive such dividends, and on or before the 20th Jan., 1889, and the 20th July, 1889, and the same days in every succeeding year, lodge such dividends in Court, as directed in the said Lodgment Schedule.—[Add Lodgment Schedule, Forms Nos. 1 and 8.]

By Chancery Funds Amended Orders, 1874, r. 16, the Clerks of Records and Writs (now the Masters of the Supreme Court) are not to receive jewels or plate, or articles of a like nature, or negotiable securities.

Neither the paymaster nor the Bank inquire as to the contents of the box, but the Bank objects to receive a box beyond a certain weight and size.

Under S. C. F. R. 1886, r. 3, "funds in Court" includes boxes and other effects.

11. *Investment of Cash, or Money on Deposit, in Stock.*

LET the fund in Court be dealt with as directed in the schedule hereto.—[Add Lodgment Schedule, Form No. 1.]

For directions to invest in Bank Stock in sums not exceeding £2,000, to avoid raising the price, see *Moorat v. M.*, M. R. at Chambers, 28th July, 1875, B. 2037.

12. *Payment into Court of Money lodged at the Bank under S. C. F. R. 1886, r. 31.*

It appearing by the receipt of one of the cashiers of the Bank that the Plt A. has lodged at the Bank, to the credit of a Supreme Court Suspense Account, the sum of £1,000, Let &c.

And Let the Plt A. on or before &c., do all necessary acts pursuant to the 31st of the Supreme Court Funds Rules, for the purpose of having the said sum of £1,000 transferred by him into Court to the credit of this action, A. v. B. 1875, A. 100, as directed in the schedule hereto.—[Add Lodgment Schedule, Form No. 7.]

13. *Administrator ad litem to transfer Testator's Stock, and pay Dividends into Court.*

"AND the Deft R., as admor of the effects of the testator, limited to the purposes of this action [by his counsel, or affidavit], admitting that there is now standing in the books of the Bank in the name of the testator £— New Consols, Let the said Deft R. as such limited admor, on or before &c., lodge the said £— New Consols in Court as directed in the schedule hereto." Direction to receive dividends and lodge same in Court. "And Let the Gov. & Co. of the Bank be at liberty to permit the said Deft to make such transfer and to receive such dividends accordingly."—See *Knyvett v. Major*, M. R., 28 July, 1860, A. 1549; on the authority of *Brant v. King*, V.-C. E., 31 March, 1829; 1 Wms. Exors. 531, 8th ed.; and see *Williams v. Allen*, 32 Beav. 650.—[Add Lodgment Schedule, Forms Nos. 2 and 3.]

In *Brant v. King*, *supra*, the order was that the Bank permit the transfer, they appearing on the application; but in *Knyvett v. Major*, *supra*, the Bank were not served, and the order was therefore only permissive.

FORMS OF LODGMENT SCHEDULES.

*Lodgment Schedule.*

In the High Court of Justice, Date of Order 1889.  
Chancery Division. Title of cause or matter. A. v. B. 1889. A. 15.  
Ledger Credit [If same title of cause or matter] "as above" [add account, if any].

	Particulars of Funds to be lodged.	Persons to make the lodgment.	Amounts.	
			Cash.	Securities.
			£ s. d.	£ s. d.
1. <i>Lodgment of cash and investment.</i>	Balance in his hands ..... Invest and accumulate in New Consols the amount lodged.	C. B. ....	5,000 0 0	
2. <i>Lodgment of securities.</i>	New Consols ..... Great Western Railway 4l. per centum Debenture Stock.	A. B. and C.D... The same .....	.... ....	5,000 0 0 4,000 0 0
3. <i>Lodgment of cash or purchase-money and interest.</i>	Cash ..... Interest on 400l. at the rate of 5l. per centum per an- num from the 4th August, 1889, and on 100l. from the 4th December, 1889.	C. B. .... The same.	500 0 0	

	Particulars of Funds to be lodged.	Persons to make the lodgment.	Amounts.	
			Cash.	Securities.
			£ s. d.	£ s. d.
4. <i>Lodgment of cash from time to time.</i>	Cash from time to time in his hands as part of the estate of X, not less than 100%.	C. B.		
5. <i>Receiver's balances....</i>	Balance to be from time to time certified on passing the receiver's accounts, or so much as shall be certified to be proper to be lodged.	A. D.		
6. <i>Exchequer bills .....</i>	Exchequer bills as follows : Two for 500% each, both dated the 6th May, 1888, and numbered 14,564 and 14,565. Six for 1,000% each, all dated the 6th June, 1888, and numbered 11,568 to 11,573, both inclusive.	A. D. ....	....	7,000 0 0
7. <i>Cash paid under r. 31 to suspense account.</i>	Amount paid to "suspense account."	John Adams ....	1,000 0 0	
8. <i>A box ,.....</i>	A box endorsed, &c. ....	A. B. and C. D.		
9. <i>Deposit of securities passing by delivery other than Exchequer bills.</i>	Twenty Chilian 5 per cent. bonds for 500% each, numbered, &c., with the coupons attached for the half-yearly payment of interest commencing the — day of —, 1889.	B.		
10. <i>To make up deficiency before division of fund.</i>	If 1-6th of such aggregate amount as aforesaid shall be less than 1,573% and interest, as mentioned in Payment Schedule, lodge amount of such deficiency.	B.		
11. <i>Money raised by mortgage by order of the Court.</i>	Amount (to be certified) to be raised by mortgage of infant's life interest and policy on his life.	Mortgagee or mortgagees to be named in the chief clerk's certificate.		
12. <i>Another form .....</i>	Amount directed to be raised by mortgage, the name or names of the mortgagee or mortgagees, and the amount to be lodged to be certified.			

## NOTES.

## PAYMASTER GENERAL.—GENERAL REGULATIONS.

By the Court of Chancery (Funds) Act, 1872 (35 & 36 V. c. 44), amended and extended to all the divisions of the Supreme Court by the Supreme Court of Judicature (Funds, &c.) Act, 1883 (46 & 47 V. c. 29), the office of Accountant-General was abolished, and that of Paymaster General established, with similar duties, re-moulded by the Act.

By O. LXII. 16, "all orders for the payment or transfer of money or securities into Court to the account or credit of the P. G., and for the payment or transfer of money or securities out of Court by the P. G., are to be drawn up in conformity with such rules relating thereto as shall be from time to time made under the Court of Chancery Funds Act, 1872, or any Act amending the same."

By S. C. F. R. 1886, r. 2, all other rules and general orders prescribing the mode of dealing with funds in Court are revoked, and by r. 3 terms are defined.

By r. 4 it is provided that the rules 5 to 27, inclusive, shall apply only to causes and matters in the Chancery Division, and, so far as the same are applicable, to matters in lunacy.

By r. 5, every order directing funds to be lodged in Court is to have a Lodgment Schedule setting out in a tabular form the description by name of the person by whom the funds are to be lodged, and the amount, if ascertained, and description of the funds. The lodgment schedule may direct the investment and accumulation of interest on the funds to be lodged, and may also direct that the funds shall not be dealt with without notice to the purchaser or other person named in the schedule.

By r. 10, the lodgment and payment schedules, respectively, are to contain the whole of the instructions intended to be acted upon by the Paymaster, and all particulars necessary to be known by him, so far as the same are capable of being expressed at the date of the order, and the Paymaster is only to be responsible for giving effect to such instructions as are expressed in the schedules thereto. The instructions and particulars contained in the schedule are not to be set forth in the body of the order, but are only to be therein referred to as appearing by the schedule, unless for any special cause it may, in the opinion of the Judge by whom the order is made, or the registrar by whom the same is drawn up, be necessary to set forth some part of such instructions or particulars, both in the body of the order and in the schedule.

By r. 22, when an order is made dealing with funds in Court in accordance with agreed minutes, the solicitor of the party whose duty it is to procure the order to be drawn up is to lodge with the registrar or other proper officer, for his consideration, draft schedules, in the same form as the lodgment and payment schedules to an order, and containing the particulars required to be contained in such schedules.

By r. 23, every order which is to be acted upon by the Paymaster is to be drawn up and entered by the registrar, unless the Judge otherwise directs, and is either to be wholly printed, or, in cases in which printed forms can be used, partly in print and partly in writing.

By r. 24, the registrar is to cause a duplicate of every order and a further copy of the schedules thereto to be made at the same time with the original; and the original order is to be passed by the registrar, and together with the further copy of the schedules is to be stamped with his official seal, and transmitted by him to the clerk of entries with the duplicate. The duplicate order is to be filed as the record, and the original order and further copy of the schedules are to be examined and stamped and marked with a reference to the record so filed. The original order and further copy of the schedules are to be returned to the registrar, who is to deliver the original order to the solicitor having the carriage of the order, and is to send the further copy of the schedules to the Paymaster.

A copy of a lodgment schedule signed by a chief clerk (under r. 5 of these Rules) is to be sent to the Paymaster by the chief clerk.

By r. 25, the copy of the schedules to an order sent to the Paymaster is to



be his authority for giving effect to the several operations directed therein ; and no part of the order other than the schedules is to be sent to him.

By r. 26, additional copies of orders according to the requirements of the parties may be printed and issued as office or certified copies.

By r. 27, accidental errors may be amended in writing, but no amendment is to be made to provide for a new state of circumstances arising after the date of the order, nor for extending the time limited for making any payment into Court.

Where the alteration is formal, and all parties consent, the registrar will make the amendment, but where the parties do not consent, there must be a summons or motion under O. xxviii. 11. A party unreasonably refusing to consent may be ordered to pay the costs of the application.

By r. 96 the Paymaster may, when he requires evidence for carrying into effect any order, act on affidavits or statutory declarations.

And by r. 99 he may, upon a request in writing made by or on behalf of a person claiming to be interested in any funds in Court to the credit of an account specified in such request, issue a certificate of the amount and description of such funds, on the morning of the day of the date thereof, and not having reference to the transactions of that day, notifying the dates of any orders restraining the transfer, &c., of such funds, and any charging orders affecting them of which he has had notice, and the names of the persons to whom notice is to be given, or in whose favour such orders have been made.

And when a cause or matter has been inserted in the list referred to in r. 101, the fact is to be notified on the certificate relating thereto: r. 99.

By r. 100, the Paymaster may, upon a like request, issue a transcript of the account; and, if so required by the person to whom it is issued, such transcript shall be authenticated at the Audit Office, and the Paymaster may supply such information as may be required.

By r. 101, a list is to be prepared by the Paymaster, and published on or before 1 March in every third year, of any funds amounting to or exceeding £50, which have not been dealt with for fifteen years; and by Chancery Funds Amended Orders, 1874, O. xiv., when a cause or matter has been inserted in this list the fact shall be mentioned in every petition or summons relating thereto, and if the amount exceeds £500 the official solr is to be served. Costs of the official solr occasioned by the neglect of a tenant for life in not applying for the dividends, were payable not by the railway co. by whom the money had been paid in under the L. C. O. Act, but out of the portion of the fund belonging to the tenant for life: *Re Clarke's Estate*, 21 Ch. D. 776.

By r. 102, small balances which have not been dealt with for five years are to be carried over to a separate account.

#### PAYMASTER GENERAL.—ORDERS IN LUNACY.

By sect. 145 of the Lunacy Act, 1890 (53 V. c. 5), where an order relates to the depositing of any funds or securities in Court, or the disposal by the Paymaster of the funds or securities in Court, to the credit of the matter of a lunatic, the Paymaster and the Bank and all other persons are to act on an office copy of the order; and by sect. 147, forging the signature of a Master in Lunacy is a felony.

As to transfer of securities out of Court, and dividends accruing thereon, see S. C. F. R. r. 6.

In the S. C. F. R. 1886, r. 3, the word "order" includes a report of a Master in Lunacy confirmed by fiat, and a certificate of a Master in Lunacy to be acted on without further order; and the notes as to form, &c., of orders dealing with funds in Court generally apply to orders and reports in lunacy.

Formerly orders in lunacy were required to be passed and entered by a Chancery registrar before being acted on by the Acc.-Gen. They are now drawn up by the Masters in Lunacy (Rules in Lunacy, 1890, r. 59), and printed under their direction and control. Orders made concurrently in Chancery and in Lunacy dealing with funds in Court are passed and entered both by the registrar in Lunacy and one of the registrars in Chancery.

By the Rules in Lunacy, 1890, r. 116, all orders for the appointment of committees, and for the allowance of maintenance, are to be deemed to take effect only until further order; and see r. 121 as to transferring into Court stock of a lunatic, when no one is named in the order to make the transfer.

By the Rules in Lunacy, 1890, r. 2, the Lunacy Orders, 1883, are annulled.

By Ch. Funds Lunacy Orders, 1874, rr. 4, 5, future orders and certificates of masters for payment or transfer into or deposit in Court of money, stock, securities, or other effects, shall direct such payment or transfer to be made into, and deposit to be made in Court, to the credit of the matter of the lunatic, to the account, if any, to which it is intended that such money, stock, securities, or other effects should be placed; and orders or certificates made before and not acted on at the commencement of these orders, are to be construed as if they contained such direction.

And by r. 6, no declaration of trust with respect to stock or securities transferred into Court to the credit of the matter of a lunatic shall be required to be made.

According to the present practice in lunacy, no order in the nature of a stop order can be made in favour of a person claiming part of the lunatic's estate as assignee of the next of kin: *Re Wilkinson*, 10 Ch. 73.

By the Jud. Act, 1873, s. 18 (5), the appellate jurisdiction in lunacy of the Privy Council is transferred to the Court of Appeal, and the general jurisdiction in lunacy is not transferred to the High Court generally (s. 17), but to such of the Judges (including the present Lords Justices) as may be intrusted, &c. The jurisdiction of the L. C. is, apparently, not affected (Jud. Act, 1873, s. 94).

A petition by the exors of a deceased lunatic for the payment of a balance in Court should be served on the committee, though his accounts be passed and his security discharged: *Re Wylde*, 5 D. M. & G. 25.

#### BRINGING FUNDS INTO COURT.—SUPREME COURT FUNDS RULES, 1886.

By r. 29, all funds to be paid into or deposited in Court are to be paid or deposited at the Law Courts Branch of the Bank of England, and placed in the books of the Bank to the account of the Paymaster; and the Bank shall cause a receipt to be given to the person making the payment or deposit. All securities to be transferred into Court shall be transferred to the said account in the books of the Bank or other co. in whose books such securities are registered. Effects deposited in Court are to be in locked boxes, or otherwise secure, so as to satisfy the Bank, and the Bank may inspect the contents of the box in the presence of the person depositing it.

A direction for lodgment of money directed by an order or (in the case of purchase-money) by a lodgment schedule signed by a chief clerk, will be issued by the Paymaster on receipt of a copy of the lodgment schedule, and for lodgment under the Trustee Relief Act upon receipt of an office copy of the schedule to the trustee's affidavit (mentioned in r. 41): r. 30. A lodgment of funds not directed by an order may be made upon a direction to the Bank or other co. to be issued by the Paymaster on a request signed by or on behalf of the person desiring to make such lodgment: *Ibid.* No lodgment can be to a separate account (except to a security for costs account) except under an order: *Ibid.* The forms of request are set out in Forms 8, 9, and 10 to the rules. A request for a direction may be sent to the Paymaster by post, and the direction returned by post: r. 35.

Rule 31 provides for payment into Court in urgent cases to a suspense account.

Although an order limits a time for lodgment, the lodgment may be made after the time has expired, but without prejudice to any liability, process, or other consequence to which the person making the lodgment may have become subject: r. 36.

The Paymaster files a certificate of lodgment, and an office copy of such certificate is to be received as evidence: r. 38.

In the case of money lodged under the Lands Clauses Consolidation Act or the Copyhold Acts, rr. 39 and 40 prescribe the particulars to be stated in the account to be raised and in the request for direction to lodge.

By r. 41, when a person desires to lodge funds under the Trustee Relief Act, he shall annex to the affidavit to be filed by him, pursuant to that Act, a schedule in the same printed form as the lodgment schedule to an order setting forth (a) his own name and address; (b) the amount and description of the funds proposed to be lodged in Court; (c) the ledger credit in the matter of the particular trust to which the funds are to be placed; (d) a statement whether legacy or succession duty (if chargeable) or any part thereof has or has not been paid; (e) a statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of government securities, or whether it is deemed unnecessary so to invest the same. An office copy of such schedule is to be left with the Paymaster.

By O. XLII. 4, a judgment (which includes an order: r. 24) for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment: see *inf.* Chap. XXVII., "EXECUTION."

By 24 V. c. 3, s. 7, the Bank is authorized to close the books for the transfer of the various stocks created by Act of Parliament transferable at the Bank on any day in the month preceding that on which the dividends thereon respectively are payable; and the persons who on the day of the closing of such books were inscribed as the proprietors shall, as between them and the transferees, be entitled to the then current half-year's dividends thereon; and the persons to whom any transfer shall be made after the day of the closing of such books shall not be entitled to such dividend, but shall take such stock exclusive of the right to the said dividend.

By s. 10, the like provision is made for closing the books for the transfer of East India stocks.

Quarterly notices are issued by the Bank, under this Act, of the closing of the books.

For the practice as to ordering transfer of stock or payment of money into Court adversely, see Dan. 1744 *seq.* As against a trustee or exor there must have been a clear admission of money, &c., in hand, and of the Plt's title, by answer (*Hazell v. Currie*, L. R. 2 Ch. 449), or by affidavit verifying an account, or in some other proceeding in the suit: Dan. 1745, 1746.

Non-appearance on a motion for payment into Court of money shown by an affidavit, not contradicted, to have been received by the accounting party, is a sufficient admission for an order on him for payment into Court: *Freeman v. Cox*, 8 Ch. D. 148; and for the principles on which payment into Court will be directed, see *London Syndicate v. Lord*, 8 Ch. Div. 84; see also *Hampden v. Wallis*, 27 Ch. D. 251; *Porrett v. White*, 31 Ch. Div. 52, following *Freeman v. Cox*, *sup.*; and see *Wanklyn v. Wilson*, 35 Ch. D. 180. The amount may be admitted in the statement of defence: *Hetherington v. Brownrigg*, 10 Ch. D. 162.

At the hearing, payment in may be ordered without previous notice: *Isaacs v. Weatherstone*, 10 Ha. xxx.

On a certificate of the chief clerk showing a balance due from an accounting party, he will be ordered to pay it into Court; but not till after the expiration of the eight days allowed by O. LV. 70; *Douthwaite v. Spensley*, 18 Beav. 74; *Craven v. Ingham*, 57 L. T. N.S. 486; W. N. (88) 83; Dan. 1748.

A prospective order may be made to enable parties to pay in from time to time: Lodgment Schedule, Forms 4 and 5.

Payment may also be directed by instalments.

The application is usually by summons in Chambers against an accounting party, if not opposed: Dan. 1747; D. C. F. p. 747; *Tompson v. Hope*, V.-C. W., 30 Jan. 1860; and as to who may make the application, see Dan. 1744—1746; and for the mode of making the transfer or payment, see Dan. 1748.

#### BRINGING FUNDS INTO COURT.—MODES OF TRANSFERRING AND DEPOSITING VARIOUS SECURITIES.

The following "securities" may be brought into Court under sections 3, 8, and 10 of the Ch. Funds Act, 1872, viz.:

1. Those passing by delivery, as Exchequer Bills.

2. Those transferable in books, as New Consols.

3. Those transferable by registered deed, as Railway Stock.

No. 1 will be deposited in Court.

Securities consisting of bonds or debentures which are deliverable, but require a transfer to complete the title, may, in some cases, be deposited without a box: see *Povah v. Walker*, 15 Eq. 316; *Re Gledstane*, W. N. (78) 26.

For a statement of the several securities held by the Paymaster, see the Auditor General's Report made pursuant to the Act, s. 20, and 46 & 47 V. c. 29, s. 4, Parliamentary Paper of 25th Feb., 1889. This list contains bonds of foreign co.'s; but now, securities of any co. out of the United Kingdom will not be received except in a box, such securities not being included in the third section of the Act. If considered desirable, securities comprised in Class 1 may be placed in a box.

Care must be taken to describe the securities in the schedule to the order by the description under which they are known at the Pay Office, adding the amounts, dates, and numbers, if any, and if there are coupons attached, they ought to be mentioned. The descriptions ought to be taken from the securities themselves, and if there are securities of several different descriptions the total amount of each description should be stated in the mandatory part of the order. Stock should be transferred to "the account of the Paymaster General for the time being on behalf of the Supreme Court of Judicature," and not "to the Paymaster General": *Re Stephens*, 8 Ch. 465.

S. C. F. R. r. 71, authorizes the Bank to deliver out securities in course of payment, and to pay the principal and interest into Court, and such principal money or dividends received by the Bank are to be placed to the credit of the same account.

Under r. 76, the money, if not directed to be invested, would be placed upon deposit. If an option is to be given, the direction should be in the alternative.

It is not of course to direct the delivery out to the solrs in the cause of securities deposited for the purpose of receiving the dividends; the trustees or exors, if there are any, being the proper persons to receive the interest; but it has been sometimes ordered: *Brown v. Heselton*, V.-C. of E., 8 Feb. 1849, A. 520.

Foreign stocks and securities, plate or jewels, and other specific articles of value unascertained, are put in boxes indorsed with the short title of the cause to which they belong, and are deposited at the Bank with the privity of the Paymaster, neither the Paymaster nor the Bank take any cognisance of the contents of such boxes; and it is not the practice of the bank to receive the interest on such securities.

The order usually directs that the foreign securities, or other specific articles, shall be placed in the box in the presence of the solrs for the parties interested.

By the Ch. Funds Amended Ord., 1874, 16, the Clerks of Records and Writs (now the Masters of the Supreme Court, see O. LX. 3) were prohibited from receiving into their custody effects of the suitors consisting of jewels or plate, or other articles of a like nature, or negotiable securities. And that negotiable securities will be ordered to be deposited with the Paymaster and not with the chief clerk of the Court: see *Harvey v. Morris*, 23 W. R. 21, 40.

The Paymaster will receive foreign government or railway bonds, the coupons on which are payable to bearer in gold in London, also French Rentes and Italian Rentes, and some other similar foreign government securities; in other cases the bonds must be placed in a box. The practice as stated in *Re Brackenbury*, 22 W. R. 682, has been so far modified.

#### TIME FOR TRANSFER OR PAYMENT.

By O. XLI. 5, every judgment or order in any cause or matter, requiring any person to do any act thereby ordered, is to state the time, or the time after service of the judgment or order within which the act is to be done, and upon the copy of the judgment or order which is to be served upon the person required to obey the same there is to be endorsed a memorandum in the words or to the effect following, viz. :—"If you the within named A. B.

neglect to obey this judgment [*or order*] by the time limited you will be liable to process of execution for the purpose of compelling you to obey the said judgment [*or order*]." The want of this endorsement on the order itself (not on the copy served) will not invalidate a motion to commit for non-compliance: *Thomas v. Palin*, 21 Ch. D. 360; but see *contra*, *Hampden v. Wallis*, 26 Ch. Div. 746. If the time be not specified, the judgment or order is not thereby rendered altogether ineffectual, but an application may be made to fix a time for performance of the act: *Needham v. N.*, 1 Ha. 633; *Morley v. Clavering*, 30 Beav. 108. As to effect of rule and mode of enforcing judgments and orders, see *inf.* Chap. XXVII., "EXECUTION."

Sometimes the order directs the transfer or payment to be made on a fixed day, or subsequently within a time after service, in the alternative, to allow an opportunity of complying before service, or in case there should be a delay in serving the order. If the order is served before the fixed day the person ordered to pay will have until the fixed day, or to the time limited after service, whichever shall be last.

In reckoning time, months, unless otherwise expressed, are calendar months; Sunday, Christmas Day, and Good Friday are not to be reckoned when the time limited is less than six days; and when the time expires on a day on which the offices are closed, the act or proceeding will be in time on the next day the offices are open: O. LXIV. 1—3; and see *Re Railway Sleepers Supply Co.*, 29 Ch. D. 204, as to the computation of time generally.

Funds, &c., may be brought into Court although the time limited by the order has expired; any further sums payable for interest or dividends may be paid in upon request without prejudice to any liability, &c., such person may have become subject to by reason of his default as to time: S. C. F. R. 1886, r. 36.

By Chancery Funds Amended Order, 1874, 4, a person who shall make a transfer, &c., into Court under r. 27 (now r. 36) shall forthwith give notice thereof to the solicitors of the persons upon whose application the order directing such transfer, &c., was made, or to such persons if they have no solicitor; or, if the order was made on the application of the person making such transfer or payment, to the solicitors of the other parties appearing on the application.

Notwithstanding *Thomas v. Nokes*, 6 Eq. 521, the word "forthwith" is not in practice considered a sufficient limitation of time within this rule: see *Gilbert v. Endean*, 9 Ch. Div. 259; and see *inf.* Chap. XXVII., "EXECUTION."

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SECTION II.—PAYMENT OF DIVIDENDS AND INTEREST, AND TRANSFER, SALE,  
OR CARRYING OVER OF SECURITIES.

LET the funds in Court be dealt with as directed in the schedule hereto.

FORMS OF PAYMENT SCHEDULES.

In the High Court of Justice, Chancery Division. Date of Order 1889.

Title of Cause or Matter. A. v. B. 1889. A. 15.

Lodger Credit [If same title of cause or matter] "as above" [add account, if any].

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
1. <i>Payment of dividends to life tenant.</i>  By Supreme Court Funds Rules, 1886, r. 6, the word "interest" in the Schedule shall, unless otherwise speci- fied, mean the dividends and interest on all the funds mentioned in the heading.	Pay interest as it accrues during the life of A. B.	A. B. of, &c.		
2. <i>To private trustees.</i>  It is not desirable, as a general rule, to order income to be paid to trustees, "or either of them": <i>Re Carr</i> , Kekewich, J., 36 W. R. 688; and the Court will never pay capital money to one trustee.	Pay interest as it accrues....	A., B., and C. as trustees of the indenture dated, &c. [or of the will of X.], or, if so ordered, either of them [or any one, and if so, or more of them], or the survivors and survivor of them.		
3. <i>To trustees of charity.</i>	Pay interest as it accrues....	A., B., and C. as trustees of the charity, or, if so ordered, any two of them, or to the trustees of the said charity for the time being, or any two of them. Where there are numerous trustees, and it is desired that only some should give a power of attorney, add, or to the at- torney of any two or more of them.		
4. <i>To a corporation sole..</i>	Pay interest as it accrues....	The Reverend A. B., of, &c., as rector of the parish of C., and to his suc- cessors, the rec- tors of the said parish for the time being.		

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£. s. d.	£ s. d.
5. To a corporation ag- gregate.	Pay interest as it accrues....	Insert style or title of the corpora- tion.		
6. To a treasurer .....	Pay interest as it accrues....	C. D., of, &c., as the treasurer of (usual style or title of corpora- tion), and to the treasurer for the time being of the said corpo- ration.		
7. To a married woman, entitled for her sepa- rate use.	Pay interest as it accrues during the life of A. B.	A. B., of, &c., the wife of C. D., on her separate receipt.		
8. To a divorced woman..	Pay interest as it accrues during the life of A. B.	A. B., of, &c., a single woman.		
9. To a widow until her second marriage.	Pay interest as it accrues until A. B. shall marry again.	A. B., of, &c., widow.		
10. To husband and wife for life successively.	Pay interest as it accrues during the life of A. B. Upon his death, in case C. D., his wife, shall survive him, pay interest as it accrues from the last half-yearly day of payment of interest preceding A. B.'s death during her life.	A. B., of, &c. C. D., at present the wife of A. B.		
11. To two persons, and the survivor.	Pay interest as it accrues during the joint lives of A. B. and C. D. On the death of either of them, pay the said interest as it accrues during his life to the survivor.	A. B. and C. D.		
12. Until a sum certain has been received.	Pay interest as it accrues during the life of C., or until A. B. shall have re- ceived £—. Subject to the payment of the said £—, pay the said interest.	A. B., of, &c. C., of, &c.		



	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
13. <i>Until costs have been received.</i>	Pay interest as it accrues during the life of C., or until the balance (to be certified by the taxing master) of the costs of the said C. be fully discharged. Subject to the payment of the said costs, pay the said interest.	A. B., of, &c., solicitor.  C., of, &c.		
14. <i>Until alienation.....</i>	Upon production from time to time of an affidavit by A. B., that she has not alienated her life interest under the indenture dated, &c. Pay interest as it accrues during the life of A. B.	A. B., of, &c.		
15. <i>Until disqualified by bankruptcy.</i>	Pay interest as it accrues during the life of A. B., or until he has become bankrupt, or assigned, or charged, or done some act or thing whereby, or by operation of law, the said interest on, &c., has become vested in some other person or persons, or some other person or persons have acquired an interest therein, the fact to be verified by his affidavit.	A. B., of, &c.		
16. <i>Until disqualified by becoming a Roman Catholic.</i> <i>In re Kneeshaw, Hobson v. Loxley, 28th June, 1884, Pearson, J., refused to dispense with the affidavit being made by the payee herself.</i>	Upon production from time to time of an affidavit by A. B., that he has not conformed to or professed the Roman Catholic religion, pay interest as it accrues during the life of A. B.	A. B., of, &c.		
17. <i>To a married woman restrained from anticipation, and no gift over.</i> <i>See Stewart v. Fletcher, 88 C. D. 627.</i>	Pay interest as it accrues during the life of A. B. The said A. B. being restrained from anticipating such interest during her coverture, it is not to be paid to any attorney except upon an affidavit or statutory declaration by such attorney that he receives it on behalf and for the use of the said A. B., and not of any other person to whom she has assigned, or purported to assign, the same.	A. B., the wife of C. D. on her separate receipt.		



	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
18. <i>Quarterly payments.</i> See S. C. F. R. 19.	Out of interest as it accrues, <i>if so during the life of A. B.,</i> pay £— a year, <i>if so,</i> with- out deducting income tax, by equal quarterly pay- ments of £— on the — day of —; the — day of —; the — day of —; and the — day of —; the first of such payments to be made on the — day of —. Pay residue of interest.....	C. D., of, &c.  E. F., of, &c.		
19. <i>To a mortgagee until a given sum and interest has been made up.</i>	Pay interest as it accrues during the life of A. B., and until C. D. shall have received £—, and interest thereon at the rate of £— per centum per annum from the — day, &c., or on so much of the said £— as shall for the time being remain unpaid, the amounts to be received to be applied in the first place in satis- faction of interest.	C. D., of, &c.		
20. <i>To the life tenant, subject to the above.</i>	Subject to the above pay- ment, pay the said interest in continuation of the pay- ments directed by the order dated, &c.	A. B., of, &c.		
21. <i>Maintenance of infants.</i>	Pay interest as it accrues during the minority of A. B.	C. D., of, &c.		
22. <i>Maintenance of infants —periodical payments.</i>	Out of interest, as it accrues during the minority of A. B., pay on the — day, &c., and the — day, &c., and on the same days in each succeeding year, <i>if so</i> [free of income tax].	C. D., of, &c. ..	100 0 0	
23. <i>Where the amount paid out of the same dividends to the same person is increased or diminished, and it is necessary to save the expense of issuing a fresh power of at- torney.</i>	Out of interest, as it accrues during the minority of A. B., pay on the — day, &c., and the — day, &c., and on the same days in each succeeding year, in continuation of the pay- ments directed by an order dated, &c.	C. D., of, &c.	40 0 0	

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
24. <i>Payment of annuities (receipts for duty to be produced to the Pay- master).</i>	Out of interest, as it accrues, pay, subject to duty, on the — day, &c., the — day, &c., the — day, &c., and the — day, &c., and on the same days in each succeed- ing year, in discharge of their respective annuities as follows:—	A. B., of, &c..... C. D., of, &c.....	25 0 0 10 0 0	
25. <i>Payment of interest where stock is sold, and there may be intervening dividend days, or where there may be interest on money on deposit.</i>	Pay any interest .....	A. B., of, &c.		
26. <i>Payment of legacy, duty having been paid out of general fund.</i>	Pay (being legacy of 100 <i>l.</i> , less the duty paid thereon).	A. B., of, &c.....	90 0 0	
27. <i>Payment of legacy, receipt for duty to be produced to the Pay- master.</i>	Pay, subject to duty .....	A. B. of, &c.	100 0 0	
28. <i>Duty payable by in- stalments.</i>	Subject to payment as here- inafter directed, of duty on the life interest of H. by four equal annual instal- ments. Pay interest as it accrues during the life of H. Pay the said instalments of duty, the first to be paid out of the interest due on, &c.	H., widow.		
29. <i>Payment of duty .... Duty on being assessed will, on the requisition of the Commissioners of Inland Revenue, be transferred to the proper account: S. C. F. R. 1886, r. 52.</i>	Pay duty on funds in Court, or pay duty in respect of the estate of A. B.			
30. <i>The like, duty having been assessed.</i>	Pay assessed amount of duty.	....	250 0 0	
31. <i>Repayment of duty paid by solicitors.</i>	Pay in repayment of amount paid for duty.	Messrs. A. B., of, &c., solicitors.	10 0 0	
32. <i>Payment of costs .... Certificate of taxation to be produced to the Pay- master.</i>	Pay costs to be taxed under this order.			

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
33. <i>The like, where costs have been assessed in Chambers.</i>	Pay assessed costs of A. B. . .	Messrs. C. D., of, &c., solicitors.	24 0 4	
31. <i>Payment of fees of taxation : S. C. F. R. 1886, r. 67.</i>	Carry over fees of taxation . .	....	9 5 0	
35. <i>Transfer out of Court.</i>	Transfer New Consols . . . . .	A. B. . . . .	....	250 0 0
36. <i>Transfer and carrying over of portions of railway stock.</i>	Transfer 4 per centum Debenture Stock, Lancashire and Yorkshire Railway Co.	A. B. . . . .	....	1,500 0 0
	Carry over like stock . . . . .	"C. D., an infant born 25 Feb. 1879."	....	1,500 0 0
	For the purpose of making such transfer and carrying over the stock, certificate of the said railway stock is (if necessary), to be delivered out to, &c., the applicant's solicitors, for the purpose of exchanging the same for certificates of equivalent amounts, as may be required, they undertaking to deliver such certificates, when obtained, to the Paymaster-General.			
37. <i>Transfer of residue in proportionate parts.</i>	Divide residue of New Consols, and transfer as under: One-tenth . . . . . Three-tenths . . . . . Six-tenths . . . . .	A. B. C. D. E. F.		
33. <i>Transfer to trustees when appointed and to be named in chief clerk's certificate.</i>	Transfer New Consols . . . . .	The persons to be named in chief clerk's certificate as having been appointed trustees of the will of A. B.	....	500 0 0
39. <i>Invest in different stocks.</i>	Invest as near as practicable the following amounts in the following securities : (1.) In £4 per centum Guaranteed Stock of the Bengal Nagpur Railway Co., Limited. (2.) In £4 per centum Guaranteed Stock of the Indian Midland Railway Co., Limited. Invest residue in £5 per centum Guaranteed Stock of the Madras Railway Co.	.... ....	3,500 0 0 3,500 0 0	

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
40. <i>Delivery out of Exchequer bills when all the bills in Court are to be delivered out, and the numbers and dates specified in the heading of the schedule.</i>	Deliver out the Exchequer bills or any other Exchequer bills for which the same may be re-exchanged.	A. B.	....	5,000 0 0
41. <i>The like, where only some of the bills are to be delivered out.</i>	Deliver out the following Exchequer bills, amounting together to £—, namely, No. — for £—, dated, &c., and No. — for £—, dated, &c., or any other Exchequer bills for which the same may be exchanged.	A. B.		
42. <i>Delivery out of securities passing by delivery other than Exchequer bills.</i>	Deliver out the following Brazilian £4 per cent. Bonds, 1883: No. — for £—, dated —. No. — for £—, dated —, &c., &c.			
43. <i>Conversion of bonds into stock.</i>	Take all necessary steps for converting the N.Z. bonds in Court into £— 4 per cent. N. Z. stock inscribed at the Bank of England in exercise of the option mentioned in the notice issued by the Bank of England, dated, &c. Pay interest as it accrues on said £— 4 per cent. N. Z. stock.	C. D.		
44. <i>Payment .....</i>	Pay .....	A. B. of, &c. ....	25 0 0	
45. <i>The like, to partners: S. C. F. R. 1886, r. 63.</i>	Pay .....	Thomas Jones and William Brown, of, &c., co-partners.	7 10 0	
46. <i>The like, to a firm: S. C. F. R. 1886, r. 6a.</i>	Pay .....	Messrs. Brown, Jones & Co., of, &c.	30 0 0	
47. <i>The like, to a person entitled to funds as real estate: S. C. F. R. 1886, r. 53.</i>	Pay .....	A. B., of, &c., entitled thereto as real estate.	100 0 0	

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
48. <i>The like, to a person not in his own right.</i>	Pay .....	A. B., of, &c., as legal personal representative of, &c., or as trustee, of, &c., or as guardian of, &c.		
49. <i>Payment to official person : S. C. F. R. 1886, r. 52.</i>	Pay .....	The official trus- tees of charit- able funds.	500 0 0	
50. <i>To the Treasury ....</i>	Pay .....	Her Majesty's Paymaster-Ge- neral "cash ac- count."	365 6 8	
51. <i>Transfer of stock and payment of cash to the Chancery Division of the High Court in Ireland.</i>	Transfer New Consols .....	M. J. B., Esq., to be by him forthwith transferred into the name of the Ac- countant - General of the High Court of Justice, Chan- cery Division, in Ireland, to the cre- dit of, &c., the ac- count of, &c.	....	2,000 0 0
	Pay cash .....	The same.	115 0 0	
52. <i>Payment to a married woman, not in her own right.</i>	Pay .....	A. B., of, &c., the wife of C. D., on her separate receipt as legal personal repre- sentative of, &c., or as trustee of, &c., or as guar- dian of, &c.		
53. <i>Payment to an infant on coming of age on a given date.</i>	On or after the — day of, &c.	A. B., of, &c.		
54. <i>Bringing advances into hotchpot.</i>	Add to residue of funds in Court £— for the purpose of computation. Divide aggregate and pay, and carry over as under— Pay 1-6th, less £— ..... Carry over 2-6ths ..... Out of 1-6th, less £—, pay.. Pay residue of fund in Court	Y. Z., of, &c. Account of, &c. A. B., of, &c. C. D., of, &c.	25 0 0	

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
<p>55. <i>Bringing advances into hotchpot.</i></p> <p>Interest to be calculated and amounts received in excess to be refunded.</p>	<p>Add to residue of funds in Court £—, with interest thereon at the rate of £— per cent. per annum, from the — day, &amp;c.</p> <p>Out of the residue, and any moneys to be lodged under the lodgment schedule—</p> <p>Pay a sum equal to 1-4th of the aggregate amount.</p> <p>If 1-4th of such aggregate shall exceed £—, amount due from C. D. for principal and interest up to date of judgment, and interest on £— at the rate, &amp;c., from the said — day, &amp;c.,</p> <p>Pay amount of such excess.</p> <p><i>Note</i>—A separate lodgment schedule would be as follows:—</p> <p>If 1-6th of aggregate amount in Payment Schedule mentioned shall be less than £—, and interest on £—, at the rate, &amp;c., from the — day, &amp;c.,</p> <p>Lodge amount of such deficiency.</p>	<p>A. B., of, &amp;c.</p> <p>C. D., of, &amp;c.</p> <p>C. D.</p>		
<p>56. <i>Payment for erection of buildings upon a chief clerk's certificate.</i></p>	<p>Pay such sums as shall from time to time be certified to be proper to be paid in respect of the buildings in the order mentioned to such person or persons as shall be certified to be entitled to receive the same.</p>			
<p>57. <i>Settlement money in Court to be invested in land to be registered with an indefeasible title.</i></p>	<p>Upon production of an affidavit showing that the defendants A. &amp; B. are registered as absolute owners of the hereditaments at, &amp;c., sell sufficient New Consols to raise £2,200.</p> <p>Pay proceeds .....</p>	<p>C. B. ....</p>	<p>2,200 0 0</p>	
<p>58. <i>Transfer to official trustees.</i></p> <p>For payment to same, see sup. Form 49.</p>	<p>Transfer New Consols .....</p>	<p>The official trustees of charitable funds.</p>	<p>....</p>	<p>100 0 0</p>

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
59. <i>Payment of premium on apprenticeship of infant, and of sum for outfit.</i>	Upon the execution of the indenture of apprenticeship by this order directed by such parties thereto as the judge shall direct being certified— Sell sufficient New Consols to raise £350. Pay to such person or persons as shall be certified as entitled to receive the same. Pay .....	....  A. B. as guardian of C. D.	  300 0 0  50 0 0	
60. <i>Transfer out of Court to trustees of settlement on marriage of a ward.</i>	Upon the execution of the indenture of settlement directed by this order by such parties thereto as the judge shall direct, and upon the solemnization of the marriage between E. & F. being certified— Transfer New Consols .....	A. B. and C. D. as trustees of the said indenture of settlement.	....	10,000 0 0
61. <i>Marriage of infant ward, wife's fund in Court settled by order.</i>	Carry over New Consols .... (Then add direction for payment of dividends to C. for life on her separate receipt).	The account of the settlement of C. on her marriage with A.		
62. <i>Outfit for infant ward on marriage.</i>	Upon the execution of the indenture of settlement directed by this order by such parties thereto as the Judge shall direct, and upon the solemnization of the marriage between E. & F. being certified— Sell sufficient New Consols to raise £500. Pay .....	X. of —.	500 0 0	
63. <i>Further consideration; assets sufficient; payment of creditors, with subsequent interest.</i> N.B.—There is no necessity to add a direction for payment of sums under £10 to the solicitor. See rule 48 of S. C. F. R.	Sell sufficient New Consols to raise the following sums, together with interest thereon respectively at the rate of £4 per cent. per annum, from the — day of — (the date of the chief clerk's certificate). Pay £417 : 12s. 6d., together with interest, as above. Pay £17 : 1s. 9d., together with interest, as above.	A. B., of —. C. D., of —.		

	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
64. Further consideration; assets deficient; apportionment among creditors.	Pay sums to be apportioned to creditors by chief clerk's certificate to the persons to whom they shall be certified to be payable.			
65. Further consideration; division of residue in proportionate parts.	Divide residue of funds in Court, and pay and carry over as under— Pay 1-10th..... Carry over 2-10ths, &c., &c...	A. B. of —. The acct., &c.		
66. Purchase of government annuity by transfer of stock.	Transfer such a sum of New Consols as shall be the amount at which the plaintiff shall contract for the purchase of a government annuity of £—, or as near to, but not less than that sum on the life of A. B.	The Commissioners for the Reduction of the National Debt.		
67. Accumulation beyond legal limits.  Transfer to Crown under 39 & 40 Vict. c. 18.	Transfer New Consols (representing accumulation of rents and profits of real estate since —).	The treasury solicitor, and the assistant paymaster-general, per Act 39 & 40 Vict. c. 18, "The Crown's Nominee Securities Account."		
68. Investment of funds in Court in land.	Upon the execution of the conveyance directed by this order, by such parties thereto as the judge shall direct being certified— Sell sufficient New Consols to raise £1,500. Pay proceeds of sale to such person or persons as shall be certified to be entitled to receive the same.	....	1,500 0 0	
69. Investment of money paid in under Lands Clauses Consolidation Act.	Invest in New Consols without deducting brokerage.	....	1,700 0 0	
70. Investment .....	Invest in New Consols.....	....	1,500 0 0	
71. Investment and accumulation.	Invest and accumulate in New Consols.	....	1,500 0 0	
72. Where stop order on the fund requires notice to be given.	A. B., named in the order dated, &c., has had notice.			



	Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees, or Separate Accounts.	Amounts.	
			Money.	Securities.
			£ s. d.	£ s. d.
73. Where the order alters the destination, or mode of distribution of the fund.	Notwithstanding the order dated, &c.			
74. May be added where necessary at the end of any lodgment schedule.	Invest and accumulate in New Consols.			
75. To be added when necessary.	Not to be dealt with without notice to A. B.			
76. When specially directed. B. C. F. R. 1896, r. 72.	Invest in New Consols, notwithstanding smallness of amount.			

LODGMENT AND PAYMENT SCHEDULE.

Ledger Credit, —.

— day of —, 189 .

I.—Lodgment.

Particulars of Funds to be Lodged.	Persons to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
From time to time a box indorsed in the High Court of Justice, Chancery Division, <i>A. v. B.</i> , 1890, <i>A.</i> , &c., Securities.	C. D. and E. F.		
New Consols .....	Y. Z.....	....	5,000 0 0

II.—Payment.

Funds to be dealt with.—Funds to be lodged as above.

Particulars of Payments, Transfers, or other Operations ordered.	Payees, Transferees, or Separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay interest as it accrues during the life of, &c.	X., of, &c.		
From time to time deliver out box.	C. D., the solicitor for the plaintiff, and E. F., the solicitor for the defendant.		

## NOTES.

## SUPREME COURT FUNDS RULES, 1886.

By S. C. F. R. 1886, r. 10, the instructions and particulars contained in a lodgment or payment schedule shall not be set forth in the body of the order, but shall only be therein referred to as appearing by the schedule, unless for any special reason it shall in the opinion of the Judge or Registrar be necessary to set forth some part of such instructions or particulars both in the body of the order and in the schedule.

Where payment is directed to a woman, she must be described as "spinster," or as "the wife of &c.," or as "widow."

As to applications for payment out of funds in Court which may be made at Chambers, see O. LV. 2.

By r. 12 of the S. C. F. R. 1886, when an order directs payment out of a fund in Court of any costs directed to be taxed, the taxing officer is to state the name and address of the person to whom such costs are payable.

Rules 13 to 16 provide as to the manner in which interest is to be ascertained, both on lodgments in Court and payments out; and by r. 17 income tax is always to be deducted, unless otherwise ordered.

By r. 18, whenever the dealing by the Paymaster with funds in Court is, by an order, made contingent upon the execution of some document, it must be so expressed in the payment schedule. The execution of such document is to be certified by a Master in Lunacy, or by a chief clerk, unless the order directs that it be verified by affidavit, and such certificate or affidavit is to state the particular amount of funds to be dealt with.

By r. 19, when an order directs the payment of dividends, annuities, or other periodical payments, there is to be stated in the payment schedule (except in the case of dividends payable as they accrue due), the time when the first of such payments and all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, are to be made.

By r. 20, when an order directs the payment, transfer, or delivery of funds in Court, in respect of which legacy or succession duty is payable, and does not direct the payment of such duty, it is to be stated in the payment schedule that such payment, &c., is subject to duty, and in such case the Paymaster is to have regard to the circumstance that such duty is payable; and when funds in respect of which such duty may be chargeable are directed to be invested, carried over, or placed to a separate account, the words "subject to duty" are to be added in the schedule to the separate account directed to be opened.

By r. 21, when a person to whom payment, transfer, or delivery of funds in Court is directed is entitled thereto as real estate, or as trustee, exor, or admor, or otherwise than in his own right or for his own use, the fact that he is entitled to the same as real estate, or the character in which he is so entitled, is to be stated in the payment schedule, or in the certificate of a chief clerk, or of a taxing master, or of a Master in Lunacy.

By r. 6, every order which directs funds in Court to be paid, sold, transferred, or delivered, or carried over to any other ledger credit than that to which the same are standing, or to be otherwise dealt with by the Paymaster, is to have annexed thereto, as part thereof, a schedule, to be styled the payment schedule, which shall be headed with the title of the cause or matter, the date of the order, and the ledger credit to which the funds dealt with are standing. The payment schedule is to contain as part of the heading a statement of the funds with which, or with part of which, or with the interest or dividends on which the Paymaster is to deal, describing them if already in Court as they appear in the Paymaster's certificate, or if not already in Court stating the source from which they are to be derived; and is to set out in a tabular form:—

- (a) The name of each person to whom a payment, transfer, or delivery of any funds is to be made: unless the name is to be stated in a certificate of a chief clerk or a Master in Lunacy or a taxing officer, or unless such payment, transfer, or delivery is to be made to trustees or other persons in succession, or to represves when no probate or letters of admon shall have been taken out at the date of the order. The name is to be in full (the christian name preceding the

surname) except in the case of a payment to a firm, when the business title of such firm may be stated; and when a payment is to be made to a person named in the schedule, the address (if known at the time of preparing the schedule) of such person, or in the case of a payment to two or more persons jointly, of one of such persons, is to be stated in the schedule:

- (b) The title of the ledger credit or separate account to which any funds are to be carried over:
- (c) The amount and description of the funds in each case to be paid, sold, transferred, delivered, or carried over, so far as the same can be then stated; and where the actual amounts to be dealt with cannot be ascertained at the date of the order, and are not to be subsequently ascertained by any means provided for by the order or by these rules, the aliquot parts to be dealt with:
- (d) The nature and necessary particulars of any other dealings with such funds by the Paymaster.

In the body of the schedule short descriptions may be used, and it is not necessary to add that the specific amounts dealt with form part of the larger amount of any like funds mentioned in the heading. The word "interest" in the schedule, unless otherwise specified, is to mean the dividends and interest on all the funds mentioned in the heading.

The payment schedule is to be prepared upon a printed form according to the Form No. 2 in the Appendix to the Rules, and as nearly as may be in the manner shown by the specimen entries appended to such form.

By r. 45, it is provided that, subject to the exceptions mentioned in such rule, funds in Court are not to be dealt with unless in pursuance of an order; and by r. 47, the Paymaster is to give effect to an order upon receipt of the necessary authority or information.

By r. 48, payments may be made by post, subject to the conditions contained in such rule.

By r. 52, when money in Court is by an order directed to be paid to any public officer or department, or to the official liquidator, or any company, or any other official person for whom an account is kept at the bank, payment thereof shall, on a requisition to that effect, be made by a direction to the bank to transfer the amount of such payment to the account at the bank of such public officer or official person accordingly. When any duty is directed to be paid out of funds in Court, such duty shall, without any words in the order to that effect, be assessed, and on a requisition made by or on behalf of the Commissioners of Inland Revenue, transferred to the proper account at the bank.

By r. 55, when securities in Court are directed to be transferred, delivered out, or carried over, dividends accruing thereon subsequently to the date of the order directing the transfer, &c. (when the amount of the securities to be transferred, &c. is specified in such order, or if not so specified then subsequently to the time when the amount of such securities shall be ascertained) are to be paid to the persons to whom or carried over to the credit to which the securities are to be transferred, &c., unless such order otherwise directs. When securities in Court are directed to be realised, and the whole of the proceeds paid out or carried over in one sum, or in aliquot parts (except when the realisation is to raise a specific sum of money), any dividends accruing on such securities subsequent to the date of the order directing the realisation (if the amount of such securities is specified in the order, or if not so specified, then subsequently to the time when such amount shall be ascertained) are to be added to such proceeds, and applied in like manner therewith, unless such order otherwise directs; and by r. 56, when such dividends have been invested, the securities purchased with such dividends shall, unless otherwise directed, be transferred, &c., and any dividends accrued in respect thereof be paid, to the persons to whom or carried over to the credit to which such first-mentioned dividends would, if uninvested have been paid or carried over.

By r. 57, when by an order money or dividends are directed to be dealt with so that the same ought not to be invested, and subsequently to the date of such order such money or dividends or any part thereof shall have been invested, the securities purchased with such money or dividends shall, unless otherwise directed, be sold, and the proceeds of such sale and any dividends

accrued in respect of such securities shall be applied in the same manner as the money or dividends so invested would have been applied under such order, if they had not been so invested.

By r. 58, when under any order dividends on securities in Court are directed to be dealt with, and a subsequent order is made dealing with part of such securities, the dividends on the residue shall, unless such subsequent order shall otherwise direct, continue to be dealt with in the same manner as the dividends were by the prior order directed to be dealt with.

Rules 59 and 60 provide for the application of money or dividends placed on deposit after the date of the order, and of any interest credited thereon.

Funds ordered to be paid, transferred or delivered to a woman, who afterwards marries, are to be paid, &c. to her on production of an affidavit of the settlement, or upon production of the settlement accompanied by an affidavit of her solr that such settlement does not affect funds: see r. 61.

By r. 7, when funds in Court are by an order directed to be carried over to a separate account, the title of the ledger credit to be opened for the purpose, unless the order otherwise directs, is to commence with the title of the cause or matter to which such funds are standing; and by r. 9, when funds standing to two or more ledger credits are dealt with by the same order, separate payment schedules shall be made out for such ledger credits respectively.

Money directed to be paid to persons described as co-partners may be paid to any one or more of them, or the survivor of them (see r. 63); and funds directed to be paid, &c. to any persons as legal pers. represves may, on proof of the death of any one of them, be paid, &c. to the survivors or survivor of them: see r. 64; but no funds will be paid under this rule and under r. 62, unless the probate or letters of admon have been granted within six years from the date of the order, or, in case such funds consist of interest or dividends, from the date of the last receipt thereof.

An application for payment out of Court by a person claiming to be absolutely entitled to money in Court, representing real estate, should be supported by an affidavit of no incumbrances, which *primâ facie* should be made by the applicant: *Williams v. Ware*, 57 L. J. Ch. 497; 58 L. T. N.S. 876.

As to the right of the Master in Lunacy in New South Wales, in respect of a fund in Court belonging to a person of unsound mind, not so found, resident in that colony, see *Re Barlow's Will*, 36 Ch. Div. 287; and that the Court in such a case would be justified in paying to the colonial Master in Lunacy any sums which the competent authority in the colony decided to be necessary for the maintenance or benefit of the *non compos*, *Ib.*

A fund in Court held on such trusts as two persons should by deed jointly appoint, and subject thereto upon trust for one of them for life, with remainder to the other, was paid out to them without execution of a deed of appointment: *Re Winstanley's Settlement*, W. N. (86) 92.

As to when applications for payment out of Court should be by summons in Chambers, *v. inf.* Chap. XVIII., "CHAMBERS."

As to mode of procedure where money was paid out of Court to persons not entitled, upon a forged affidavit, see *Slater v. S.*, 58 L. T. N.S. 149; 59 L. T. N.S. 315.

Where a person absolutely entitled to a fund in Court came of age, the Court declined to allow the fund to remain in Court, and to order payment of the interest only: *Isaac v. Gompertz*, 1 Ves. jun. 44.

Where several persons are entitled to interest for life in succession, the Court usually only directs payment to the first for life, with liberty to apply on his death, when a further order must be obtained; but if husband and wife are so entitled, the Court directs payment to them in succession, and the paymaster continues the payment to the survivor upon proof of the death of the other.

#### DEALINGS WITH FUNDS IN COURT.

By the Supreme Court of Jud. (Funds, &c.) Act, 1883 (46 & 47 V. c. 29, s. 10), "any rules made by the L. C., with the concurrence of the Treasury, under the provisions of the Ch. Funds Act, 1872, or this Act, may determine what evidence of an order of the High Court of Justice, or Court of Appeal, and of the directions contained in such order, shall be necessary or suffi-

cient" to authorize the transfer, or sale, or delivery out of funds to the credit of the account of the Paymaster.

All dealings with funds in Court are now regulated by the S. C. F. R. 1886, made in pursuance of this and previous Acts.

#### INVESTMENTS.

By r. 69, when an order directs investment and accumulation of funds in Court, the Paymaster, upon receipt of a copy of the order, is to invest from time to time until he receives an order or request to the contrary; and under r. 70 the proceeds of Exchequer bills will be reinvested in Exchequer bills. No sum less than £40 will be invested without an express direction in the order (r. 72); but r. 73 excepts sums lodged under sect. 32 of the Legacy Duty Act (36 G. III. c. 52), which will be invested when they amount to £10.

By r. 74, money lodged under the Trustee Relief Act will be invested without an order for that purpose if it amounts to £40.

By r. 75, the Paymaster is at liberty in all cases to cease to invest upon a request of the solicitor for the person claiming to be entitled to or interested in the fund in Court.

The investment cannot be made through private brokers: *Exp. Bolton Junction Ry.*, 24 W. R. 451; W. N. (76) 80; *Re West Riding, &c., Ry.*, 24 W. R. 357.

Cash under the control of or subject to the order of the Court may be invested (O. XXII. 17) in the following stocks, funds, or securities, namely—Two and three-quarters p. c. consolidated stock (to be called after the 5th April, 1903, 2½ p. c. consolidated stock); consolidated £3 p. c. annuities; reduced £3 p. c. annuities; £2 15s. p. c. annuities; £2 10s. p. c. annuities; Local Loans stock under the National Debt and Local Loans Act, 1887; Exchequer bills; Bank stock; India 3½ p. c. stock; India 3 p. c. stock; Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment; stocks of colonial governments guaranteed by the Imperial Government; mortgage of freehold and copyhold estates respectively in England and Wales; Metropolitan Consolidated Stock, £3 10s. p. c.; 3 p. c. Metropolitan Consolidated Stock; debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares; nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

Money paid into Court under the Lands Clauses Act and Settled Estates Act is "cash under the control of the Court": *Exp. St. John's Coll., Oxford*, 22 Ch. Div. 93.

An investment in railway debenture stock was made of money paid into Court under the Lands Clauses Act as the price of land belonging to a charity: *Re Byron's Charity*, 23 Ch. D. 171.

Where the fund in Court is subject to a trust for investment, the investments authorized by the trust will, if otherwise unobjectionable, be allowed.

As to providing against excessive payments of income to tenant for life on a change of investment, see *Re Ingram*, 11 W. R. 980, *inf.*

And as to investment of lunatic's property, *Re Ld. Rossmore*, Ir. Rep. 8 Eq. 367.

The exors of a petitioner who had got an order for an investment which had not been completed were entitled to revive: *Re Youl*, 16 Eq. 107.

#### INVESTING IN EXCHEQUER BILLS.

Where the amount to be invested in Exchequer bills is large, the order sometimes directs the investments to be made in parcels of a certain amount.

S. C. F. R. 1886, r. 72, provides for the re-investment of principal and interest of any Exchequer bills or Exchequer bonds deposited in Court which may be paid off.



R. 73 authorizes the bank to deliver out Exchequer bills and other securities in course of payment, and, in the case of Exchequer bills, to renew them if new bills are issued, and, in other cases, to pay the principal and interest into Court.

R. 72 renders it unnecessary to add any direction for investment of interest on Exchequer bills or Exchequer bonds, but in the case of other securities capable of being deposited in the same manner, the order will have to provide for such investment, if required.

Money paid into Court and invested in Exchequer bills under a private Act which directs such investment, may be invested in any securities in which cash under the control of the Court may be invested: *Jackson v. Tyas*, 52 L. J. Ch. 830.

#### MONEY ON DEPOSIT.

As to the cases in which money will be placed on deposit, see S. C. F. R. 1886, rr. 76—85.

Dividends directed to be invested, when amounting to less than £40, half-yearly; and when not directed to be invested, notwithstanding the smallness of the amount, are (subject to rr. 37, 65, 66, and 73) to be placed on deposit: see r. 64; and when they amount to £40 will be invested; and interest on money on deposit so soon as it amounts to £10 will be placed on deposit: r. 80.

As to the time for placing money on deposit, see r. 70.

The proceeds of government securities converted into cash under r. 44 by transfer to the Nat. Debt Commrs were to be deemed to have been placed on deposit (without a request) on the day of such conversion: r. 71 (see Ch. Funds Orders, 1873, 13). But this is now abrogated by Jud. Act, 1875, s. 30, repealing Ch. Funds Act, 1872, s. 16, on which these rules depended.

By r. 77, money lodged under O. XXII., or under O. XXXI. 26, is not to be placed on deposit, nor where the amount is less than £10; and by r. 76, no interest is to be computed on a fraction of a pound.

R. 78 provides for the withdrawal of money on deposit to meet the requirements of an order, and when the amount is reduced below £10, and upon request countersigned by a registrar or chief clerk.

As to the periods for which and when interest is to be computed, and as to the mode of calculating interest on money withdrawn, see rr. 82—85.

#### NOTARIAL ACTS—POWERS OF ATTORNEY.

A “notarial act” is described as the act of authenticating or certifying some document or circumstance by a written instrument under the signature and official seal of a notary; or of authenticating or certifying as a notary some fact or circumstance by a written instrument under his signature only: see Brooke’s Notary, p. 46.

Thus, a notarial certificate authenticating a power of attorney under the signature and seal of a notary, is a notarial act; but a mere note or memorandum of reference at the foot of the power of attorney, for the purpose of identifying it, is not, and does not require an additional stamp: Brooke, 186.

As to the authentication of powers of attorney, executed here for the purpose of being acted upon abroad, as for the transfer of American or French stock, and for other purposes, see Brooke, 332 *et seq.*

By the 5 & 6 W. 4, c. 62, ss. 14, 15, 16, 18, a notary is empowered, in certain specified cases, to receive the solemn declarations now substituted for oaths. Under s. 14, the Bank will act upon a declaration made before a notary: Brooke, 189, 190.

The Paymaster acts only on powers of attorney issued out of his office: Other powers must be referred to in the order, and the payment or transfer directed to be made to the attorney named therein.

Where the order directs payment or transfer out of Court a power of attorney will, on the request of the solr, be issued at the Pay Office; such power of attorney must be attested by two witnesses, who must state their full addresses and profession or occupation: Dan. 1794; and for forms, see Dan. Ch. Forms, at p. 764.

By O. XXXVIII. 6, all examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in

the Central Office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any Judge, Court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of her Majesty's consuls or vice-consuls in any foreign parts out of her Majesty's dominions; and the Judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such Court, Judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

As to the signatures and seals being authenticated by a diplomatic person, under 18 & 19 V. c. 42, *v. sup.* p. 98.

In the case of a power of attorney not issued from the Pay Office, executed abroad, the Court requires the signature by the grantor to be proved in one of the following ways:—

- (1) By the affidavit of an attesting witness.
- (2) By an affidavit of an impartial person verifying the grantor's signature.

(3) By a notarial certificate of due execution annexed to the power, the signature of the notary, and that he holds the office, being verified by affidavit, or, in the case of a foreign notary, being authenticated by a diplomatic person, under 18 & 19 V. c. 42.

An affidavit sworn out of her Majesty's dominions before a notary public was allowed to be filed, the nearest consul being 150 miles away: *Cooke v. Wilby*, 25 Ch. D. 769; see, also, *Brittlebank v. Smith*, 32 W. R. 675, where the nearest British consul was 250 miles away, but certified that the clerk of the circuit Court before whom the affidavit was sworn was authorized to administer oaths.

Where a notarial certificate was produced in lieu of an affidavit of due execution by the attesting witness, or of one verifying the grantor's signature, it was held necessary to verify the notary's signature; and an affidavit of comparison of the notary's signature with that in the book kept at Doctors' Commons was not sufficient: *Re Barton*, V.-C. W., 31 July, 1858, A. 1527.

The Court declined to act on an affidavit of the person named to receive money verifying the signature of the party executing such a power of attorney from the colony of Victoria, or on a notarial certificate of the due execution annexed thereto, the notary's signature not being verified: *Smith v. Wright*, V.-C. S., 23 Nov. and 3 Dec. 1855, B. 99; *Re Owen*, V.-C. W., 13 Dec. 1855, B. 211. The Court would have acted on the affidavit of an impartial person verifying the signature to the power; as a power of attorney to receive money, though usually under seal, need not be so; otherwise as to a power to execute a deed: *S. C.*

A deed signed in the presence of a notary was treated as a document to be used in Court under 15 & 16 V. c. 86, s. 22, and judicial notice taken of the notary's signature, although there was no evidence of an intention to use it in Court: *Brooke v. B.*, 17 Ch. D. 833.

In *Armstrong v. Stockham*, 24 L. J. Ch. 176, payment out was ordered under a power of attorney executed at Belize, in British Honduras, before a notary there, and certified under his hand and seal, and on an affidavit of a person residing here, verifying the notary's handwriting, and that he held that office.

If any considerable time has elapsed, an affidavit that the person who executed the power is alive, and that the power is unrevoked, will be required: *Bailey v. Collett*, 18 Beav. 179; 23 L. J. Ch. 230.

A transfer of stock made under a bank power of attorney two days after the death of the grantor was held valid: *Kiddill v. Farnell*, 3 S. & G. 428.

An affidavit verifying the execution of a power of attorney, but not intituled in any cause or matter, will not be acted upon: *Re Wood*, V.-C. K., 4 Dec. 1857, Reg. Min. f. 117.

As to the authorities before whom affidavits may be sworn, *v. sup.*

And see, as to the law of Lower and Upper Canada on this subject, *Nye v. Macdonald*, L. R. 3 P. C. 331.

Where expedient, the chief clerk in certifying debts will make sums under £10 payable to solrs (see payment schedule, form No. 63), but not sums over

that amount, as it would interfere with the stamp duty on powers of attorney: *Brandling v. Humble*, Jac. 48; and in *Kelsall v. Minton*, 2 Beav. 361, a written authority even for that amount was required, and in general should be given: *Staines v. Giffard*, 20 Beav. 484; as by letter from each creditor: *Anon.*, 5 Jur. N.S. 385; and the signatures verified by affidavit: *Dourning v. Picken*, Kay, App. 1; but the authority is sometimes dispensed with: *Staines v. Giffard*, *ubi sup.*; *Mansfield v. Green*, W. N. (66) 220.

As to payments under powers of attorney, see the Conveyancing Acts, 1881 (44 & 45 V. c. 41), ss. 46, 47; 1882 (45 & 46 V. c. 39), ss. 8, 9.

#### STAMPS.

By 33 & 34 V. c. 97, schedule, the stamps on powers of attorney to be issued in the Pay Office are, for principal money not exceeding £20, five shillings; over that amount, ten shillings; for dividends under £3 a year, nothing; for a single payment, one shilling; and in any other case, five shillings: and by sect. 116, and schedule, the duty upon a notarial act is one shilling, which may be denoted by an adhesive stamp to be cancelled by the notary.

#### LEGACY AND SUCCESSION DUTY.

The Acts relating to legacy duty are the 36 G. 3, c. 52; 55 G. 3, c. 184; 45 G. 3, c. 28; 8 & 9 V. c. 76; and 44 & 45 V. c. 12, ss. 26, 41, 42.

The Succession Duty Act is 16 & 17 V. c. 51. The 28 & 29 V. c. 104, Pt. v. ss. 53—64, relates to the recovery of succession, legacy, and probate duties in certain cases; the 31 & 32 V. c. 124, s. 9, provides for payment of interest at the rate of £4 p. c. per ann. on arrears of legacy or succession duty; the 44 & 45 V. c. 12, s. 41, for the cesser of the one p. c. succession duty in cases where duty has been paid on the affidavit or inventory or account in conformity with that Act; and the 51 V. c. 8, ss. 21, 22, for the charge of additional succession duty, and for the mode of payment of duty on succession to real property chargeable as an annuity.

The 36 G. 3, c. 52, s. 25, enacts that if in any admon suit any direction shall be given for payment of any legacies or residue, the Court shall, in giving such directions, provide for the payment of the duties thereby imposed; and shall take care that no allowance is made in respect of any legacy or residue, without proof of the payment of the duties.

And by the 16 & 17 V. c. 51, s. 53, the Court, in the admon of any property under its control, chargeable with duty under that Act or the Legacy Duty Acts, is to provide for the payment of duty thereout. And as to probate and admon duties, see 23 V. c. 15, ss. 4, 5.

By S. C. F. R. 1886, r. 20, when an order directs payment, transfer, or delivery of funds in Court in respect of which legacy or succession duty is payable, and does not direct the payment of such duty, it shall be stated in the payment schedule that such payment, transfer, or delivery is subject to duty, and in such case the Paymaster is to have regard to the circumstance that such duty is payable; and by r. 52, when any duty is directed to be paid out of funds in Court, such duty shall, without any words in the order to that effect, be assessed, and on the requisition of the Commrs of Inland Revenue, be transferred to the proper account at the bank.

And by r. 66, the Paymaster, before acting upon an order under r. 20, is to require the production of the receipt or certificate of payment, and on receiving notice from the proper officer that the duty is payable, is to cause a memorandum to that effect to be made in his books.

Where the amount of the duty is to be specified in the schedule, a certificate from the Inland Revenue Office of the correct amount must be produced to the registrar.

If the order is made in Court, the registrar sees that the cautionary words are inserted in case the order does not provide for the duty, but if the order is made in Chambers, the chief clerk sees to it, and makes a note on the summons, stating whether or not any duty is payable before transmitting the summons to the registrar to draw up the order.

It ought to be ascertained before the order is passed whether or not the duty has been paid, as the Paymaster will not receive evidence of payment before the date of an order made subject to payment of duty.



Where a legacy is given free of duty, it must be shown that the duty has been paid out of the residue.

Except in obvious cases, the question of liability is to be discussed with the Commrs of Inland Revenue, and not with the registrar or chief clerk; if necessary, it will be determined by the Court.

The Acts are to be construed strictly and in favour of the subject; and the Crown being unsuccessful was held not entitled to costs: *Hobson v. Neale*, 17 Beav. 185, 6.

The 36 G. 3, c. 52, s. 27, makes the stamped receipt of the office the only evidence of payment. But a copy of the entry from the books is sufficient, if duly proved: *Harrison v. Borwell*, 10 Sim. 380.

The controller's certificate is sufficient evidence: *E. Howe v. E. Lichfield*, 2 Ch. 155. The solr's affidavit is not: *Re Marsham*, 12 W. R. 45.

If the duty has been paid, the official receipt or the certificate of the controller should be produced and entered as read in the judgment or order; but not on a nomination by will to the benefits of the Customs Annuity Fund, as it is in the nature of an appointment under a special power and not of a legacy: *A. G. v. Rowsell*, 36 Ch. D. 67, n.

By 44 & 45 V. c. 12, s. 34, legacy and succession duty are not chargeable where the gross value of the estate of the deceased does not exceed £300; and by s. 36, the payment of the sum of 30s. for the fixed duty on the affidavit or inventory in conformity with that Act is to be deemed to be in full satisfaction of any claim to such duty.

Where payment is directed to the legal pers. represve of a deceased person, no receipt for duty on the fund as part of such deceased person's estate is requisite, the represve being accountable.

As to what shall be deemed legacies, see 36 G. 3, c. 52, s. 7; *Hanson*, 61—72; and as to duty on anns, and anns payable out of legacies, and on legacies given to purchase anns, see ss. 8, 9, 10; *Hanson*, 72—77; and on legacies to persons in succession, s. 12. As to legacy duty on a contingent interest, see *Lord v. Colvin*, 3 Eq. 737. Money left to pay duty is not chargeable as a legacy: s. 21, and *Hanson*, 93—96.

Duty is payable on foreign government bonds, the property of a British subject: *Re Ewin*, 1 Cr. & J. 151; *Hanson*, 67. And the estate of a British subject, permanently resident in the empire of China, is subject to legacy duty: *Re Tootal's Trusts*, 23 Ch. D. 532. And where the settlement is English, and the legal ownership of the property is in persons subject as Englishmen to English jurisdiction, so that any claim in respect of the funds must be decided in an English Court, succession duty is payable, though the persons beneficially entitled are foreigners: *Re Cigala's Settlement*, 7 Ch. D. 351.

The law of the country of the domicile of a deceased person governs the succession to his moveable personalty: *Dogliani v. Crispin*, L. R. 1 H. L. 301. Therefore the moveable personal assets of a British subject having a foreign domicile are not subject to legacy duty: *S. C.*; *Forbes v. F.*, 2 Cr. & J. 382; affirmed *sub nom. A. G. v. Jackson*, 8 Bli. N.S. 15; *A. G. v. Forbes*, 2 Cl. & F. 48; *Arnold v. A.*, 2 M. & C. 256, 270; *Thomson v. Adv. Gen.*, 13 Sim. 153; 12 Cl. & F. 1; *Hanson*, 16; nor to succession duty: *Wallace v. A. G.*, 1 Ch. 1; but where the exor of a foreigner has, under the will, collected the assets and invested them in English securities, any subsequent devolution will make them liable to succession duty: *A. G. v. Campbell*, L. R. 5 H. L. 524. But not where they are merely brought to this country for distribution: *A. G. v. Forbes*, 2 Cl. & F. 48; 8 Bli. N.S. 15; nor where they have not actually been so got in and invested: *Lyall v. L.*, 15 Eq. 1.

Legacy duty was payable on the share of a deceased partner domiciled in England in the proceeds of freehold property in India forming a partnership asset: *Stokes v. Ducroz*, 38 W. R. 535; 63 L. T. N.S. 176, following *Forbes v. Steven*, 10 Eq. 178; and on the proceeds of land in England devised on trusts for sale by a domiciled Frenchman: *Skottowe v. Young*, 11 Eq. 474. As to probate duty payable on the death of an heir, taking land directed to be sold, the trust for conversion failing, see *A. G. v. Lomas*, L. R. 9 Ex. 29.

Children, illegitimate in this country, of a person domiciled in a country in which they were legitimate paid legacy duty at 1 p. c. only: *Skottowe v. Young*, 11 Eq. 474; and see *Re Goodman's Trusts*, 17 Ch. Div. 266; *Re Andros*, A. v. A., 24 Ch. D. 637; and in accordance with the law of the country were entitled to succeed on an intestacy: *Dogliani v. Crispin*, L. R. 1 H. L. 301;

a child taking under the marriage settlement of his parents (foreigners), made in England of English funds had to pay duty: *Lyall v. L.*, 15 Eq. 1; *Re Budart*, 10 Eq. 288; *A. G. v. Lovelace*, 4 D. & J. 340. But natural children recognized by foreign law, and, in the absence of legitimate children, admitted to succeed, *ab intestato*, to the whole personal estate of their father, being "strangers in blood" within s. 10 of the Succession Duty Act, are liable to pay duty at 10 p. c. in respect of land of their father situate in England, *Re Atkinson*; *Anderson v. Atkinson*, 21 Ch. D. 100.

Legacy duty is payable on the death of a person domiciled abroad upon personal property in this country of an immoveable nature, such as leaseholds: *Chatfield v. Berchtoldt*, 7 Ch. 192.

Legacies given free of duty, which the residue was insufficient to bear, had to bear the duty rateably: *Wilson v. O'Leary*, 17 Eq. 419.

Where "all legacies" were to be "paid" free of duty, specific legacies, as well as pecuniary, were payable free of duty: *Re Johnston*, *Cockerell v. Earl of Essex*, 26 Ch. D. 538; *Ansley v. Cotton*, 16 L. J. Ch. 56.

Annuities given to trustees while carrying on testator's business are subject to legacy duty: *Re Thorley, T. v. Massam*, 60 L. J. Ch. 217; 64 L. T. N.S. 15.

And as to domicile, *v. inf.* Chap. XLIV., "ADMINISTRATION."

As to the right of an exor, who was compelled to pay duty on a fund taken out of Court without providing for it, to recover the amount from legatees or purchasers from them, see *Foster v. Ley*, 2 Bing. N. C. 269; *Bowra v. Rhodes*, 10 W. R. 747; *Hanson*, 62. And as to the duty of exors and solrs notwithstanding the pendency of a suit to provide for the duty, *Bryan v. Mansion*, 5 W. R. 483; 3 Jur. N.S. 475; *Re Sammon*, 3 M. & W. 381; *Hanson*, 105.

In *Bryan v. Mansion*, *sup.*, the assignee of a life interest had to refund, and under the circumstances with costs, the duty on income paid out of Court without providing for it.

As to the liability of charitable bequests to legacy and succession duty, see *inf.* Chap. XLII., "CHARITIES."

The Succession Duty Act, 16 & 17 V. c. 51, took effect from the 19th of May, 1853. Duty was payable on a remainder which vested before the Act took effect, but fell in afterwards: *Wilcox v. Smith*, 4 Drew. 40; and see *Hanson*, 262, and subsequent cases there cited.

Where property was to be accumulated for twenty-one years, and then to go to a person answering a certain description at that time, succession duty was payable on the death of a person who would have been entitled if he had lived to the end of the twenty-one years: *A. G. v. Gell*, 3 H. & C. 615; followed, but disapproved, by Wickens, V.-C., in *Ring v. Jarman*, 14 Eq. 357; and see *Crow v. Robinson*, 10 W. R. 306; *Hanson*, 263.

Sect. 4 provides for payment of duty on property passing by the exercise of general or special powers: see *A. G. v. Charlton*, 1 Ex. D. 204; 4 App. Ca. 427.

This section does not restrict the Act as to appointments to wills taking effect or settlements made after it; personalty not within s. 4 is not to be treated as the property of a donee, so as to be exempt from duty where the donee may be domiciled abroad: *Re Lovelace*, 4 D. & J. 340.

A corporation having purchased reversionary realty from a vendor who died before the life tenant, had to pay duty at 5 p. c.: *S. G. v. Law Revers. Soc.*, L. R. 8 Ex. 233; s. 15.

As to succession duty on life policies, see s. 17: *Re Maclean*, 19 Eq. 274; *A. G. v. Abdy*, 1 H. & C. 266.

Where under s. 18 the succession is accelerated, the Court, before parting with the fund, has required the parties either to arrange with the office as to the payment of duty, by commuting it for a present payment (*Bailey v. Tindal*, 17 Dec. 1853, A. 252; 18 Jur. 668), or to leave in Court a sufficient amount to answer it: *Re Raikes*, V.-C. K., 18 Jan. 1856, B. 304.

Where a jointress dies, the succession duty will, under s. 15, be chargeable upon the land, even in the hands of a purchaser: *Cooper v. Treuby*, 28 Beav. 194, unless the case comes within s. 42, so as to bind the substituted property: *Dugdale v. Meadows*, 6 Ch. 501.

On the death, prior to the passing of the Act, of a person entitled under a marriage settlement in reversion expectant on the death of a life tenant, who died *after* the Act, legacy duty was payable by the persons entitled under

the reversioner's will, but not succession duty likewise: *A. G. v. Littledale*, L. R. 5 H. L. 290.

The tenant for life and the tenant in tail in remainder, having, on re-settlement of the estate, charged an annuity on the estate in favour of the latter during the life of the former, on his death, and the latter succeeding to the estate, an allowance must be made in respect of the annuity, whether the re-settlement was before or after the Act: *Commrs. of Inland Revenue v. Harrison*, L. R. 7 H. L. 1; *Lord Braybrooke v. A. G.*, 9 H. L. C. 150; *A. G. v. Floyer*, 9 H. L. C. 477; 10 W. R. 762; and see *Le Marchant v. Commrs. of Inland Revenue*, 1 Ex. D. 185.

Where settlor settled property upon trust for himself for four years, if he should so long live, and then, or upon his death before that time, for other persons, on his death before the end of the four years duty was payable on the whole fund, and not only on the income between the death and the end of the four years, as the duty attached not merely to the increase of benefit to the successors, but to the property which they acquired: *A. G. v. Noyes*, 8 Q. B. Div. 125.

A conveyance or assignment by way of *bonâ fide* sale, does not create a succession within 16 & 17 V. c. 51: *Fryer v. Morland*, 3 Ch. D. 675; but see *De Rechberg v. Beeton*, 38 Ch. D. 192; 36 W. R. 682.

Where a father as admor of his son paid the 3 p. c. admon duty under 44 & 45 V. c. 12, in respect of his son's estate, he was exempted by sect. 41 of that Act from paying 1 p. c. succession duty on a reversion expectant on his own decease, which formed part of the son's estate: *Re Haygarth's Trusts*, 22 Ch. D. 545.

Where a settled fund during the lives of the tenants for life, is paid to their children under an appointment and power of advancement, there is an acceleration of succession in respect of which duty is payable under s. 15: *Exp. Sitwell, Re Drury-Lowe's Settlement*, 21 Q. B. D. 466.

Deeds of covenant to transfer stock to trustees for charitable purposes, the transfer not being completed until after covenantor's death, were a disposition of property, and the stock was chargeable with succession duty: *A. G. v. Montefiore*, 21 Q. B. D. 461.

The principle is that where there is a family arrangement for a re-settlement by which the tenant for life takes back his life estate, and the powers he had before, then, as everything else under the re-settlement must necessarily come out of the rest of the estate which belonged to the tenant in tail, the succession must be derived from him: *Lord Braybrooke v. A. G.*, 9 H. L. C. 150; cited by Lord Selborne in *Charlton v. A. G.*, 4 App. Ca. 427.

When a power is created to be exercised over an estate, the donor (the person out of whose estate a "benefit" or "succession" is to be derived) is, under s. 2, the "predecessor" of the person taking such benefit or succession. Where father and first son re-settled, reserving power to father and first son, and in default to father and second son, the first son dying, he is still the donor of the second power: *Charlton v. A. G.*, *sup.*; and see *A. G. v. Mitchell*, 6 Q. B. D. 548.

But where first tenant in tail was lunatic, and re-settlement was with consent of L. C., upon terms whereby the estate of the second tenant in tail (who had created a base fee and mortgaged) was treated of a certain value, and the interests of those in remainder were rendered indefeasible, the second tenant in tail was not the predecessor: *A. G. v. Dowling*, 6 Q. B. D. 177.

The exemption granted by s. 18 to persons already charged with legacy duty "in respect of the same acquisition of the same property," does not extend to appointees under a general power of appointment conferred on the legatee: *A. G. v. Mitchell*, 6 Q. B. D. 548.

SECTION III.—CARRYING OVER SECURITIES AND CASH.

1. *Carrying over Securities, Money on Deposit, Dividends, and Interest.*

LET the fund in Court be dealt with as directed in the schedule hereto.

Payment Schedule.

In the High Court of Justice, Chancery Division.                      Date of Order, 1 Aug. 1890.

Title of Action.    *A. v. B.*    1889.    A. 120.

Ledger Credit, “as above.”

Funds in Court—£10,000 New Consols ; £5,650 Cash.

	Particulars of Payments, Transfers, or other operations.	Payees, Transferees, or Separate Account.	Amounts.	
			Cash.	Securities.
			£    s.   d.	£    s.   d.
1. <i>To account of legal personal representative when constituted, or to another account in the same action.</i>	Carry over cash.....	“The account of the legal personal representative of A. when constituted.”	500   0   0	
<i>To another action    ....</i>	Carry over New Consols to the ledger credit mentioned in the second column.	“ <i>Jones v. Brown</i> , 1890, J. 27.”	....	4,200   0   0
2. <i>Government securities of a given value.</i>	Carry over £5,000 New Consols, being equivalent at the date of this order to £— cash.	“The account of A. B.”	....	5,000   0   0
3. <i>Government securities of certain value at a future day. S. C. F. R. 87.</i>	Carry over so much New Consols as at the bank average price, on the — day of — shall be equivalent to £5,000.	“The account of A. B.”		
4. <i>Fees of taxation, where the costs have been already taxed and the fees ascertained, but not paid. S. C. F. R. 67.</i>	Carry over fees of taxation..	....	15   16   4	

NOTES.

The Bank average price of Government securities appears in the account transmitted by the Bank to the Comptroller General of the National Debt Office, a copy of which is sent daily to the Pay Office: see S. C. F. R. r. 87. In the case of securities other than the above, “the average market price of the day ” is the proper expression, and then an affidavit by a stockbroker will be required by the Paymaster.

No money or securities in Court will be carried over except in pursuance of an order; and the rules applicable to the form, &c., of orders for transfer, &c., out of Court apply generally to orders for carrying over.

## SEPARATE ACCOUNT.

Where practicable, funds ought always to be paid in or carried over to separate accounts, so as to avoid the expense of service on unnecessary parties.

Care must be taken in wording the heading of a separate account, because when a fund is placed to such an account, it is released from the general questions in the action, and becomes marked as being subject only to the questions arising upon the particular matter referred to in such heading, so that, in all subsequent dealings with it, those parties only need be served who are interested in the particular fund; and the Court, from the heading of the account, sees to what extent the fund has been severed from the other questions in the action: *Laprimaudaye v. Teissier*, 12 Bea. 206; *Re Jervoise*, *ib.* 209; *Re Eyton*, *Bartlett v. Charles*, 45 Ch. D. 458; and see *Re Tillstones*, 9 Ha. lix. In *Noble v. Stow*, 29 Bea. 409, it was held that carrying over the fund to the separate account of a person was not equivalent to a declaration that she was absolutely entitled. But see *Re Jenkins*, 3 N. R. 408; 10 Jur. N.S. 332; *et inf.* Chap. XLI., "TRUSTEES."

A fund should not be carried over to "the account of A. or his incumbrancers" when there is no suggestion that incumbrances exist: *Hargrave v. Kettlewell*, 33 W. R. 136; 55 L. T. N.S. 674.

Until a fund is carried to a distinctly separate account the representative of the deceased person whose estate is being administered is a necessary party to any application respecting it: *Salmon v. Anderson*, 9 Bea. 445, 449.

But the costs of persons appearing unnecessarily, though properly served, may be refused: *In re The Justices of Coventry*, 19 Bea. 158; Dan. 1570, 1776, *inf.* p. 222.

The purchaser under the judgment or order, and a person as against whom proceedings had been stayed, were allowed their costs of appearing on application to carry over the funds to particular accounts: *Rowley v. Adams*, 16 Bea. 312; *Noble v. Stow* (2), 30 Bea. 272. But not a purchaser who has got his conveyance: *Barton v. Latour*, 18 Bea. 526.

The title of an account directed to be raised must not exceed thirty-six words, exclusive, in the case of a separate account in a cause or matter, of the title of the cause or matter in which such separate account is raised; unless a sufficient reason be assigned to the satisfaction of the registrar in the case of orders, or of the paymaster in the case of requests, who, in such case, is to add to the direction to raise such account the words "notwithstanding r. 103;" four figures are reckoned as one word: r. 103.

In dealing with securities, it should be borne in mind that railway and other public companies have generally a limit below which they do not permit a division of their stocks. For the purposes of division, therefore, it may in some cases be necessary to sell the stock, or some portion of it. As a rule, railway stocks cannot be carried over on account of the stock certificates, which are lodged at the Bank by the paymaster when the stock is brought into Court: see *Piper v. Bateman*, V.-C. B., 24 July, 1875, B. 2690, where two sums of railway stock, parts of larger sums, could not be carried over for this reason. The Court directed that they should be deemed to have been set apart to answer a certain legacy, and that the dividends should be paid to the tenant for life of the legacy.

The Bank of England cannot be required to transfer Consols into the joint names of a corporation and individuals: *Law Guarantee Society v. Hunter*, 24 Q. B. D. 406.

Since 51 V. c. 2, s. 18, the Bank of England allows not more than four accounts of government stocks to be opened in the same name or names: see *Vaizey on Investments*, 87.

A sum of railway stock ordered to be carried to six separate accounts had to be apportioned with the aid of cash paid in at the same time, so as to prevent fractions of £1: *Re Perry*, 22 W. R. 433.

Cash or money on deposit in Court to the credit of an action or matter

may be invested to the credit of a separate account or of another action or matter without being previously carried over; but as the money on deposit must be withdrawn from deposit before it is carried over, the order must provide for any interest to be credited.

Fees of taxation are carried over by the paymaster under r. 67, without any direction in the order; but if the order is dated after the taxing master's certificate, there ought to be a direction: see Schedule, Form No. 4.

If the fund is liable to duty, the words "subject to legacy" or "succession duty" must be added to the title of the account: r. 20.



## CHAPTER XVII.

### COSTS.

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#### SECTION I.—COSTS BETWEEN PARTIES.

##### 1. *Taxation and Payment of Costs by one Party to another.*

LET Plt (Deft) A. pay to the Deft (Plt) B. his costs of this action [*or application*], such costs to be taxed by the taxing master.

##### 2. *The Like—Other Forms.*

REFER it to the taxing master to tax the costs of the Plt (Deft) A. of this action [*or application*]; [*or Let the costs of the Plt (Deft) of this action [*or application*] be taxed by the taxing master*]; And Let the Deft (Plt) B. pay to the Plt (Deft) A. the amount of his said costs when so taxed.

In the absence of special direction, the registrar ought to include in the costs of action the costs of all applications reserved to be disposed of at the hearing, and all costs reserved to be disposed of at the hearing: per M. R., in *Hodges v. H.*, 25 W. R. 162.

##### 3. *Costs of Application to be Costs in the Action.*

AND the costs of the Plt [*or Petr, or Deft, or Applicant, or all parties*] of this application are to be costs in this action.

##### 4. *Action and Counterclaim dismissed—Apportionment of Costs.*

THE application of the Deft, which upon hearing &c., was adjourned &c., and upon hearing counsel for the Deft and for the Plt; And this Court being of opinion that in the taxation of the costs under the said judgment, dated &c., the Plt is liable to pay the whole of the Deft's costs except so far as they have been increased by the Deft's counter-claim; And that there ought to be no apportionment of the Deft's general costs of this action, and that the Deft is liable to pay to the Plt only the amount by which the Plt's costs have been increased by the Deft's counter-claim, Let it be referred back to the taxing master to review his taxation accordingly.—*Saner v. Bilton*, Fry, J., 19 March, 1879, B. 648.

For form of order, where a solr brought an action on his bill of costs, and the Deft failed to appear and support his counter-claim, and the Court

sent the bill for taxation, under the 7 & 8 V. c. 73, s. 37, see *Lunley v. Brooks*, 3 April, 1889, B. 464; S. C., 41 Ch. Div. 323.

### 5. *Petition dismissed with Costs.*

UPON the petition of &c., on &c., preferred &c. that [*recite prayer of petition*], and upon hearing &c., this Court doth order that this petition do stand dismissed out of this Court with costs, to be taxed by the taxing master (in case the parties differ). And it is ordered that the Plt A. pay to the said B. and C. the amount of their costs, when taxed.

### 6. *Motion refused with Costs.*

UPON motion this day made unto this Court by counsel for [*recite notice of motion*], and upon hearing &c., this Court doth not think fit to make any order on this application; but doth order that the Plt [*or Deft*] A. do pay to the Deft (Plt) B. [*name the party to receive costs*] his costs of this application, to be taxed by the taxing master.

For order on abandoned motion, *v. inf.* Chap. XXIV., "MOTION."

### 7. *Summons in Chambers dismissed with Costs.*

THE Judge doth not think fit to make any order upon this application, but doth order that the Plt A. do pay to the Deft B. his costs of this application to be taxed by the taxing master (in case the parties differ).

### 8. *Summons originating Proceedings dismissed with Costs.*

LET the originating summons filed in this action stand dismissed out of this Court with costs, to be taxed by the taxing master; And Let the Plt A. pay to the Deft B. the amount of such costs when taxed.

### 9. *Costs occasioned by Adjournment of Summons into Court.*

LET the Plt A. pay to the Deft B. his costs occasioned by the adjournment into Court of this application, such costs to be taxed &c.—*In re General Estates Co.*, M. R., 16 Feb. 1869, A. 1725; 8 Eq. 123.

In *Holden's case*, 8 Eq. 444, it was held that where a summons is adjourned into Court, the costs of the application directed to be paid by the unsuccessful party are ordinarily the costs of the adjournment into Court only.

### 10. *Costs of adjourned Summons in Court and in Chambers.*

LET the Deft B. pay to the Plt A. his costs of this application in Chambers, and occasioned by the adjournment thereof into Court, such costs to be taxed &c.



11. *Taxation and payment of Costs without prejudice how ultimately to be borne.*

TAX the costs of the Plts and the Defts of this action ; And Let the Plt A. pay to the Defts B. and C. respectively the amount of their said costs when taxed, without prejudice to any question how such costs are ultimately to be borne.

Where a party is entitled to costs, but it is not ascertained who ought ultimately to bear them, the judgment or order often directs payment to be made by one of the parties, or out of a fund in Court available for the purpose, "without prejudice to the question how the same are ultimately to be borne:" *Smith v. Hammond*, 6 Sim. 10, 15.

Defts disclaiming all interest may be dismissed with costs on motion by Plt *ex parte*, without prejudice to the question how the costs shall ultimately be borne as between Plt and the other Defts: *Clements v. Clifford*, 14 W. R. 22; *Baily v. Lambert*, 5 Ha. 178. As to the costs of disclaiming Defts generally, *v. inf.* Chap. XLVII., "MORTGAGES."

12. *Costs made a Charge.*

AND Let the Plts' costs, and also the costs which the Plts or any of them shall so pay to the Defts, be a lien (charge) on the estate of the testator in question in this action.

As to making costs a charge with interest, see p. 229.

13. *No Costs given on either Side.*

THE Court doth not think fit to give any costs of this action [or application] on either side.

14. *The Like—As to Part.*

AND this Court doth not think fit to give any costs on either side, as to so much of the costs of this action [or application] as have been occasioned by &c. [or as relate to &c., or so far as such costs have been increased by &c.].

15. *Taxation of Plt's and Deft's respective Costs of Parts of Action—Set-off.*

TAX the costs of the Plt of this action, except so much thereof as relates to the claim set up by him to &c.; Tax the costs of the Deft of so much of this action as relates to the said claim; And the taxing master is to set off the said costs of the Plt and of the Deft when so respectively taxed, and certify to which of them the balance after such set-off is due; And Let such balance be paid by the party from whom to the party to whom the same shall be certified to be due.

As to set-off, *v. O.* LXV. 14 and 27 (21), and *inf.* pp. 226, 228.

An order in this form involves an apportionment of the costs of every general proceeding in the action: *v. inf.* p. 226.

### 16. *Costs specially reserved.*

THE Court specially reserves the question how and by whom the costs of this action are to be borne.—*Clough v. Reddish*, Chitty, J., 31 July, 1882.

### 17. *Taxation of Costs except so far as occasioned by particular Claim.*

TAX the costs of the Plt of this action except so far as such costs have been occasioned by the Plt setting up a claim to the whole of the debt in the pleadings mentioned.—*Hardy v. Hull*, 17 Beav. 355; *Begbie v. Fenwick*, 27 July, 1868, A. 2681, S. C. 6 Ch. 869.

This order involves an apportionment of general charges: *v. inf.* p. 226.

The Deft's costs occasioned by such claim had been given him at the hearing, so that no taxation and set-off of his costs was required.

### 18. *Taxation of Deft's Costs of Action with Set-Off of Part, caused by Deft's wrongful Claim, including Costs of Co-Defts, Husband and Wife, in Redemption Action.*

TAX the costs of the Deft P. (*mortgagee*) of this action, except so far as the same relates to the claim made by him in respect of the sum of £— charged by the deeds dated &c.; Tax the costs of the Defts W. and wife of this action; And Let the Plt O. pay unto the Deft W. the costs of the said Deft W., and of his said wife when so taxed; and the taxing master is to inquire and certify how much of such costs of the Deft W. and wife (if any) have been occasioned by the Deft P.'s said claim in respect of the said sum of £—, and he is also to tax the Plt his costs of this action so far as the same have been occasioned by the said claim of the Deft P. in respect of the said sum; And Let such costs of the Plt when so taxed, together with what he shall have paid to the Deft W. for the costs of the said Deft W. and of his said wife (if any) occasioned by the said claim of the Deft P. in respect of the said sum of £— be set off against the said costs of the Deft P. when taxed; and the taxing master is to certify to whom after such set-off the balance is due; And Let the party from whom such balance shall be certified to be due pay the amount thereof to the other party.—*Orange v. Pickford*, V.-C. K., 6 June, 1860, B. 1526.

And for direction to distinguish and set off part of costs of suit, see *Burrows v. Walls*, 5 D. M. & G. 256; *Wheaton v. Graham*, 24 Beav. 483.

An order in this form involves an apportionment of the costs of every general proceeding in the suit: *v. inf.* p. 226.

### 19. *Taxation of Costs, except so far as increased by particular Claim.*

TAX the costs of the Plt (Deft) of this action, except so far as such costs have been increased by the Plt's claim to, &c. [*or* Deft setting up &c., *or* claiming &c.]; Tax the costs of Plt (Deft) of this action so far only as the same have been increased by the said claim [*or* by the Deft

setting up &c., or claiming &c.]. Directions for set-off and payment of balance.

An order in this form does not involve an apportionment of the costs of the general proceedings : *v. inf.* p. 226.

For order in favour of one of two Plts with costs, and dismissing the bill as to the other with costs, so far as occasioned by his being a Plt, see *Umfreville v. Johnson*, 10 Ch. 581.

### 20. *Costs up to a particular Time.*

LET the Plt A. pay to the Deft B. his costs of this action up to and including this hearing [or the trial of this action, or the — day of — (when the Deft offered by &c., in writing, to pay the amount sought to be recovered by Plt &c.)], such costs to be taxed &c.

Where costs are given up to a particular date they will include costs of briefs, affidavits, &c., actually and properly incurred previous to that date, although the application in support of which they were prepared was not heard until after : and see *Webster v. Manby*, 4 Ch. 372.

### 21. *Where Action defective, and Leave to amend given at Trial.*

THIS action coming on for trial &c., Leave to amend writ and statement of claim ; And Let the Plt pay to the Deft his costs of his action so far as they may have been thrown away by reason of the said amendments.—*Wethered v. Cox*, Kay, J., 6 Dec. 1888, B. 1598.

### 22. *Costs to be paid by Plt and Deft respectively from and to a particular Time—Set-off.*

TAX the costs of the Plt G. of the first-mentioned action up to the — day of —, the date of the letter from the solr for the Plt in the second-mentioned action, in his said affidavit referred to ; And tax the costs of the Deft L. incurred in the first-mentioned action since the — day of —, and also his costs of this application ; And the taxing master is to set off such costs of the Plt G. and of the Deft L. respectively, when so taxed, and certify to whom after such set-off the balance is due ; And Let the party from whom such balance shall be certified to be due pay the amount thereof to the other party.—*Gresham v. Luke*, V.-C. S., 26 March, 1860, A. 647.

### 23. *Costs taxed and set off against Sum due.*

TAX the Plt his costs of this action &c. ; And Let such costs when taxed be set off against the sum of £—, due from the Plt to the Deft under the agreement dated &c., with interest &c. ; And the taxing master is to certify to whom, after setting off the said costs when so taxed against the said sum of £—, and interest &c., the balance is due ; And Let the party from whom the balance shall be certified to be due, within one month after the date of the taxing master's certificate, pay

the amount thereof to the other party.—Liberty to apply.—See *Radley v. Ingram*, V.-C. S., 3 March, 1860, B. 716.

**24. *Taxation of Exor's Costs between Party and Party, and also between Solr and Client—Payment of Party and Party Costs by Plt and Balance out of Funds in hand.***

Tax the costs of the Deft of this action as between party and party, and also as between solr and client, including in such last-mentioned costs any charges and expenses properly incurred by the Deft in the admon of the estate of G., the testatrix &c., not being costs of action, and not already taxed or allowed. And Let H., the next friend of the infant Plts, pay to the Deft &c., what shall be certified as his said costs as between party and party. And Let the Deft be at liberty to retain and pay out of the funds in his hands, or which may hereafter come into his hands, as the exor of the will of the said testatrix, so much of the said costs as between party and party as he shall not recover and actually receive from the said H., and also what shall be certified to be the amount of the difference between the said costs as taxed between party and party, and as taxed between solr and client.—See *Re Garmeson*, *Garmeson v. Sharrod*, V.-C. M. at Chambers, 7 June, 1872, A. 1451.

For order when the costs are to be paid out of fund in Court, see Chap. XVI., "LODGMET AND PAYMENT OF FUNDS."

**25. *Taxing Master to look into Affidavits, and if improper or of unnecessary length, to distinguish and set off Costs.—O. LXV. 27 (20).***

LET the costs of the Plts of this action be taxed by the taxing master (including the costs of the Plts' motion made unto this Court on the — day of —); And in taxing such costs the taxing master is to look into the affidavits filed in this cause on behalf of the Plts, and disallow the costs thereof or of such part thereof as he shall find to be improper, unnecessary, or vexatious (or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence), and to ascertain the costs (if any) occasioned to the Deft thereby as may be so disallowed; And Let such last-mentioned costs be deducted from the Plts' said costs; And Let the balance be certified. Directions for payment, or, if necessary, directions for set-off and payment.—And see *Cracknall v. Janson*, Fry, J., 27 June, 1878, A. 1315; 11 Ch. D. 1, 14.

**26. *Reference to Tax under O. LXV. 11.***

THIS cause coming on for further consideration &c. in the presence of counsel for &c., Let it be referred to the taxing master to tax the costs of the Plt and the Deft, and of parties having liberty to attend the hearing under the order, dated &c., and of all other parties

properly attending the proceedings up to the date of the classification order, dated &c.; and after that date of those parties only attending the proceedings who were not excluded or classified out by the said classification order &c., and in such taxation the taxing master is, under O. LXV. 11, to inquire whether any costs have been improperly or without any reasonable cause incurred, and as to the cause of delay in the proceedings in this cause between the years 1873 and 1884, and to make such disallowance as he may think fit for costs (if any) which have been so improperly or without any reasonable cause incurred, or which have been occasioned by the improper delay (if any), and to call on the solrs engaged in this action to show cause why such disallowance should not be made.—*Furness v. Davis*, Kay, J., 19 January, 1885, A. 615.

*27. Costs of Affidavits to be disallowed.*

DIRECTION to tax, and the Defts are to be allowed no costs of the following affidavits, that is to say, an affidavit of &c.

*28. Costs of Affidavits to be allowed although not read as Evidence.*

ORDER by consent, no evidence being read; "And let the Deft B. pay to the Plt A. the costs of this application, including therein the costs of the affidavits mentioned in the schedule hereto."

*29. Costs in any event.*

AND the Plts' (Defts') costs of this application are to be borne by the Defts (Plts) in any event.

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SECTION II.—TAXATION OF COSTS AND PAYMENT OUT OF FUNDS IN COURT.

*1. Taxation of Costs and Payment to Solr.*

REFER it to the taxing master to tax the costs of the Plt and the Defts [*or all parties*] of this action, *or* application, *or* Let the costs of the Plt and Defts of this &c. be taxed by the taxing master [*If ordered, as between solr and client, or if ordered as to exor or trustee only, the costs of the Deft B., the exor or trustee of &c., as between solr and client*]; And Let the fund in Court be dealt with as directed by the schedule hereto. [*Add Payment Schedule, Form No. 32.*]

The amount raised includes the fees of taxation.

Where the costs are payable out of a fund in Court, they are paid to the solrs of the parties, but in other cases they are always ordered to be paid to the parties themselves.

*2. Taxation of Costs of Application—Payment out of Cash.*

TAX the costs of the Petr (Applicant) and of &c. of this application [*If so ordered, and relating thereto, and consequent thereon, If so, as*

between solr and client]; And Let the fund in Court be dealt with as directed in the schedule hereto. [*Add Payment Schedule, Form No. 32.*]

### 3. *Fund deficient—Apportionment.*

DIRECTION to tax costs; And Let the fund in Court be dealt with as directed by the schedule hereto, and in case the said fund shall be insufficient to pay such costs when taxed in full, the taxing master is to apportion the same rateably among the said parties in proportion to the respective amounts of their said costs when taxed. [*Add Payment Schedule, Form No. 32.*]

For direction for the apportionment of costs between pure and impure personal estate and real estate, *v. inf.* Chap. XLII. "CHARITIES."

For direction to apportion costs between two estates, *v. inf.* Chap. XLIV. "ADMINISTRATION."

### 4. *Order to tax and include Costs in Certificate under former Order.*

TAX the costs of the Plt of the application of the — day of —, and the costs of all parties of this application [*If so, and relating thereto, and consequent thereon*] respectively [*as between solr and client*]; And the taxing master is to include the amount of such costs in his certificate to be made in pursuance of the order dated, &c.; And Let the fund in Court be dealt with as directed in the schedule hereto. [*Add Payment Schedule, Form No. 32.*]

### 5. *Taxation as between Party and Party, and as between Solr and Client, and Payment.*

TAX the costs of the Plt of &c., as between party and party, and also as between solr and client, and certify the difference; And Let the Deft B., out of the testator's residuary personal estate, pay to the Plt A. what shall be certified to be the amount of his said costs as between party and party; And Let out of the £— cash in Court &c., what shall be certified to be the amount of the difference between the Plt's costs, as taxed between party and party and as taxed between solr and client, be paid as directed in the schedule hereto. [*Add Payment Schedule, Form No. 32.*]

For direction to pay costs out of dividends on fund in Court, *v. sup.* p. 188.

### 6. *Costs to be apportioned between two Funds.*

DIRECTION to tax costs; And the taxing master is to apportion the said costs, when taxed, between the £500 cash in Court to the credit of &c., "Personal estate account," and the £3,000 cash in Court to the credit of &c., "Real estate account," in proportion to the respective amounts thereof; And Let so much of the said costs as the taxing master shall certify to be the proportion to be paid out of the £500 be paid thereout as directed &c.—Like direction for payment of the costs apportioned to the other fund. [*Add Payment Schedules, Form No. 32, for each account.*]



## NOTES.

## JURISDICTION AND PROCEDURE GENERALLY.

O. LXV. 1, provides that, "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the admon of estates and trusts, shall be in the discretion of the Court or Judge; Provided that nothing herein contained shall deprive an exor, admor, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court shall, for good cause, otherwise order."

The effect of this rule and the Acts is not to give any new jurisdiction to award costs, but only to regulate the mode in which costs are to be dealt with where the Court previously had jurisdiction, original or statutory: *Re Mills' Estate, Exp. Commr. of Works*, 34 Ch. Div. 24; questioning *Exp. Mercers' Co.*, 10 Ch. D. 481; and see *Re Lee and Hemingway*, 24 Ch. D. 669. No hard-and-fast rule as to costs can now be laid down in any division of the Court, but discretion must be exercised according to the circumstances of each particular case: *The Friedeberg*, 10 P. D. 113.

The rule does not apply to costs specially given by statute as matter of right, *ex. gr.*, double costs, or a reasonable indemnity in lieu thereof: *Hasker v. Wood*, 54 L. J. Q. B. 419; 33 W. R. 697; *Reeves v. Gibson*, (1891) 1 Q. B. C. A. 652.

As to the threefold jurisdiction of the Court in respect to costs (1) statutory; (2) general, over its own officers; and (3) in dealing with contested claims, see observations in *Re Park, Cole v. P.*, 41 Ch. Div. 326, at p. 331; and that, under the general jurisdiction, taxation of part of a bill may be ordered, see *Storer & Co. v. Johnson and Weatherall*, 15 App. Ca. 203; affirming *S. C.*, *In re Johnson and Weatherall*, 37 Ch. Div. 433.

As to the inherent jurisdiction of the Court to order payment of costs by unsuccessful applicant under a statute silent as to costs, see *Re Bombay Civil Fund Act*; *Pringle v. Secretary of State for India*, 40 Ch. Div. 288.

Where Plt sues to enforce a legal right, and there is no misconduct on his part, the Court cannot withhold costs: *Cooper v. Whittingham*, 15 Ch. D. 501; and see *Upmann v. Forester*, 24 Ch. D. 231; *Wittman v. Oppenheim*, 27 Ch. D. 260; *Goodhart v. Hyett*, 25 Ch. D. 182; and, conversely, there is no power to give costs to an unsuccessful Plt: *Re Foster and G. W. Rail. Co.*, 8 Q. B. Div. 515; *Dicks v. Yates*, 18 Ch. Div. 76; but this rule does not prevent the Court from giving out of a fund the costs of an unsuccessful application reasonably incurred for the ascertainment of the fund: *Butcher v. Pooler*, 24 Ch. Div. 273.

Where there are distinct issues, the word "event" must be read distributively: *Myers v. Defries*, 5 Ex. Div. 180; and see *Ellis v. Desilva*, 6 Q. B. Div. 521; *Shrapnel v. Laing*, 20 Q. B. Div. 334.

As to what is "good cause" for depriving a successful party of costs, see *Huxley v. West London Extension Rail. Co.*, 14 App. Ca. 26; as to the necessity of such cause being shown, *Wight v. Shaw*, 19 Q. B. Div. 397; *Baines v. Bromley*, 6 Q. B. D. 691; that the power of the Judge may be exercised without application being made to him at the trial, *Turner v. Heyland*, 4 C. P. D. 432; *Collins v. Welch*, 5 C. P. Div. 27; or upon application after verdict, *Kynaston v. Mackinder*, 47 L. J. Q. B. 76; and that by declining at the trial to exercise his discretion he does not necessarily become *functus officio*, *Huxley v. W. L. Rail. Co.*, *sup.*

Even in an action tried by a jury, the Court has power, upon good cause shown, to deprive a successful party of costs: *Myers v. Defries*, 4 Ex. Div. 176; *Harnett v. Vyse*, 5 Ex. Div. 307; and in exercising its discretion may consider his conduct previously to, as well as during, the litigation: *Harnett v. Vyse*, *sup.* at p. 311; but not letters or conversations written or declared to be "without prejudice": *Walker v. Wilsher*, 23 Q. B. Div. 335; and a Plt partially successful may be ordered to pay costs: *Harris v. Petherick*, 4 Q. B. Div. 611.

An order giving Deft against third parties such costs as he is "entitled to by law" is not an exercise of discretion under the rule: *Lewis v. Trimming*, 21 Q. B. D. 230.

By the Supreme Court of Judicature Act, 1890 (53 & 54 V. c. 44), s. 5, subject to the Judicature Acts, "and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the admon of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid."

By O. XVI. 54, "the Court or a Judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, and give such direction as to costs as the justice of the case may require."

Third parties, who had in reality fought the Plts and failed, were ordered, together with Defts, to pay costs both of successful appeal and in Court below: *Edison and Swan United Electric Light Co. v. Holland*, 41 Ch. Div. 28.

In *Hornby v. Cardwell*, 8 Q. B. Div. 329, a third party was ordered to pay all the costs of the action, including the costs of the proceedings between Plt and Deft.

Where a third party was ordered to pay the costs of the proceedings taken to bring him before the Court, the order could not be varied on appeal, though by the subsequent judgment the action had been dismissed against him with costs: *Beynon v. Golden*, 4 Ex. Div. 246; but, *semble*, the costs of the interlocutory proceedings should have been reserved.

For cases in which Deft has been ordered to pay costs to third party, see *Dawson v. Shepherd*, 49 L. J. Exch. 529; 28 W. R. 805; *Forkshire Wagon Co. v. Newport Coal Co.*, 5 Q. B. D. 268.

By Jud. Act, 1873, s. 49, no order made by the High Court as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order.

As to cases within this section, and as to costs of appeal generally, *v. inf.*, Chap. XXXVI., "APPEALS."

By O. LXV. 27 (37), the rules, orders, and practice as to costs existing before the Act are, so far as not inconsistent with the Acts and rules, to remain in force. As to references to the taxing masters, and proceedings before them, *v. inf.* p. 241.

By O. LXV. 27 (25), the powers and duties of the taxing masters are transferred to the taxing officers of the Supreme Court.

By O. LXV. 13, the Court or a Judge may direct payment of the costs of a solr of the Court when appointed guardian *ad litem* of an infant or person of unsound mind.

By O. XVI. 31, unless otherwise directed, costs ordered to be paid to a person admitted to sue or defend as a pauper, shall be taxed as in other cases.

#### TAXATION—PARTY AND PARTY AND SOLR AND CLIENT COSTS.

Where costs are directed to be taxed *simpliciter*, this means as between party and party.

Where a sale is directed, the costs are costs of action. Where the costs are not reserved, the successful party will get, as costs of action, his costs subsequent to the hearing, such as costs of a sale, or of inquiries for working out the judgment (but not of other matters wrongly brought in under it: *Krehl v. Park*, 10 Ch. 334); but the taxing master will not tax the costs twice. If the costs are taxed immediately, subsequent costs, which cannot be taxed by anticipation, must be waived, or a fresh order obtained. If the costs are to be taxed as between solr and client, or if any costs, charges, and expenses not strictly costs of action are to be allowed, or the taxation is in any respect to vary from taxation as between party and party, this should be expressed in the judgment or order.

Where trustees are held entitled to costs from parties for whom they are not trustees, it is generally as between party and party, but may be given them as between solr and client: *Turner v. Collins*, 12 Eq. 438; though there is no fund to take them from: *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112. But the Court has a general jurisdiction to give solr and



client costs: *Andrews v. Barnes*, 39 Ch. Div. 133, questioning *Cockburn v. Edwards*, 18 Ch. Div. 449.

Solr and client costs can be given though the parties are before the Court only by means of a representation order: *Re Davies, Jenkins v. D.*, W. N. (91) 104.

In ordinary cases, where there are no fiduciary relations, only party and party costs will be given, unless there is something scandalous, or gross charges of fraud which have not been sustained: *Turner v. Collins*, 12 Eq. 438.

Where there was such a relation between the parties, and the Court by consent referred all matters in dispute, including costs, to an arbitrator, he had, without special authority, power to give solr and client costs: *Mordue v. Palmer*, 6 Ch. 22.

Relators in charity cases generally have solr and client costs: *Morg. & D.* 139.

An unfounded action to recover a charity fund of small amount in the hands of trustees was dismissed with solr and client costs: *Andrews v. Barnes, sup.*

The costs of a sequestration were not given as between solr and client: *Re Shapland*, 23 W. R. 40.

In a representative case for the opinion of the Court in a winding-up, party costs only were allowed out of the assets: *Re Mutual Society, Grimwade v. Mutual Society*, 18 Ch. D. 530.

When costs are directed to be taxed as between solr and client, it does not necessarily mean that all costs which the solr is entitled to against his client are to be allowed, but the allowance will vary according to the circumstances of the case; regard being had to the position of the parties, and the fund out of which the costs are to be paid; and a distinction is made: 1st, where such costs are payable out of a fund belonging to other parties; 2ndly, where such costs are payable out of a common fund, in which the party has only a limited interest; and, 3rdly, where such costs are payable out of a fund belonging exclusively to the party himself.

Costs of action as between solr and client do not include costs of appeals, rehearings, and exceptions: *Agabeg v. Hartwell*, 5 Beav. 271, 273; nor of a case sent to another Court: *Salkeld v. Johnston*, 1 M. & G. 533.

The addition of the words "and consequent thereon," or "and relating thereto," or both sets of words, to the words "as between solr and client," give respectively a wider range to the taxation. Where the costs are to be paid out of a party's own fund, all the above words may properly be inserted; and in acting upon them the taxing master will use his discretion according to the circumstances as to the extent of the allowance.

An order imposing costs by way of penalty is irregular, but may be upheld if right in substance: *Willmott v. Barber*, 17 Ch. Div. 772; and that solr and client costs should not be awarded by way of damages, see *Cockburn v. Edwards*, 18 Ch. Div. 449, 459.

Where an inquiry as to damages is directed, the costs of the inquiry will in general be reserved, so that the Court may retain control over them: *Slack v. Midland Rail. Co.*, 16 Ch. D. 81.

See S. C. F. R., r. 67, as to providing for fees of taxation out of a fund in Court.

#### ALLOWANCES.

As to giving security for costs, *v. sup.* Chap. IV., "SECURITY FOR COSTS."

By O. LXV. 27 (50), when a cause is struck out of the paper for some defect on the part of the Plt, and again set down, Deft is to be allowed the costs so occasioned: *v. sup.* p. 133.

As to costs of creditors coming in under an admon judgment, see O. LV. 58, *et inf.* Chap. XLIV., "ADMINISTRATION."

Where an admon action is brought in a County Court, taxation may be obtained in the High Court: *Re Worth*, 13 Ch. D. 521.

As to costs to be allowed in taxation between party and party, see O. LXV. 27 (29); and that in taxation, as between solr and client, the taxing master has a discretion, notwithstanding the schedule of fees, *Ryan v. Dolan*, Ir. Rep. 7 Eq. 92.

And as to the allowance of particular items on taxation, *v. inf.* Section IX.; and for what will be allowed under the head of "charges and expenses," *v. Chap. XLI.*, "TRUSTEES."

The assignor of a lease was entitled, in an action against the assignee for breach of contract to indemnify, to recover as damages full (and not only taxed) costs of an unsuccessful defence of an action by the landlord : *Howard v. Lovegrove*, L. R. 6 Ex. 43.

An official liquidator will have to pay the costs of a groundless appeal or application, whether he gets them out of the estate or not : *Ferrao's Case*, 9 Ch. 355.

And so in the case of a trustee in bankruptcy provoking litigation : *Exp. Angerstein*, 9 Ch. 479 ; *Re Pettit*, 1 Ch. D. 478. But an official liquidator defending an action in the name and on behalf of the co. is not personally liable for costs : *Fraser v. Brescia Steam Tram. Co.*, 56 L. T. N.S. 771. See also Buckley, 258, 312.

A Deft whose interest has ceased cannot obtain payment of his costs : *Wymer v. Dodds*, 11 Ch. D. 436.

An order for payment of costs by two or more persons is joint and several as between them and the payee.

But as between themselves, the costs payable by two co-Defts to the Plt may be payable by one of them, and the other may have liberty to apply in Chambers as to payment of such costs by his co-Deft to him : *Wilson v. Thomson*, 20 Eq. 459 ; and see *Furlong v. Scanlon*, Ir. Rep. 9 Eq. 202.

And that "judgment for Plt with costs" only carries, as against a co-Deft, such costs as Plt has incurred by the act of that Deft, see *Stumm v. Dixon*, 36 W. R. 457.

Formerly, where the costs of any of the Defts were to be borne by another Deft, the Court did not in general order them to be paid directly by the one Deft to the other, but directed the Plt to pay them to the Deft who was to receive them, and to recover them against the Deft who was to bear them ; but now the proper practice is to make a direct order between the Defts : *Rudow v. Great Britain Mutual Society*, 17 Ch. Div. 600.

In *Wilson v. Thomson*, 20 Eq. 459, where a decree was made with costs against two Defts, and the suit was caused by the misconduct of one of them, he had to bear them as between him and his co-Deft.

As to enforcing payment, *v. inf.* Chap. XXVII., "EXECUTION."

As to the review of taxation, see *inf.* Section IX.

Where an action is dismissed with costs, taxation takes place without any order, unless prohibited by the Court or a Judge, upon special application of party aggrieved : O. LXV. 27 (33).

A judgment dismissing an action with costs, carries the costs of a motion by the Plt which stood over until the trial, and was not brought on : *Gosnell v. Bishop*, 38 Ch. D. 385 ; and as to costs of proceedings in Chambers and interlocutory, *v. inf.* Chap. XVIII., "CHAMBERS;" Chap. XXIV., "MOTION."

By O. LXV. 23, on interlocutory applications, the Court may direct payment of a sum in gross, in lieu of taxed costs. This rule is frequently acted upon in Chambers.

By O. LXV. 27 (33), the taxing master may tax the costs payable by any party without any order referring them for taxation, unless the Court prohibits it, and costs so taxed are recoverable by *fieri facias* or *elegit*. But as this rule is only permissive, the taxing masters do not generally act upon it, and it is still the practice to insert the direction for taxation.

By O. LXV. 27 (34), the course of proceedings is regulated where costs are directed to be taxed "in case the parties differ."

By r. 27 (35), where any costs are by any judgment or order directed to be taxed, and to be paid out of any money in Court, the taxing officer, in his certificate, is to state the total amount of all such costs as taxed, without any direction for that purpose in such judgment or order.

In *Re Blight*, 21 W. R. 573, costs incurred in the Probate Court were ordered to come out of the residue which had been paid into Court to the credit of infants, under 36 Geo. 3, c. 52.

By O. LXV. 27 (23), where any party appears upon an application in which he is not interested, or upon which he ought not to attend, he will not be allowed his costs unless expressly directed ; and by r. 27 (27), the taxing master may direct who shall attend the taxation, and disallow the costs of unnecessary attendance.

R. 27 (28), provides against any party being prejudiced by any other party refusing or neglecting to bring in his costs for taxation.

By r. 27 (43), costs of actions commenced or proceeding in a district registry are to be the same as in London.

Where final judgment is entered in the district registry, costs are to be taxed in such registry, unless the Court or a Judge shall otherwise direct: O. xxxv. 4; but any party may appeal to a Judge by summons within four days after the district registrar's decision, or such further time as may be allowed by the Judge or the registrar: r. 9.

The Court, however, will not, except under special circumstances, direct the costs of an admon action to be taxed in the district registry, though prosecuted there down to further consideration. But if such an order is made the Paymaster is bound to act upon the certificate of the district registrar: *Re Wilson, Wilson v. Alltree*, 27 Ch. D. 242.

When all that is claimed by an action could have been obtained by summons, the Court has only allowed same costs as on a summons: see *O'Kelly v. Culverhouse*, W. N. (87) 36; *Barr v. Harding*, 36 W. R. 216; *Briton Medical Assoc. v. Britannia Fire Assoc.*, W. N. (88) 245; *London Steam Dyeing Co. v. Digby*, 57 L. J. Ch. 505; *Johnson v. Evans*, 60 L. T. N.S. 29; or has disallowed costs: *Re Johnson, Wagg v. Shand*, 53 L. T. N.S. 136; *Blackett v. B.*, 51 L. T. 427.

As to the costs of motions, *v. inf.* Chap. XXIV.; of petitions, *inf.* Chap. XXIII.; of special cases, *inf.* Chap. XXI.; of proceedings in Chambers, *inf.* Chap. XVIII.; of trustees, and their charges and expenses, *inf.* Chap. XLI., "TRUSTEES;" as to costs in charity cases, *inf.* Chap. XLII., "CHARITIES;" as to costs in admon, *inf.* Chap. XLIV., "ADMINISTRATION;" in partition suits, *inf.* Chap. XLVI., "PARTITION;" and as to costs generally, see Morg. & W.; Dan. 1167.

#### HIGHER AND LOWER SCALE.

By O. LXV. 8, 9, in causes and matters commenced after the rules came into operation, costs are to be taxed according to the lower scale in Appendix N., but the fees in the column headed "higher scale" in that appendix may be allowed, either generally, or as to particular business in any cause or matter, if "on special grounds, arising (1) out of the nature and importance, or (2) the difficulty, or (3) urgency of the case," the Court or a Judge shall so order, or if the taxing officer, under directions given to him by the Court or a Judge, shall think such allowance ought to be made upon such special grounds.

By r. 10, upon any reference to tax, as between solr and client, including charges for business done in any cause or matter, the taxing master may allow the higher scale fees if, on such special grounds, he thinks the allowance ought to be made.

In order that the higher scale should be allowed, it is not sufficient that the case is one of importance and difficulty, but there must be "special grounds arising" in one of the three ways mentioned in the rule: *Williamson v. North Staffordshire Rail. Co.*, 32 Ch. Div. 399 (containing observations on *Lydney & Wigpool Co. v. Bird*, 13 Ch. D. 358); *The Horace*, 9 P. D. 86; *Paine v. Chisholm*, 39 W. R. 353; and if none of those conditions exist appeal will lie. *S. C.*

Where the difficulty of a case was removed by expenditure of time, money, and learned industry in presenting it to the Court, costs on the higher scale were allowed: *Fraser v. Brescia Steam Tramways Co.*, 56 L. T. N.S. 771; and see *Davies v. D.*, 36 Ch. D. 374, where costs subsequent to reply were allowed on the higher scale.

Where the higher scale was allowed in the Court of first instance, it was allowed also by the Court of Appeal, on reversing the decision and dismissing the action: *Turton v. Turton*, 42 Ch. Div. 128, 149.

The amount of the fund in question cannot, *per se*, be a special ground: *Re Spettigue's Trusts*, 32 W. R. 385; nor the fact that Deft submits to an injunction for a deliberate infringement of Plt's rights (as so to rule would be to impose a penalty on him for submitting): *Hudson v. Ogerby*, 32 W. R. 566; 50 L. T. N.S. 323; nor on motion for interlocutory injunction that important questions are raised: *Grafton v. Watson*, 51 L. T. N.S. 141; nor the mere fact that an issue of fraud is raised: *Re Terrell*, 22 Ch. Div. 473; *secus*, as against a party making unfounded charges of fraud: *Harrison v. Leutner*, 24 Ch. D. 594; and the fact that the Plt in issuing the writ has

certified the lower scale, does not interfere with the discretion: *S. C.* And see *Moseley v. Victoria Rubber Co.*, 57 L. T. N.S. 143, 148; *Pooley's Trustee v. Whetham*, 33 Ch. D. at p. 120; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Cardiff Steamship Co. v. Barwick*, 53 L. T. N.S. 56; *Ellington v. Clark*, 38 Ch. D. 332; 58 L. T. N.S. 818; *Horne v. Oyler*, 49 L. J. C. P. 655.

As to the discretion of the taxing officer on taxation on lower scale in County Court, see *Re Langlois and Biden*, (1891) 1 Q. B. (C. A.) 349.

#### COUNTY COURT SCALE.

By O. LXV. 12, "in actions founded on contract, in which the Plt recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding £50, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a Judge otherwise orders."

By the County Courts Act, 1888 (51 & 52 V. c. 43), s. 116 (substituted for sect. 5 of the County Courts Act, 1867), a Plt in an action founded on contract, which could have been commenced in a County Court, recovering less than £20, is not to be entitled to any costs, and recovering less than £50, only to County Court costs; subject to a proviso that if, within twenty-one days after service of writ, or further time, if ordered, he obtains an order, under O. XIV., empowering him to enter judgment for £20 or upwards, he is to be entitled to High Court costs.

Under sect. 5 of 53 & 54 V. c. 44, and O. LXV. 1, the Court has a complete discretion not only as to the incidence, but as to the quantum of costs to be allowed: *Neaves v. Spooner*, 58 L. T. N.S. 164; 36 W. R. 257; and will allow costs on the High Court scale where the action proves a proper one to be there decided: *Williams v. Allen*, 60 L. T. N.S. 103; W. N. (89) 48; and see *Oppenheimer v. Davenport*, W. N. (84) 57; *Copley v. Jackson*, W. N. (84) 94.

The section applies to an action in which a solr is Plt: *Blair v. Eisler*, 21 Q. B. D. 185; but not where costs are given by statute, *e. g.*, under the Dramatic Copyright Act, 3 & 4 W. 4, c. 15, by way of full and reasonable indemnity: *Reeves v. Gibson*, (1891) 1 Q. B. (C. A.) 652.

As to the application of sect. 5 of the County Courts Act, 1867, where the Plt's claim was reduced by set-off or counter-claim, see *Potter v. Chambers*, 4 C. P. D. 69; *Chatfield v. Sedgwick*, 4 C. P. D. 459; *Neale v. Clarke*, 4 Ex. D. 286 (where, the original claim exceeding £50, the Plt was held entitled to High Court costs); *Lund v. Campbell*, 14 Q. B. D. 821; *Ahrbecker v. Frost*, 17 Q. B. D. 606; *Stooke v. Taylor*, 5 Q. B. D. 576 (*q. v.*, as to distinction between set-off and counter-claim).

As to the application of the above rule where an action of contract is referred to arbitration, costs abiding event, see *Hyde v. Beardsley*, 18 Q. B. D. 244; *Emmott v. Heys*, 36 W. R. 237; W. N. (87) 243.

A Plt bringing himself within the proviso in sect. 116, by obtaining judgment for £20 or upwards under O. XIV., is entitled to High Court costs of the whole action, though he recovers less than £50, as (per Field, J.) the policy of the Act is to encourage proceedings in the High Court when the benefit of O. XIV. can be obtained: *Barker v. Hempstead*, 23 Q. B. D. 8.

#### DELAY OR MISCONDUCT.

By O. LXV. 11, "if in any case it shall appear to the Court or a Judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solr, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or Judge may call on the solr of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solr and his client, and also (if the circumstances of the case shall require) why the solr should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. The Court or Judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solr in the first place to show cause before such



taxing officer, and may also, if they or he think fit, direct or authorize the official solr of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or Judge may direct. Any costs of the official solr shall be paid by such parties or out of such funds as the Court or a Judge may direct; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament."

This rule extends to costs incurred in actions pending on 24th October, 1883 (when the rule came into operation), and to costs payable out of a fund, and applies notwithstanding a previous order for taxation of costs of an action. The powers conferred by it may be exercised by the Judge of his own motion without any request from any of the parties: *Brown v. Burdett*, 37 Ch. Div. 207.

Where an admon suit was commenced in 1873, and the chief clerk's certificate not made until 1884, the Court on further consideration directed the taxing master to inquire as to the cause of the delay, and disallow any costs occasioned by improper delay: *Furness v. Davis*, 33 W. R. 320; 51 L. T. N.S. 854. See form, *sup.*, No. 26, p. 216; and see *In re Ormston, Goldring v. Lancaster*, 58 L. T. N.S. 74; 59 L. T. N.S. 594; 36 W. R. 216; *Re Dale, Stubbs v. D.*, 62 L. T. N.S. 28.

#### PROLIXITY, ETC.

By O. LXV. 27 (20), the Court or Judge may direct the costs of any proceeding (whether the same is objected to or not) which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed; or may direct the taxing officer to look into the same, and disallow the costs thereof, or of such part thereof as he shall find to be improper or unnecessary or vexatious, or to contain unnecessary matter, in which case the party whose costs are so disallowed is to pay the costs thereby occasioned to the other parties; and where the question has not been raised before the Court or Judge, the taxing officer is to look into the same (and as to evidence, although the same may be entered as read), and thereupon the same consequences shall follow as if he had been specially directed to do so: see Form 25, *sup.* p. 216. As to the discretion to be exercised by the taxing master on taxation with a view to payment out of a fund or estate or assets of a co., see O. LXV. 27 (38a), and *inf.* p. 242.

By 27 (21) the taxing officer may in such cases adjust such costs, certifying for payment or set-off, or may delay their allowance; and by 27 (22) where questions as to such costs are dealt with at Chambers in the Chancery Division, the chief clerk is to make a note thereof for the information of the taxing officer.

By O. XXXVIII. 3, the costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

In taxing costs of respondent in the House of Lords, the appendix being of undue length, no costs were allowed for drawing, and all costs of so much as consisted of shorthand notes of arguments were disallowed: *Singer Manufacturing Co. v. Loog*, 8 App. Cas. 15.

In order that a party may be allowed under this rule costs occasioned to him by improper proceedings by another party, there must have been a disallowance of such costs either by the Court or by the taxing master on one of the grounds mentioned in the rule. Therefore, where costs of particulars in a patent action are disallowed for want of the statutory certificate of reasonableness, the Plt is not entitled to the costs occasioned to him by them, and the taxing master cannot enter into the question whether they were improper: *Garrard v. Edge*, 44 Ch. Div. 224.

As to the inherent power of the Court to take pleadings or affidavits off the file for prolixity, see *Hill v. Hart-Davis*, 26 Ch. Div. 470, where, an affidavit of documents being of oppressive length, the Court, to avoid delay and expense, allowed it to remain on the file, but ordered the party filing it to pay the costs: and see *Cracknall v. Janson*, 11 Ch. D. 1.

By O. LXV. 27 (8), the necessity for or propriety of separate proceedings by several Defts is to be inquired into by the taxing officer; there is no appeal

from his decision: *Beattie v. L. Ebury*, 22 W. R. 68; 43 L. J. Ch. 80; and see *Woods v. W.*, 5 Ha. 229; *Greedy v. Lavender*, 11 Beav. 417; *et inf.* Chap. XLIV., "ADMINISTRATION"; and as to trustees severing in defence, *inf.* Chap. XLI., "TRUSTEES"; and generally, Morg. & D. 88, 262.

The Court would not deprive of their costs Defts who were successful at the hearing, on the ground that they might have raised the defence by demurrer: *Bush v. Trowbridge, &c. Co.*, 10 Ch. 459; but see *Re Star and Garter Hotel*, 42 L. J. Ch. 374.

#### COSTS OF PART OF ACTION—APPORTIONMENT—SET-OFF.

Where a Deft has put himself in the right by a tender or payment into Court, the Court, in the exercise of its discretion in a fit case, allows Plt his costs up to time of tender or payment, and gives the Deft the subsequent costs of action: see *Buckton v. Higgs*, 4 Ex. D. 174; *The William Symington*, 10 P. D. 1.

Where a Plt obtains a judgment with costs as to one object of the action, but entirely fails as to another object, and as to that his action is dismissed with costs, the costs are apportioned, and the costs of one part set off against the costs of the other: *A. G. v. Carrington*, 6 Beav. 458.

A Deft being entitled "to fight from every available point of advantage," if he succeeds generally, ought not to be deprived of costs merely because he has failed on some defences; *secus*, if he raises and contests a distinct issue on which he fails: *Blank v. Footman, Pretty & Co.*, 39 Ch. D. 678.

Where costs are ordered to be paid out of a particular fund, that does not determine that that fund is ultimately to bear them; and where any question remains, it is proper to add the words "without prejudice to the question as to what fund is primarily liable to bear such costs": *Sheppard v. S.*, 33 Beav. 130.

And as to the effect of an offer by Deft to settle or compromise, see *Trotter v. Maclean*, 13 Ch. D. 574; *Fennessy v. Day*, 55 L. T. N.S. 161; *Birmingham Land Co. v. L. & N. W. Rail. Co.*, 57 L. T. N.S. 185; 36 Ch. D. 650.

#### APPORTIONMENT.

When the Court gives part of the costs of the action it may do so in two ways; the one will involve an apportionment of the whole of the general charges; the other will extend only to the excess of expense incurred in consequence of the particular matter directed to be excepted. For an instance of the application of both modes in an original and cross suit, see *Begbie v. Fenwick*, 6 Ch. 869.

In the former case, where the Court directs taxation of the costs of one of several objects of the action, that according to the settled practice in the Ch. Div. carries not only so much of the costs of the action as relates exclusively to that particular object, but also a portion of the costs of every general proceeding in the action: *Heighington v. Grant*, 1 Beav. 230; *Hardy v. Hull*, 17 Beav. 355; *Proud v. Bates*, 14 W. R. 306. The costs relating exclusively to one object are charged to that alone, and those common to both apportioned between them: *A. G. v. Carrington*, 6 Beav. 458; *Knight v. Purssell*, 28 W. R. 90; *Jenkins v. Jackson*, 60 L. J., Ch. 45; *S.C.*, in C. A., (1891) 1 Ch. 89; though, *semble*, it might be otherwise in Q. B. D.; and see *Throckmorton v. Crowley*, 3 Eq. 196. For the actual mode of apportioning in such cases, see the certificate of the clerks in Court in *Heighington v. Grant*, *sup.*

A decree in two suits (original and cross) directed, as to the second, that it should be dismissed with costs so far as it sought to set aside a certain security, and that the Plt in that suit should pay to B. (the Plt in the first suit), his costs in the first suit, "so far as the same have been increased by the answer of F.," the Plt in the second suit.

The latter costs were held to include so much of the bill as was framed to anticipate the answer, and carried a proportion of the costs of the hearing.

As to the costs of the cross suit, F. had to pay the proportion of the general costs (as in *Heighington v. Grant*, 1 Beav. 228, *et sup.*): *Begbie v. Fenwick*, 6 Ch. 869.

In the latter of the two cases above referred to, where it is intended, either in directing payment of certain costs, or in excluding them from the

costs of the suit, that the amount only should be paid or excluded by which the costs have been increased by that particular matter, it should be distinctly so expressed. The effect of the terms in which the orders have been expressed with reference to these two modes of taxation has been sometimes doubted; but it has been settled that Forms 15, 17, 18, *sup.* pp. 213, 214, involve an apportionment of the general charges, by the use of the expressions "relate to" or "occasioned by"; and that Form 19, *sup.* p. 214, in which the words used are "except so far as such costs have been increased by," does not involve such apportionment.

But where a Deft was allowed to withdraw his defence on paying Plt's costs, "so far as they were occasioned" by the defence, the Deft was only liable to pay the increased costs, and not an apportioned part of the general costs; the Master of the Rolls observing that the general rule above stated was applicable where the costs were occasioned by a particular charge or matter, but not to costs occasioned by a defence: *Real and Personal Advance Co. v. McCarthy*, 18 Ch. Div. 362.

Where Plt, succeeding as to one only of three items claimed, was to recover against Defts costs rightly incurred in recovering the amount, and the Defts to recover from Plt costs rightly incurred in defending themselves, Plt was held entitled to general costs: *Sparrow v. Hill*, 9 Q. B. Div. 675; but this case does not lay down any general rule applicable to Chancery actions: *Harley v. Hunt*, W. N. (87) 184; and see *Jenkins v. Jackson*, 60 L. J. Ch. 45; S. C. in C. A., (1891) 1 Ch. 89, where the order being in similar terms as to costs relating to separate claims, Plt was not entitled to the general costs.

Where a party was successful on one point and not on others, the taxing master apportioned the costs by taxing them as a whole and dividing them in thirds: *Knight v. Purcell*, 28 W. R. 90; 49 L. J. Ch. 120; followed in *Jenkins v. Jackson*, *sup.*

By O. LXV. 2, where issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.

A counter-claim being in the nature of a separate action (see O. XIX. 3), where claim and counter-claim are both dismissed, the Plt pays the general costs: *Saner v. Bilton*, 11 Ch. D. 416 (and see Form 15, p. 213); *Mason v. Brentini*, 15 Ch. Div. 287; and similarly, where both succeed, he receives them, although the result on the whole may be in favour of the Deft: *Re Brown, Ward v. Morse*, 23 Ch. Div. 337; *Baines v. Bromley*, 6 Q. B. Div. 691. Charges common to both proceedings, *ex. gr.*, a brief fee, are divided, but there is no apportionment of those costs which would have been duplicated if the counter-claim had been the subject of an independent action.

Where claim was dismissed without costs, and counter-claim with costs, and if costs of counter-claim should not amount to half the entire costs of action, Deft was to pay the difference, the latter direction was, on appeal, held irregular as imposing costs by way of penalty, but the whole order was substantially within the discretion of the Judge as amounting to dismissal of claim and counter-claim with direction for Deft to pay half the costs of action: *Willmott v. Barber*, 17 Ch. Div. 772.

On trial with jury, where the judgment was that Plt should recover against Deft his costs of suit, and Deft recover costs of counter-claim, the Plt was entitled to the general costs: *Baines v. Bromley*, 6 Q. B. Div. 691; and in such a case it is immaterial whether the judgment is drawn up for Plt on claim and Deft on counter-claim, or for Deft for balance under O. XXI. 17: *Shrapnel v. Laing*, 20 Q. B. Div. 334.

On trial without jury, where the claim was admitted subject to the counter-claim, the costs of claim and counter-claim were to be taxed as if they were separate actions: *Finska Angfartygs Aktiebolaget v. Brown*, W. N. (91) 116.

As to the application of the same principles where the action is referred and the costs are to abide the event of reference, see *Ellis v. Desilva*, 6 Q. B. Div. 521; *Stooke v. Taylor*, 5 Q. B. D. 569; and *inf.*, Chap. XXVI., "ARBITRATIONS."

Where on trial of issues official referee found for Plt on claim and Defts on counter-claim for larger sum, the action being for work done, and the counter-claim being in the nature of a defence on the ground of the inferiority of the work, judgment was given for the Defts with costs, as having substantially succeeded: *Lowe v. Holme*, 10 Q. B. D. 286.

Where two Plts claimed in respect of two different causes of action, and one succeeded and the other failed, the successful Plt was entitled to his general costs, and the other was to pay to the Deft the costs occasioned by his being joined: *Viscount Gort v. Rowney*, 17 Q. B. Div. 625.

#### SET-OFF.

Where several points are in dispute, and each party succeeds on some or one of them, the costs may be set off one against the other, and Plt or Deft ordered to pay the balance: *Bankart v. Tennant*, 10 Eq. 141, 150; see Forms 15, 18, 23, *sup.* pp. 213, 214, 215. And as to such direction, see *Taylor v. Popham*, 15 Ves. 72; Dan. 1203.

Where, however, so much of an information as related to one of two objects was dismissed without costs, and the A. G. was directed to be paid his costs of the other part, this was held to be an exception to the general rule: *A. G. v. Carrington*, 6 Beav. 454.

By O. LXV. 27 (21), in any case in which a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

By O. LXV. 14, a set-off for costs between parties may be allowed, notwithstanding the solr's lien for costs in the particular cause or matter in which the set-off is sought.

*Quære*, whether this rule applies to costs in different actions: see *Edwards v. Hope*, 14 Q. B. D. 922; or only to costs in the same action: *Blakey v. Latham*, 41 Ch. D. 518. But in either case the Court has a discretion, whether under the rules of 1883 or under the practice previously prevailing: *Edwards v. Hope, sup.*

Costs which a party is ordered to pay personally may be set off against costs which he is entitled to receive out of a fund in Court: *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317; but there is no right of set-off, either of costs or money recovered, against costs or money payable in another and distinct proceeding: *Re Harrauld, Wilde v. Walford*, 31 W. R. 518.

Where on appeal an action was dismissed with costs, and, as a consequence of that dismissal, a cross action, which had been dismissed by the Court below, was remitted for trial, a stay of taxation with a view to a set-off against probable costs in the cross action, not having been applied for when the judgment of the Court of Appeal was delivered, could not be afterwards granted: *Automatic Weighing Machine Co. v. Combined Weighing, &c. Co.*, 58 L. J. Ch. 647; 61 L. T. N.S. 536; 37 W. R. 636.

Where an appeal by a party entitled to costs out of the estate (the certificate of taxation being ready for signature) was dismissed with costs, the Court of Appeal declined to order a set-off, but stayed payment of costs to the appellant for a fortnight so as to give time for the consideration of the set-off by the taxing master: *Re Crawshay, Dennis v. C.*, 45 Ch. Div. 318.

The Court of Bankruptcy will not allow costs of proceedings in the High Court to be set off against costs in bankruptcy: *Exp. Griffin, Re Adams*, 14 Ch. Div. 37.

As to set-off of costs caused by Deft to Plt in an action for infringement of a patent, dismissed with costs, and where the Deft did not receive a certificate under 46 & 47 V. c. 57, s. 29 (6), see *Garrard v. Edge*, 44 Ch. Div. 224.

Costs ordered to be paid by the Master of the Rolls were on motion directed by the Master of the Rolls to be set off against costs ordered to be paid by the Lord Chancellor and by the Master of the Rolls: *Cattell v. Simons*, 6 Beav. 304.

Where process had issued against Plt for costs ordered to be paid by him to Defts, Defts had leave, on motion, to set off costs subsequently ordered to be paid by them to Plt, they undertaking not to levy more than the balance. The order to set off, not having been asked for when the order for costs against Defts was made, was made without costs: *Bryon v. Saloon Omnibus Co.*, 4 Drew. 546. The order to set-off may be obtained at Chambers: see *Roberts v. Buëe*, 8 Ch. D. 198, 200.



Where the Plt's bill was dismissed against husband and wife, the costs were directed to be paid to the husband; see Form 18, *sup.* p. 214; and his receipt alone was sufficient. And where the bill was dismissed with costs, only so far as it sought to charge the wife's separate estate, she not having defended separately or made herself liable for the costs, they were directed to be set off against a sum due from the husband for rent: *Wright v. Chard*, V.-C. K., 17 Dec. 1859, B. 373; 4 Drew. 702.

In *Umfreville v. Johnson*, 10 Ch. 580, on appeal, the bill was dismissed with costs, so far as concerned one Plt, and a decree with costs made in favour of the other, and Deft was only to pay the balance.

As to the liability of several Defts employing the same solr, see *Re Colquhoun*, 5 D. M. & G. 35; and Mr. Follett's certificate, *Id.* 36.

As to apportioning costs of admon action between different estates or assets, *v. inf.* Chap. XLIV., "ADMINISTRATION"; and *Re Allen, Davies v. Chatwood*, 11 Ch. D. 244.

As to apportionment of costs of action to administer trusts of a settlement between appointed and unappointed shares, see *Moore v. Dixon*, 15 Ch. D. 566.

#### INTEREST ON COSTS—COSTS MADE A CHARGE.

The Plt's costs of suit, not having been paid by Deft pursuant to decree for sale of property subject to Plt's lien, were ordered to be paid to Plt's solr out of the proceeds of the sale, with interest at £4 p. c. from the date of certificate of taxation, subject to recouping the estate to the extent of anything recovered from Deft: *Townshend v. Martin*, V.-C. S., 5 Dec. 1853, B. 241; and see decree in *Lock v. Lomas*, V.-C. S., 24 Nov. 1855, giving interest on costs.

In *Matthias v. M.*, V.-C. S., 16 Jan. 1858, B. 588, costs were directed to be a charge on settled estates, with interest at £4 p. c., which the life tenant was to keep down. Where a mortgagee's costs are ordered to be added to his security, the amount so charged carries interest at 4 p. c. from the date of the allocatur: *Lippard v. Ricketts*, 41 L. J. Ch. 595. And for direction that costs shall be a charge on real estate, *v. inf.* Chap. XLIV., "ADMINISTRATION," and Chap. XXXVIII., "INFANTS." An order for taxation and payment of costs by Deft was a charge on his realty from the date of the taxing master's certificate; but as against purchasers, &c., only from its registration under 1 & 2 V. c. 110: *Hargrave v. H.*, 23 Beav. 484; and for the decree, see Chap. XLVII., "MORTGAGES." The allocatur of a taxing master, though registered, was no charge, but a final order for payment, when registered, was: *Shaw v. Neale*, 20 Beav. 157; 1 Jur. N.S. 666; 6 H. L. C. 581. To make the costs bear interest under that Act (sects. 17, 18), there must be an order for their payment by some person, and it will not be payable on costs to be raised from an estate: *A. G. v. Nethercote*, 11 Sim. 529; and see *Taylor v. Jardine*, 1 Ha. 316; *Chadwick v. Holt*, 4 W. R. 791; *D. Beaufort v. Phillips*, 1 D. & S. 321. And as to certificates of taxation between solr and client, under the 6 & 7 V. c. 73, see sect. 43.

In *Morley v. Mendham*, V.-C. W., 5th June, 1858, B. 1232, trustees were to be at liberty to advance a sum out of the personal estate for repairs on the real estate, such sum and the costs to be a charge on the latter, with interest at £4 p. c.

By the 23 & 24 V. c. 127, s. 27, where payment is ordered of costs previously taxed, the Court or Judge may give interest at £4 p. c. from the date of the certificate of taxation. This only applies to solrs: *Jenner v. Morris*, 11 W. R. 943.

As to the allowance of interest on costs on taxation in the absence of special direction, and under the Solicitors' Remuneration Act, *v. inf.* pp. 266 *et seq.*

## SECTION III.—TAXATION.

1. *Order of Course to tax Bill delivered within One Month—6 & 7 V. c. 73, s. 37.*

UPON the petition of B. of &c., this day preferred unto this Court, it was alleged that the Petr employed the above-named A. as his solr in a suit in this Court in which C. and others are Plts and the Petr and others are Defts, and in other matters; that the said solr, on or about the — day of — (*i. e., within one calendar month, s. 48*), delivered unto the Petr his bill [*or (three) bills*] of fees and disbursements, which, as the Petr is advised, ought to be taxed; [*or employed the said A. in certain matters of business; or conveyancing business and other matters*]; that the said solr, on or about the — day of —, delivered unto the Petr his bill, *or (three) bills* of fees and disbursements, which, as the Petr is advised [*If so, contains charges for work not done on his retainer, and which the Petr is not liable to pay, and the same does or do not contain any item for business done in any Court; as to these allegations, see s. 37*], ought to be taxed; that the Petr submits to pay what shall appear to be due to the said solr on the taxation of his said bill [*or bills*]; It was therefore prayed, and it is accordingly ordered, that it be referred to the taxing master to tax and settle the said bill [*or bills*], and that the Petr, and also the said solr, do produce before the said master, upon oath, as he shall direct, all books, papers, and writings in their custody or power respectively relating to the matters hereby referred, or any of them; And that they be examined touching the same matters, or any of them, as the said master shall direct; And it is ordered that the said solr do give credit for all sums of money by him received of or on account of the Petr, and be at liberty to charge all sums of money paid by him to or on account of the Petr; And it is ordered that if the said bill [*or bills*], when taxed, be less by a sixth part than the said bill [*or bills*] as delivered, the said master do tax the costs of the Petr of this reference, and if the said bill [*or bills*], when taxed, shall not be less by a sixth part than the said bill [*or bills*] as delivered, the said master do tax the costs of the said solr of this reference; And the said master is to certify the amount due from the Petr to the said solr, or from him to the Petr, as the case may be, having regard to the costs of this reference so to be taxed as aforesaid, and any sum or sums of money which may have been so received or paid as aforesaid; And it is ordered that the amount so to be certified be paid, within twenty-one days after service of this order, and of the taxing master's certificate, to be made in pursuance thereof, by the party from whom to the party to whom the same shall be certified to be due, unless the Court shall, upon special circumstances, to be certified by the said master, otherwise order, upon application to be made within one week after the date of the said master's certificate, by the party liable to pay such amount; And it is ordered, that upon

payment by the Petr to the said solr of what may be certified to be due to him as aforesaid, or in case it shall appear that there is nothing due to him, he, the said solr, do deliver to the Petr upon oath all deeds, books, papers, and writings in his custody or power belonging to the Petr; And it is ordered that no proceedings be commenced against the Petr in respect of the said bill [*or bills*] pending this reference.

The direction for delivery up of the client's papers, &c., is discretionary, and should not be inserted in the order when the action in which the bill of costs has been delivered is still pending: *Exp. Jarman*, 4 Ch. D. 835; (following *Re Byrch*, 8 Beav. 824; disapproving *Re Teague*, 11 Beav. 318).

### 2. *Order of Course by consent.*

UPON the petition of B. of &c., it was alleged that the Petr employed the above-named A. as his solr in &c. [Form 1, *sup.*]; That the said solr, on or about the — day of —, delivered unto the Petr his bill of fees and disbursements which the Petr desires to tax; That the Petr submits to pay what shall appear to be due to the said solr on the taxation of his said bill; It was therefore prayed, and the said solr having signed the petition and consented to this order, it is accordingly ordered, that it be referred to the taxing master to tax and settle the said bill, and that the Petr and also the said solr do produce before the said master upon oath as he shall direct all books, papers, and writings in their custody or power respectively relating to the matters hereby referred or any of them, and that they be examined touching the same matters or any of them as the said master shall direct; And it is ordered that the said solr do give credit for all sums of money by him received of or on account of the Petr, and that he be at liberty to charge all sums of money paid by him to or on account of the Petr; and the said master is to certify the amount due from the Petr to the said solr, or from him to the Petr as the case may be, and to tax the costs of this reference and certify the amount thereof.

### 3. *Order of Course to tax Bill delivered more than One Month and less than Twelve Months, on Client's Application—s. 37.*

UPON the petition of B. of &c., it was alleged that the Petr employed the above-named A. as his solr in &c. [Form 1, *sup.*; *But state date of delivery after one, and within twelve calendar months*]; that the Petr submits to pay what shall appear to be due to the said solr on the taxation of his said bill; It was therefore prayed, and it is accordingly ordered, that it be referred &c. to tax and settle the said bill.—Usual directions [see Form 1, *sup.*]; But the said master is to make his certificate in a month, unless the said master shall think fit to extend the time to enable him to make his certificate; or this order is to be of no effect.

#### 4. *Like Order on Solicitor's Application.*

UPON the petition of the said A. &c., it was alleged that the Petr was employed by B. of &c. in &c. [Form 1, *sup.*]; that the Petr transacted such business, and on the — day of — (*i.e. after one, and within twelve months*), caused a bill of his charges, accompanied by a letter subscribed with his own hand, to be personally delivered [*or sent by the post*] to the said B.; that the said B. has not paid the Petr's said bill, nor taken any steps to get the same taxed; It was therefore prayed, and it is accordingly ordered, that it be referred to the taxing master to tax and settle the said bill, and that the Petr and also the said B. do produce &c., and that they be examined &c.; And it is ordered that the Petr do give credit for all sums of money by him received of or on account of the said B., and be at liberty to charge all sums of money paid by him to or on account of the said B.; And it is ordered (in case the said B. shall attend upon such taxation) that if the said bill when taxed be less by a sixth part than the said bill as delivered, the said master do tax the costs of the said B. of this reference; and if the said bill, when taxed, shall not be less by a sixth part than the said bill as delivered, the said master do tax the Petr's costs of this reference; And the said master is to certify the amount due from the said B. to the Petr, or from the Petr to the said B., as the case may be, having regard to the costs of this reference (if taxed as aforesaid), and any sum or sums of money which may have been so received or paid as aforesaid; And it is ordered that the amount (if any) so certified to be due from the Petr be within &c. paid by the Petr to the said B. unless [see Form 1, *sup.*]; And in case the said B. shall pay to the Petr such sum as may be certified to be due to him without further order, or in case the said master shall certify that there is nothing due to the Petr, or that he has been overpaid, It is ordered that the Petr do deliver to the said B., upon oath, all deeds, books, papers, and writings in his custody or power belonging to the said B.; And it is ordered that no proceedings be taken by the Petr against the said B. in respect of the said bill pending this reference; And it is ordered that a copy of this order be personally served on the said B. one week, at the least, before any appointment is taken out for the taxation of the said bill.

#### 5. *Order upon Summons for Taxation.*

UPON the application of A. &c., and upon hearing the solr for the applicant and the above-named solr in person, and the applicant, by his solr, submitting to pay what shall appear to be due to the said solr on the taxation of the bills hereinafter mentioned, and the said solr consenting, Let it be referred to the taxing master to tax the two bills of fees and disbursements delivered in or about the months of December, 1871, and May, 1872, to the applicant by the said solr;

And Let the applicant and the said solr produce &c. [see Forms 1, 2, *sup.*].—*Re Brocklesby*, V.-C. B. at Chambers, 29 May, 1872, A. 1328.

6. *Special Order to tax limited to particular Items.*

“REFER &c. to tax and settle the following disputed items in the bill of fees and disbursements, and for business done by G., as the solr of the Petr, amounting to £—, in the petition mentioned [*state the items here or by reference to a schedule*].”—Parties to produce, and be examined; Costs reserved; No direction as to costs of reference, or for payment.—*Re Tryon*, M. R., 22 March, 1844, B. 761.

For terms of taxation after one calendar month from bill delivered, see *Re Bromley*, 7 Beav. 488.

For order for leave, pending taxation, to deliver additional bills, altering items by enlarging only, see *Re Walters*, 9 Beav. 303, n.; but this can only be by special leave: *Ib.* 302, n.; and see *inf.* Section IV., Form 2, p. 243.

And for order for taxation, limited to items to be specified, with consequent directions, see *Scougall v. Campbell*, L. C., 3 Feb. 1827, B. 499; 3 Russ. 554.

For order for taxation of so much of bill of London agents delivered to country solrs as related to a particular action, upon terms of payment into Court by the applicants of the whole amount claimed by the agents to be due to them, see *In re Johnson and Weatherall*, 37 Ch. Div. 433, at p. 443. S. C., in D. P., *nom. Storer and Co. v. Johnson and Weatherall*, 15 App. Cas. 203, at p. 209.

7. *Order of Course for Taxation of Conveyancing Costs under Lands Clauses Consolidation Act, 1845, s. 83.*

UPON the petition of B., of &c. this day preferred &c., it was alleged, That the Petr and the said A. cannot agree as to the amount of the said bill of costs, and are therefore desirous of having the same taxed under the provisions of the Lands Clauses Consolidation Act, 1845; It was therefore prayed, and it is accordingly ordered, That it be referred to the taxing master to tax and settle the said bill, and that the Petr and also all other parties do produce before the said master upon oath as he shall direct all books, papers, and writings in their custody or power respectively relating to the matters hereby referred, or any of them, and that they be examined touching the same matters or any of them as the said master shall direct; And it is ordered that if one sixth part of such bill shall be disallowed on such taxation the said master do tax the Petr his costs of such taxation, and if one sixth part of such bill shall not be disallowed on such taxation, the said master do tax the said A. his costs of such taxation; And the said master is to certify the amount due in respect of the said bill, having regard to the costs of such taxation so to be taxed as aforesaid.

8. *Taxation with Leave to question Retainer.*

“The Petr by his counsel submitting to pay what, if anything, shall appear to be due to the said L. (*solicitor*) on the taxation of the bill of fees and disbursements delivered to the Petr by the said L. on the —

day of —, Let it be referred to the taxing master to tax and settle the said bill; but the Petr is to be at liberty to dispute the retainer (by him) of the said L. as his solr.”—Usual directions, inserting, “if anything” in the directions for payment.—*Re Lindus*, M. R., 1 June, 1861, B. 1154.

And as to ordinary taxation, with liberty to the client to question the retainer, see *Re Thurgood*, 19 Beav. 548; *Re Hair*, 10 Beav. 187; and *Re Kitton*, 35 Beav. 369, *inf.* p. 236.

#### NOTES.

##### TAXATION UNDER 6 & 7 V. c. 73, s. 37—APPLICATION FOR TAXATION.

Within one calendar month from the delivery of the bill, exclusive of the day on which the bill is delivered (*Blunt v. Heslop*, 8 Ad. & Ell. 577), an order for taxation, under 6 & 7 V. c. 73, s. 37, may be obtained *ex parte* and of course: *Re Becke*, 5 Beav. 409; *Re Bromley*, 7 Beav. 488; *Holland v. Gwynne*, 8 Beav. 124.

After one month, and before the expiration of twelve from delivery—provided there has not been a verdict or writ of inquiry in an action by the solr to recover the amount, nor payment of the bill (not being a mere payment on account; see *Re Woodard*, 18 W. R. 37)—the order, though accompanied with such special directions as the Court may think proper to impose, is still of course, and obtained *ex parte*: *Re Gaitskell*, 1 Phill. 576; *Re Pender*, 2 Phill. 69.

After twelve months from delivery, and, within that period, after verdict, writ of inquiry, or payment, a special application on notice must be made, and the order will not be made except under special circumstances to be proved to the satisfaction of the Judge to whom the application shall be made.

All applications under 6 & 7 V. c. 73, s. 37 (not being applications for orders of course), for the taxation and delivery of bills of costs, and for the delivery by any solr of deeds, documents, and papers, must be made to a Judge at Chambers by summons, instead of, as formerly, by special petition: see O. LV. 2 (15); but an application by petition may be dealt with under O. LXX. 1, on payment of difference of costs by petitioners: *Re Kellock*, 56 L. T. N.S. 887; 35 W. R. 695.

Leave to serve the summons out of the jurisdiction will not be granted: *Exp. Brandon*; *Re Bonron*, 54 L. T. N.S. 128.

The person applying for a special order to tax, when the common order would have sufficed, pays the costs though he succeeds: *Re Bracey*, 8 Beav. 338; *Re Bignold*, 9 Beav. 269; *Re Atkinson*, 26 Beav. 151.

But the objection must be taken in time: *Re Hair*, 11 Beav. 96.

And conversely, an order of course, obtained where a special application is necessary, is liable to be discharged for irregularity, though there may be a case for granting taxation: *Harris v. Start*, 4 M. & Cr. 261; *Grove v. Sansom*, 1 Beav. 297.

So, also, where a special petition to tax two bills failed as to one, and the other might have been taxed under the common order, the petitioner had to pay the costs: *Re Cattlin*, 8 Beav. 121.

The common order to tax cannot be obtained by the client where remuneration is claimed for work alleged by the solr to be non-professional; and this rule is not affected by the Solicitors' Remuneration Act, 1881, s. 8: *Re Inderwick*, 25 Ch. Div. 279; nor where a right to withdraw the bill as originally sent in has been claimed by the solr: *Re Thompson*, 30 Ch. Div. 441; nor can the order be obtained when the application is to tax the last only of a series of bills: *Re Yetts*, 33 Beav. 412; or on the application of two out of three persons who are jointly liable: *Re Ilderton*, 33 Beav. 201; *Re Lewin*, 16 Beav. 608 (and see *inf.*, Section VII., Form 2); unless one of the parties liable refuses to consent: *Re Hair*, 10 Beav. 187; or there has been a separate retainer: *Exp. Ford*, 5 D. M. & G. 35.

And the Court has no power under s. 37 to direct taxation of a part only of a solr's bill of costs, but can do so under its inherent jurisdiction: *Stoner &*



*Co. v. Johnson and Weatherall*, 15 App. Ca. 203; *S. C.*, 37 Ch. Div. 433; *nom. Re Johnson and Weatherall*.

If the relation of solr and client exists, the fact of there being an agreement does not prevent the common order being made: *Ward v. Lawson*, 8 Ch. 65; *Re Inderwick*, 25 Ch. Div. 279.

The authority to a Judge to authorize a solr to commence an action or suit for recovery of his fees, &c., against the party chargeable, and also to refer his bill for taxation within one month from delivery of the bill on proof to the satisfaction of the Judge that the party chargeable is about to quit England, is by the Legal Practitioners Act, 1875 (38 & 39 V. c. 79), repealing this part of 6 & 7 V. c. 73, s. 37, extended to the case where there is probable cause for believing that such party is about to become bankrupt, or a liquidating or compounding debtor, or to do any other act which, in the opinion of the Judge, would tend to defeat or delay the solr in obtaining payment.

The order to tax under s. 37 may be obtained by a married woman employing a solr and making her separate estate, though not herself personally, liable: *Waugh v. Waddell*, 16 Beav. 521; and payment of the amount found due on taxation may be enforced by the appointment, subject to the rights of the trustees, of a receiver of the separate estate to which she is entitled without restraint on anticipation: see *Re Peace and Waller*, 24 Ch. D. 405. Where, on an application to discharge an order for irregularity, it appeared that the married woman's separate estate was liable, she was put upon an undertaking to pay out of her separate estate the debt which was contracted by her while single: *Re Bennett*, M. R., 6 April, 1876, Reg. Min. 167. In the case of an infant the application is by next friend, *pro hac vice*: *Re Fluker*, 20 Beav. 143.

The order may be obtained by a party in contempt: *Newton v. Ricketts*, 11 Beav. 67.

An assignee in bankruptcy cannot obtain an order to tax without giving an undertaking to pay the whole bill, and not merely a dividend on the amount *pro rata* with other creditors: *Re Emslie & Co.*, 9 Eq. 72.

Although the right of action for recovery of costs, given subject to conditions by sect. 37, is not limited to an assignee in bankruptcy, and can be assigned by the solr, so as, since the Jud. Act, 1873, s. 25 (6), to give the assignee the right to sue in his own name (*Ingle v. McCulchan*, 12 Q. B. D. 518; and see *Penley v. Anstruther*, 52 L. J. Ch. 367), it seems doubtful whether an assignee of costs can obtain taxation: see *Re Ward*, 28 Ch. D. 719; but in any case taxation of one out of several bills cannot be obtained, under the common order of course, by the assignee of the particular bill only: *S. C.*

In general an application to tax by a party to an action need not have been in that branch of the Court where the action was heard: *Robins v. Mills*, 1 Beav. 227; unless the merits of the case must enter into the discussion: *Webb v. Grace*, 12 Beav. 489; or unless, as part of a compromise confirmed by the V.-C., it was intended that taxation should take place in the cause: *Re Howard*, 8 Beav. 424; and see *Re Elmslie*, 12 Beav. 538.

Where a client having obtained one common order to tax afterwards obtained another without mentioning the first, or that he was bringing an action against the solr to recover moneys received by the solr for his use, the order was held irregular and varied by the Court: *Re Webster*, (1891) 2 Ch. 102.

A registrar of the Liverpool or Manchester District Registry has no jurisdiction to make an order for taxation on a petition of course: *Re Porrett*, (1891) 2 Ch. (C. A.) 433.

By O. III. 7, "after stay of proceedings, upon payment of the amount claimed for debt or in respect of liquidated demand and for costs, within four days after service, the Deft may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, Plt's solr shall pay the costs of taxation."

#### COMMON ORDER TO TAX.

The common order includes an account of all sums received by the solr as such, not a general account: *Russel v. Buchanan*, 9 Sim. 167; *Cooper v. Ewart*, 15 Sim. 564; 2 Ph. 362, 363, n.; and also an account of receipts for interest, though not of profits, on moneys in hand: *Re Savery*, 13 Beav. 424.

But in the absence of special directions in regard to payments by the

client, the taxing master should confine himself to simple payments proved to have been made on account of the bill of costs: *Re Smith*, 9 Beav. 182; 4 Beav. 309; *Jones v. James*, 1 Beav. 307.

A solr employed as a general agent to receive rents or money must keep proper accounts to entitle him to payment of his bill of costs: see *White v. Lady Lincoln*, 8 Ves. 363; *secus*, in case of separate transactions, of which the client was aware at the time: *Re Lee*, 4 Ch. 43.

Under the common order costs of proceedings alleged to have been informal or improperly taken, or costs improperly incurred, may be questioned: see *Wiggins v. Peppin*, 2 Beav. 403; *Clayton v. Meadows*, 2 Ha. 26; and see *Alsop v. L. Oxford*, 1 M. & K. 564; *Re Clark*, 1 D. M. & G. 43.

Under the common order the taxing master has jurisdiction as to retainer, and it may be questioned as to any items, except so far as admitted by the petitioners: *Re Bracey*, 8 Beav. 266; *Re Hair*, 10 Beav. 187; *Re Thurgood*, 19 Beav. 548; *Re Kitton*, 35 Beav. 369; but a client who has obtained the common order cannot dispute the retainer as to the whole bill, though he may do so as to particular items; *secus*, where the common order has been obtained by the solr: *Re Jonas*, 36 Ch. D. 105; *Re Herbert*, 34 Ch. D. 504.

But at common law a special direction was necessary to enable the taxing master to go into the question of retainer: *Re Pyne*, 5 C. B. 407.

If the bill contains various charges, as to any of which the petitioner questions his liability, he should add to his petition, "and for work not done on his retainer, and for which he is not liable:" *Re Springall*, 14 L. J. Ch. 12; and see *sup.* Form 8.

The fact that the solr is a trustee may be taken into consideration by the taxing master without special directions to that effect: *Cradock v. Piper*, 1 Mac. & G. 664. As to solr-trustee's costs, see *Re Barber*, 34 Ch. D. 77; and *inf.* p. 263.

#### TAXATION UNDER ORDER—DELIVERY OF BILL.

In general taxation must be upon the bill as delivered: *Re Carven*, 8 Beav. 436; *Re Wells*, *Ib.* 416. A solr will not be allowed to alter his bill of costs after it has been referred for taxation: *Re Blakesley*, 32 Beav. 379; or to escape taxation by omitting some items objected to: *Re Heather*, 5 Ch. 694; *Re Holroyde*, 29 W. R. 599; or the costs of the reference, by an offer to accept less than the amount of the bill delivered: *Re Paull*, 27 Ch. Div. 485; *Re Carthew*, *Ib.*; or to impose as a condition immediate payment or substitution of a bill of larger amount: *Re Thompson*, 30 Ch. Div. 441; but he may reserve the right to withdraw or alter his bill upon a fair condition fully stated: *Ib.*; and see *Re Lett*, 31 Beav. 488; though liberty has been given pending taxation to add omitted items and increase those undercharged: *Re Whalley*, 20 Beav. 576; *Re Walters*, 9 Beav. 299. (See Form of Order, *Ib.* 303, n.; and *inf.* Section IV., Form 2, p. 243.)

And before being served with an order for taxation he has been allowed, under special circumstances, to substitute a second bill of reduced amount on payment of all costs incurred by client up to the date of obtaining the order: *Re Chambers*, 34 Beav. 177; 5 N. R. 298; 13 W. R. 375; see, however, *Re Thompson*, 30 Ch. Div. 441; *Re Holroyde*, 29 W. R. 599; *Re Jones*, 54 L. T. N.S. 648; *Re Robertson*, 42 Ch. D. 553.

Sect. 37 does not give the solr any statutory right to have the amount of his charges ascertained by taxation only: *Exp. Ditton*, 13 Ch. D. 318.

Delivery must be to the party chargeable, *i.e.*, the client: *Re Abbott*, 4 L. T. N.S. 576; or to his duly-authorized agent: *Re Bush*, 8 Beav. 66; *Re Robertson*, 42 Ch. D. 553; and if not at his residence, at the place to which his letters were to be addressed: *Spier v. Bernard*, 8 L. T. N.S. 396. A mere constructive delivery is not sufficient: *Re Robertson*, *sup.*

But delivery to one of several joint contractors or promoters is sufficient: *Mant v. Smith*, 4 Hur. & N. 324.

Where a substantial part of a bill of costs is improperly set out, and a substantial part properly, the whole bill is not bad: *Blake v. Hummell*, 51 L. T. N.S. 430; see *Haigh v. Ousey*, 7 E. & B. 578; *Wilkinson v. Smart*, 33 L. T. N.S. 573.

The Act (6 & 7 V. c. 73) does not authorize the taxation of every pecuniary demand in a solr's bill for any kind of employment; and though the business need not have been done in any Court it must have been done by the solr as



such: see *Allen v. Aldridge*, 5 Beav. 401; *Re Lees*, *ibid.* 410, that fees of a manor steward as such, though a solr, are not taxable; and so where the solr was employed as a canvassing agent, and not in his legal capacity: *Re Oliver*, 15 W. R. 331.

But costs of solr retained as election agent and to advise the committee, and for business in a revising barrister's Court, were taxable: *Re Osborne*, 25 Beav. 353; *Re Andrews*, 17 Beav. 510; and, having regard to the form of his bill of costs, the charges of a solr as returning officer for a School Board election: *Re Jones*, 13 Eq. 336.

Until there has been delivery of a proper bill, delivery and taxation cannot be resisted by the solr on the ground of payment, though some years have elapsed since the alleged settlement: *Re Stogdon*, 56 L. J. Ch. 421.

By the Solicitors' Remuneration Act, 1881 (44 & 45 V. c. 44), provision is made for regulating the remuneration of solrs in respect of conveyancing and non-contentious business, and agreements for such remuneration may be made and enforced, or impeached, and the amount ascertained by taxation: *v. inf.* p. 266. If the agreement relates to work alleged to be non-professional, the common order for delivery and taxation cannot be obtained: *Re Inderwick*, 25 Ch. Div. 279.

#### ACTION FOR COSTS.

The restraint by s. 37 of any action or suit for recovery of fees until the expiration of one month after delivery of bill of costs was confined to proceedings founded on the implied contract arising out of the relation of solr and client, and was no bar to proceedings to enforce a merely collateral engagement, *e.g.*, an action on a promissory note given on account of fees, or a bill to enforce a mortgage security for previous advances and costs: *Jeffreys v. Evans*, 14 M. & W. 210; *Thomas v. Cross*, 13 W. R. 166.

The omission to file the certificate of taxation did not render it void, and an action by the solr on the bill was restrained as a contempt: *Re Campbell*, 3 D. M. & G. 585.

The right of a client to file a bill against his solr for an account and taxation was not excluded by the jurisdiction given by the statute: *O'Brien v. Lewis*, 9 Jur. N.S. 321; *Re Bailey*, 34 Beav. 393.

As to such a bill by a country solr against his London agent, see *Ward v. Lawson*, 8 Ch. 65; *Ward v. Eyre*, 15 Ch. Div. 130. And where a bill (action) was the proper remedy an application under the Solicitors Act, or under the general jurisdiction of the Court, was not entertained: *Re Forsyth*, 2 D. J. & S. 509; 34 Beav. 140.

#### TAXATION UNDER SPECIAL CIRCUMSTANCES AFTER TWELVE MONTHS FROM DELIVERY.

Special circumstances under 6 & 7 V. c. 73, s. 37, under which taxation may be granted after twelve months from delivery, on the application of the party chargeable, are: pressure, overcharge so gross as to amount to what the Court considers fraudulent, or misrepresentation: see *Re Strother*, 3 K. & J. 518; *Re Williams*, 15 Beav. 417; *Re Harper*, 10 Beav. 284; *Re Hook*, 3 Giff. 372; *Re Norman*, 16 Q. B. Div. 673; *Re Pybus*, 35 Ch. D. 568; *Re Eley*, 36 W. R. 96.

Mere overcharge, not involving fraud, is not a ground for taxation, after twelve months from delivery: *Re Harle*, 17 W. R. 21; *secus*, where there are large and unusual charges requiring explanation: *Re Robinson*, L. R. 3 Ex. 4; *Re Pybus*, 35 Ch. D. 568.

A dispute as to the completeness of the bill delivered is a special circumstance: *Re Bagshawe*, 2 D. & S. 205; and see *Re Nicholson*, 3 D. F. & J. 93. The continuance of the relation of solr and client will not, *per se*, justify taxation after twelve months from delivery of the bill: *Re Elmslie*, 16 Eq. 326; but see *Re Flower*, 18 L. T. N.S. 457; 16 W. R. 749; *Re Nicholson*, 3 D. F. & J. 93.

And the special circumstances on which taxation is applied for after the prescribed time must be such as the client could not reasonably have availed himself of sooner: *Re Barnard*, 2 D. M. & G. 359; and see *Re Bagshawe*, 2 D. & S. 205; *Re Strother*, *sup.*

Where several successive bills had been made by letter one continuous account, the time was reckoned from the delivery of the latest, though most of the series had been delivered more than twelve months before the application: *Re Cartwright*, 16 Eq. 469.

But a solr's charges for carrying through a complicated and protracted business, *e.g.*, admon proceedings, are not necessarily one bill so as to entitle the client to taxation of the whole series: *Re Hall and Barker*, 9 Ch. D. 538; and as between a country solr and his London agent, separate bills cannot, at the option of the solr, be treated as one continuous bill, so as to escape from the twelve months rule: *Re Nelson*, 30 Ch. Div. 1.

The effect of a winding-up order is to suspend the operation of the twelve months rule; and, accordingly, if the bill is taxable in point of time at the date of the winding-up (see *Re James*, 4 D. & S. 183), the lapse of twelve months from delivery does not bar taxation on behalf of the official liquidator: *Exp. Evans*, 11 Eq. 151.

In bankruptcy the jurisdiction of a local registrar to tax costs is independent of 6 & 7 V. c. 73, and a bill of costs may be taxed by him without any special order, though twelve months have elapsed since its delivery: *Exp. Blair*, 5 Ch. 482.

Retention of a bill for twelve months is only *prima facie* evidence of its reasonableness; and the exor of the client is not estopped from disputing items: *Re Park, Cole v. P.*, 41 Ch. Div. 326.

#### AGREEMENTS BETWEEN SOLICITORS AND THEIR CLIENTS—33 & 34

##### V. c. 28 (ATTORNEYS AND SOLICITORS ACT, 1870).

Although before 33 & 34 V. c. 28, the taxing masters were in the habit, under the common order, of entertaining the question of agreements by the solr as to costs (*Re Philp*, 2 Giff. 35, 36), the Court, it seems, had no jurisdiction under the Solicitors Act (6 & 7 V. c. 73) to determine upon motion or petition the construction and effect of a special agreement as to costs; although the jurisdiction of the Court was not ousted by an agreement as to particular items: *Re Rhodes*, 8 Beav. 224; *Re Thompson*, *ibid.* 237; *Re Beale*, 11 Beav. 600; *Re Forsyth*, 34 Beav. 140; 2 D. J. & S. 509.

Agreements to take a gross sum from a client in lieu of costs were jealously regarded: *Re Whitcombe*, 8 Beav. 140; an agreement to receive 5 p. c. commission upon the amount recovered was treated as illegal: *Pince v. Beattie*, 11 W. R. 979; or a fixed sum for costs hereafter to be received, upholding the common order for delivery and taxation of a bill of costs: *Re Newman*, 30 Beav. 196; and see *Re Ingle*, 21 Beav. 275.

But an agreement with a corporation that a solr, transacting professional business for no other client, should be paid a fixed yearly salary, clear of all office expenses and to include all emoluments, was held not to be opposed to 6 & 7 V. c. 73: *Galloway v. Corp. of London*, 4 Eq. 90.

For the principles upon which the bill of a railway co.'s solr charging a lump sum for attendances and services during a period was to be taxed, see *Re Tilleard*, 32 Beav. 476.

And now, under the Attorneys and Solicitors Act, 1870 (33 & 34 V. c. 28), s. 4, a solr may make an agreement in writing with his client respecting the amount and manner of payment for any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such solr, either by a gross sum, or by commission or percentage, or by fixed salary or otherwise—provided that, when any such agreement shall be made in respect of business done or to be done in any action or suit, the amount payable under the agreement shall not be received until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement, who may require the opinion of a Court, &c. to be taken upon the agreement by motion or petition, with power to the Court, &c., either to reduce the amount payable under the agreement, or to order the agreement to be cancelled, and the costs, &c. to be taxed, in the same manner as if no such agreement had been made.

An agreement under this section must be in writing, and signed by both parties: *Re Lewis, Exp. Munro*, 1 Q. B. D. 724; and a verbal agreement by a client to pay a sum in discharge of past costs is not binding: *Re Russell*, 30 Ch. D. 114; *Re Raven*, 30 W. R. 134; 45 L. T. N.S. 642.

Sect. 8. No action or suit shall be brought upon any such agreement, but every question respecting the validity or effect of such agreement may be examined and determined, and the agreement enforced or set aside, without suit or action, on motion or petition, by the Court in which the business or any part thereof was done, or by a Judge thereof; or if the business was not done in any Court, then, where the amount payable under the agreement exceeds £50, by any superior Court, &c.; where the amount does not exceed £50, by the County Court Judge.

Under this section payment for work done by the solr pursuant to such an agreement shall not be enforced by action, but application shall be made to a superior Court or County Court, according to the amount in dispute, in order to ascertain whether the agreement is reasonable, and whether it shall be enforced or not: *Rees v. Williams*, L. R. 10 Ex. 200.

Sect. 9. Upon motion or petition such an agreement, if it shall appear fair and reasonable, may be enforced, &c.; and if not deemed to be fair and reasonable, may be declared void, and ordered to be cancelled, and taxation of the costs, &c., in respect of the matters included therein, may be directed as if such agreement had not been made, &c.

Sect. 10. Agreements may be re-opened within twelve months after payment under special circumstances. Agreements made by a client in the capacity of guardian, trustee, or committee of any person whose estate or property will be chargeable with the amount, or any part of it, payable under such agreement, must before payment be laid before the taxing officer of a Court having jurisdiction to enforce the agreement, for examination, and any part may be disallowed, or the direction of the Court obtained on motion or petition; and if the whole or any part of the amount be paid by the client without previous allowance, he shall be liable at any time to account to the person whose estate or property is charged with the amount paid; and if in any such case the solr accept payment without such allowance, he may be ordered to refund the amount so received by him under the agreement.

Sect. 11. Nothing in the Act contained shall give validity to any purchase by a solr of the interest or any part of the interest of his client in any suit, action, or contentious proceeding to be brought or maintained, or give validity to any agreement by which a solr, retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, &c.

An agreement by which, in the event of success, the solrs are to receive 10 p. c. on the value of the property recovered, amounts to champerty, and is invalid; and the taxing master cannot allow the agreement, or take the opinion of the Court, under sect. 4, before any proceedings have been taken thereunder: *Re Attorneys Act*, 1870, 1 Ch. D. 573.

But an agreement to charge the client nothing if he loses the action, and to take nothing for costs out of any money awarded in the action, is not invalid under sect. 11, and need not be in writing: *Jennings v. Johnson*, L. R. 8 C. P. 425.

By the Solicitors' Remuneration Act, 1881 (44 & 45 V. c. 44), s. 8—(1) with respect to the conveyancing and other business to which that Act relates (as to which *v. inf.* p. 266), solr and client may make agreements before or after, or in the course of the transaction of any such business, for the remuneration of the solr, as they think fit, by gross sum, commission, percentage, salary, or otherwise; (2) any such agreement is to be in writing, and signed by the person to be bound thereby, or by his agent; (3) the agreement may provide for the remuneration, including, or not including, disbursements made by the solr; and (4) may be sued on, impeached and set aside, in the like manner, and on the like grounds, as an agreement not relating to the remuneration of a solr. If, on taxation, the agreement is objected to by the client as unfair or unreasonable, the taxing master may inquire into the facts and certify them to the Court, and, on just cause shown, the Court or a Judge may order cancellation of the agreement, or reduction of the amount payable under it. By sect. 9, the application of the Attorneys and Solicitors Act, 1870, to the business to which the new Act relates, is negatived.

An agreement by mortgagor with his solr to pay a fixed sum for remuneration, so as to include the mortgagee's costs, is an agreement between solr and "client" within the definition in sect. 1 of the Act, and the Court

would not, in the absence of evidence that the agreed sum was an unfair charge, order taxation for the purpose of giving the taxing master jurisdiction to inquire whether such agreement should be set aside: *Re Palmer*, 45 Ch. Div. 291.

#### SIGNATURE AND FORM.

The signature of the bill of costs required by the Act of 6 & 7 V. being for the client's protection, he may obtain the common order to tax an unsigned bill: *Re Pender*, 2 Ph. 69; 8 Beav. 299, 304; and see *Re Foster*, 2 D. F. & J. 105.

But the provision in sect. 41, that after twelve months from payment a bill of costs cannot be referred for taxation, is not limited to bills which have been signed by the solr: *Re Sutton*, 11 Q. B. D. 377.

Bill of costs delivered, not signed, but with a letter signed, was held to be signed within the Act, and though delivered to client's agent: *Re Bush*; *Re Carven*, 8 Beav. 66, 438.

No particular heading is necessary: *Champ v. Stokes*, 6 H. & N. 683; but the bill must be delivered in a taxable shape: *Philby v. Hazle*, 8 C. B. N.S. 647; otherwise no action can be brought on it: *Wilkinson v. Smart*, 24 W. R. 42.

Where the items were improperly lumped together, the solr was allowed to supply a detailed statement, but not to increase his demand: *Re Tilleard*, 32 Beav. 476; 3 D. J. & S. 519; nor can he withdraw his bill when delivered without condition, or on a condition which is illegal: *Re Kellock*, 35 W. R. 695; and see *Re Thompson*, 30 Ch. Div. 441.

#### SECURITY FOR COSTS OF TAXATION.

A client resident abroad, applying to tax his solr's bill, must give security for the costs of the proceeding: *Re Pasmore*, 1 Beav. 94; and for what should be found due: *Anon.*, 12 Sim. 262; but may be allowed to pay a sum into Court instead: *Cliffe v. Wilkinson*, 4 Sim. 123; a client alleged to be insolvent, was directed to give security for the costs of taxation of a bill already paid: *Re Webb*, M. R., 17 November, 1876; as to waiver of the right, see *Murrow v. Wilson*, 12 Beav. 497.

Where taxation was ordered on paying in a sum which accumulated, the solr was only entitled to payment from the fund of what was found due: *Re Smith*, 9 Beav. 342.

#### COSTS OF TAXATION.

As to what reductions affect the right to the costs of taxation since 6 & 7 V. c. 73, s. 37, which directs that if the bill, when taxed, be more or less by one-sixth than when delivered, the client or solr, as the case may be, is to pay the costs of the reference, see *Re Clark*, 13 Beav. 173, 180 (taxing master's certificate); 1 D. M. & G. 43; *Re Remnant*, 11 Beav. 603, 609; *Re Haigh*, 12 Beav. 307.

By O. LXV. 27 (38b), "if on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges (exclusive of disbursements) contained in the bill is reduced by a sixth part, no costs shall be allowed to the solr leaving the bill for taxation, for drawing and copying it, nor for attending the taxation." And by r. 27 (19c), if a solr having the carriage of an order directing taxation fails to leave copy order, and statement of names of parties, &c., at the taxing office within seven days after the order has been perfected, no costs of taxation are to be allowed him.

The bill as delivered is the bill to be taxed, and while new items cannot be introduced in order to affect the costs of taxation (*Re Tilleard*, 32 Beav. 476), a bill containing items, together with an offer to take less (e.g., £83, say £78), is not a bill delivered, within the meaning of the Act, for the lesser sum: *Re Carthew*, 27 Ch. Div. 487; *Re Paull*, *ib.*

Items struck out on taxation as not chargeable against the person to whom the bill was delivered, will not be omitted from consideration in determining the costs of taxation: *Re Clark*, *sup.*

Less than a sixth being taken off on taxation, though more than a sixth was taken off the general account in a suit by the client against his solr for a general account, the solr was allowed the costs of taxation: *May v. Biggenden*, 24 Beav. 207.

More than a sixth being taxed off, insolvent solr's assignees had to pay the costs: *Re Peile*, 25 Beav. 561.

One sixth being taxed off, though the reduced amount was more than solr had offered to accept without delivering bill, he had to pay costs: *Re Elwes and Turner*, 58 L. T. N.S. 580; W. N. (88) 68.

Payments made by the client himself to the solr for counsel's fees and stamps will be considered as part of, and properly be included in, the bill in calculating the amount taxed off: *Re Metcalfe*, 30 Beav. 406.

Probate duty paid by the solr has been held to be a disbursement within sect. 37: *Re Lamb*, 23 Q. B. D. 5; but it would be impracticable to follow this case on every occasion, and the taxing masters take *Re Remnant*, 11 Beav. 603, as their guide.

A solr who has refused to consent to an order of course for taxation may be ordered to pay the costs of a special application: *Re Lett*, 31 Beav. 488.

Under an ordinary reference to tax costs of a solr to a trustee in bankruptcy, the taxation is regulated by the practice in bankruptcy, and 6 & 7 V. c. 73, has no application: *In re Marsh*, 15 Q. B. Div. 340.

As to the jurisdiction of the Court on party and party taxation to order payment of costs of taxation by a solr who delivers an extortionate bill in order to increase such costs, see *Re Grundy, Kershaw & Co.*, 17 Ch. D. 108.

As to costs in case of neglect or delay in proceedings before taxing officer, see O. LXV. 27 (55).

#### DISCHARGING ORDER.

On application to discharge the common order for taxation as irregularly obtained, the Court considers only if the order is regular: *Harris v. Start*, 4 M. & Cr. 261; *Gregg v. Taylor*; *Grove v. Sansom*, 1 Beav. 123, 297; *Watts v. Penny*, 11 Beav. 435; *Re Lewin*, 16 Beav. 608; but in *Re Ingle*, 21 Beav. 275, the order, though irregular, was under the circumstances upheld; and in *Re Webster*, (1891) 2 Ch. 102, was left standing, with the omission of the latter part directing payment of what should be found due on taxation.

A solr by acquiescence may preclude himself from objecting to irregularities in obtaining the order: *Re Bartrum*, 12 W. R. 660, 699.

An order of course to tax costs in one matter, the solr having acted in several, and on payment for him to deliver all papers, was discharged with costs: *Holland v. Gwynne*, 8 Beav. 134; but see *Re Pender*, *Ib.* 299.

For cases in which orders of course have been discharged for misstatement or omission in the petition, see *Re Perkins*; *Re Carven*; *Exp. Mobbs*, 8 Beav. 241, 436, 499; *Re Gabriel*, 10 Beav. 45; *Watts v. Penny*, *sup.*; *Re Rees*; *Re Eldridge*, 12 Beav. 256, 387; *Re Gedye*, 15 Beav. 254; or irregularity in obtaining the order: *Re Yetts*, 33 Beav. 412; *Re Ilderton*, *Ib.* 201.

Where not: *Re David*, 30 Beav. 278; *Re Fluker*, 20 Beav. 143; and see *Re Flower*, 19 W. R. 578, that the common order obtained by an infant's solr will not be discharged, because the fact that the next friend disputes his liability has not been stated.

#### PROCEEDINGS BEFORE THE TAXING OFFICER—EVIDENCE, &c.

The order for taxation usually directs that the parties be examined: see Form 1, p. 230. By O. LXV. 19b, the proper officer by whom any order directing taxation of costs is drawn up is to certify upon the order the date on which it was signed, entered, or otherwise perfected.

And under the common order for taxation the solr's cross-examination may be taken by an examiner as well as by the taxing master: see *Re Flux*, 44 L. J. Ch. 375.

By O. LXV. 18, every reference for the taxation of costs in the Chancery Division is to be made to the taxing master in rotation, or in such manner or order as the L. C. may from time to time direct, provided that where there has been any former taxation in the same cause or matter, or on any summons under O. LV. 3 or 4, relating to the same estate or trust, the reference is to be to the same taxing master.



By rr. 19c, d, the solr having carriage of an order directing taxation is to be disallowed the costs of taxation if he does not, within seven days after the order was signed, entered, or otherwise perfected, leave at the office of the taxing officer a copy of the order, with a statement annexed containing the names and addresses of the parties appearing in person and solrs of parties not so appearing; and the taxing officer is to send to the parties or solrs notice by post of a date before which papers are to be left, and a subsequent date on which the taxation will be proceeded with.

In every bill of costs the professional charges are to be entered in a separate column from the disbursements, and every column shall be cast before the bill is left for taxation (O. LXV. 19h); and every bill left for taxation is to be endorsed with the names and addresses of solr and London agent, if any: O. LXV. 27 (38).

By O. LXV. 27 (25), the taxing officers of the Supreme Court are empowered, in relation to the taxation of costs, to examine witnesses, to direct production of documents, &c., make separate certificates or allocaturs, to require any party to be represented by a separate solr, and to direct and adopt all such other proceedings as could be directed on references for taxation and adopted by officers of the Courts whose jurisdiction is transferred by the Act, and to take accounts of what is due in respect of costs, and such other accounts connected therewith as may be directed by the Court or Judge. But a taxing master cannot order shorthand notes to be taken of the evidence before him: *Hilleary v. Taylor*, 36 Ch. Div. 262; though he has power to allow the costs of such notes taken by consent.

By r. 27 (27), the taxing officer is empowered to arrange and direct what parties are to attend before him, and to disallow the costs of any party whose attendance he shall consider unnecessary in consequence of the interest of such party being small or remote or sufficiently protected by other parties interested.

By r. 27 (30), the same or similar fees are to be allowed for work and labour properly performed, and not provided for in the schedule, as have heretofore been allowed.

R. 27 (34) prescribes the practice on taxation "in case the parties differ."

By r. 27 (35), where costs are to be paid out of any money or fund in Court, the taxing officer is, without any directions, to state in his certificate the total amount of all such costs.

R. 27 (37) preserves the rules, orders, and practice of Courts whose jurisdiction is transferred to the High Court of Justice, relating to costs and the allowance of solrs' fees and the taxation of costs existing prior to the commencement of the Act, so far as they are not inconsistent with the Act and rules in pursuance thereof. The effect of this rule is that the old rules of the Court of Chancery, except so far as they are altered by the new rules, are still binding in the Chancery Division: see *Pringle v. Gloag*, 10 Ch. D. 676, 678. Costs of an admon action brought in the County Court may be taxed in the High Court: *Re Worth*, 18 Ch. D. 521.

An "affidavit of increase" as to payments to witnesses was not required in the Chancery Division, there being sufficient evidence for the purpose of taxation in the recitals in the judgment and otherwise: *Smith v. Day*, 16 Ch. D. 726.

By r. 27 (38), all discretionary fees and allowances are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who is to take into consideration the other fees and allowances to solr and counsel in respect of the work to which such allowance applies, the nature and importance of the cause, &c., the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances; and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment.

For particular items which have been sanctioned or disallowed by the Court on review of the taxing master's certificate, see *inf.*, Section IX., "REVIEW OF TAXATION."

## SECTION IV.—ENFORCING DELIVERY OF BILL.

1. *Order of Course to deliver and Tax Bill—s. 37.*

UPON the petition of B. of &c., it was alleged that the Petr employed the above-named A. as his solr, in &c. [Form 1, p. 230]; that the Petr is desirous of obtaining the papers in the possession of the said solr belonging to the Petr, but the said solr refuses to deliver up the same until his bill of costs is paid; that the said solr, although applied to, has not delivered his bill of costs against the Petr; that the Petr submits to pay what shall appear to be due in respect of the said bill; It was therefore prayed, and it is accordingly ordered, that the said solr do, within a fortnight after service of this order, deliver to the Petr a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he has been employed as the solr for the Petr; And that it be referred &c.—Usual directions [Form 1, p. 230].—See *Re Smith*, 19 Beav. 329, 330, n.

For order on special application for delivery and taxation of bill, see *Re Jervis*, M. R., 26 June, 1845, A. 2089; but the direction for delivery should be as in the above form.

2. *Form of Order giving Liberty, pending Taxation, to deliver an additional Bill, and to alter Items by Enlargement only.*

LET the Petr be at liberty to bring before the master an additional bill of any items of business done or money paid omitted to be charged in his said bill already delivered, and likewise to alter any of the items already charged in his said bill by increasing or enlarging the same, but he is not to diminish or make less any of the items already charged. And let the master tax such additional bill and enlarged items.—See *Foster v. Rayner*, L. C., 28 Oct. 1745 (cited in *Re Walters*, 9 Beav. 302, n.). And see *Re Wells*; *Re Carven*, 8 Beav. 416, 438.

## NOTES.

## ENFORCING DELIVERY OF BILL OF COSTS.

By O. LV. 2 (15), following Gen. Ord. 17 April, 1867, all applications under 6 & 7 V. c. 73 (not being applications for orders of course), for the taxation and delivery of bills of costs, and for the delivery by any solr of deeds, documents, and papers, are to be made by summons at Chambers instead of (as formerly) by petition to the Court.

An order on the solr for the delivery of his bill might, after personal service (see *Re Catlin*, 18 Beav. 510), have been enforced by attachment: see *Lane v. Oliver*, 2 Ha. 97.

And now, by O. XLII. 24, every order of the Court or a Judge, in any cause or matter, may be enforced in the same manner as a judgment to the same effect—i. e., in the case of a judgment requiring any person to do any act other than the payment of money or to abstain from doing anything, by writ of attachment or by committal: O. XLII. 7.

To enforce delivery, the order should be endorsed under O. XLI. 5.

An order served without the proper endorsement might be re-served, when properly endorsed, more than fourteen days afterwards, although a motion

for the usual four-day order for non-compliance with the unendorsed order was irregular: *Re Gregg*, 9 Eq. 137; *Re Bowen*, 11 W. R. 607.

Delivery was ordered, with costs, against a solr who, when paid, undertook to, but did not, deliver his bill: *Re Foljambe*, 9 Beav. 402; and see *Re Bailey*, 34 Beav. 392; *Re Blackmore*, 13 Beav. 154.

But on affidavit by the solr that he had no documents, &c., from which to make out his bill, the Court refused to commit him for non-compliance with an order to deliver: *Re Ker*, 12 Beav. 390.

As to the jurisdiction to entertain a bill filed by a country solr against his London agent for (*inter alia*) delivery and taxation of his bill of costs, the agency being disputed, and a special agreement of partnership alleged, see *Ward v. Lawson*, 8 Ch. 65.

The Judges of the Queen's Bench Division have jurisdiction to order delivery of a bill of costs, though no part of the business was transacted in any Court of law or equity; but the application ought to be made in the Chancery Division: *Re Pollard*, 20 Q. B. Div. 656.

#### SECTION V.—TAXATION AFTER ACTION BROUGHT.

##### 1. *Order of Course to tax after Action, but before Verdict or Writ of Inquiry executed, or Twelve Months expired—s. 37.*

UPON the petition of B., of &c., it was alleged that the Petr employed the above-named A. as his solr in &c. [Form 1, p. 230]; that the said solr has commenced proceedings against the Petr in the Q. B. Div. of this Court to recover the amount of the said bill [*state shortly the proceedings taken in the action*, sect. 37]; that the Petr submits to pay what shall appear to be due to the said solr on the taxation of the said bill; It was therefore prayed, and it is accordingly ordered, that it be referred to the taxing master to tax and settle the said bill, and that the Petr and also the said solr do produce &c., and give credit &c. [Form 1, p. 230]; and in case it shall appear that there is anything due to the said solr, It is ordered that the said master do tax the said solr his costs of the said proceedings, and that such costs be added to the amount which shall be so found due; And it is ordered that if the said bill when taxed be less by a sixth part &c. [Form 1, *sup.*, Section I., p. 230]; And it is ordered that the amount so to be certified be paid &c., unless &c. [Form 1, p. 230]; And it is ordered that upon payment &c. the said solr do deliver to the Petr upon oath &c. [*if action is brought in an inferior Court, add*, And it is ordered that the said A. be restrained from further proceeding against the Petr in respect of the said bill pending this reference]; but the Petr is to carry this order and the said bill of costs into the office of the said master on or before the — day of —, [*if so, add*, and in default the said solr is to be at liberty to proceed with the said action as if this order had not been made]; And it is ordered that either party be at liberty to prosecute this order; and the said master is to make his certificate in a fortnight, unless the said master shall extend the



time, to enable him to make his certificate, or this order is to be of no effect; And in case the said master shall not state any special circumstance in his said certificate, and shall certify that there is anything due from the Petr to the said solr, it is ordered that the amount so certified be paid by the Petr to the said solr; And in default of such payment being made, the said solr is to be at liberty at any time after two days from the filing of the said master's certificate, without service of this order or of such certificate, to sue out execution against the Petr by writ of *fiery facias*, *elegit*, or otherwise, for the amount which may be so certified to be due as aforesaid.

*2. Taxation at the Instance of a Person jointly liable after Action brought.*

AND the applicant, by his solr, submitting to pay what shall appear to be due to the said A. (*solicitor*) on the taxation of the bill of fees and disbursements made out by the said A. against, and delivered to, C. and the said S., and in respect of which the said A. has commenced an action in the Q. B. Div. of this Court; Refer it to the taxing master to tax and settle the said bill; And Let the applicant and the said solr A. produce &c., and be examined &c.; And Let the said solr give credit for all sums of money by him received of or on account of the applicant and of the said C., or either of them; and in case it shall appear that there is anything due to the said solr, Let the said master tax the said solr his costs of the said action, and Let such costs be added to the amount which shall be so found due; And if such bill when taxed be less by a sixth part &c.; And Let the amount so to be certified be paid accordingly, unless &c.; And Let upon payment by the applicant to the said solr of what may be certified to be due to him as aforesaid, or in case it shall appear that there is nothing due to him, the said solr deliver to the applicant and to the said C. upon oath all deeds, books, papers, and writings in his custody or power, belonging to the applicant and to the said C., relating to the subject-matter of the said bill of costs [*if action is brought in an inferior Court, add, And Let the said A. be restrained from further proceeding against the applicant in respect of the said bill pending this reference*]; but the applicant is to carry this order and the said bill of costs into the office of the said master on or before the — day of — [*if so, and in default thereof the said solr is to be at liberty to proceed with the said action as if this order had not been made*]; And Let either party be at liberty to prosecute this order &c. [*finish as in Form 1, sup.*].—See *Thorneloe v. Skoines*; *Re Silberberg*, V.-C. M. in Chambers, 17 Nov. 1873, B. 2993.

The direction to stay proceedings by the solr for the recovery of his bill formerly inserted is now limited to proceedings in an inferior Court: see Jud. Act, 1873, s. 24 (5).

3. *Special Order to tax—Judgment to be entered for Amount claimed—Undertaking not to issue Execution.*

LET R. (*solicitor*) be at liberty to enter up judgment for the sum of £— (*the amount claimed*), and costs, to be taxed, in the action brought by him against the Petrs J., and C. his wife, the said R., by his counsel, undertaking not to issue execution for a greater amount than shall appear to be due to him upon the taxation of his bill of costs (fees and disbursements) hereinafter directed to be taxed, and interest thereon from &c. to the day of payment, at the rate of £5 p. c. per ann., such execution not to be issued until ten days after the date of the master's certificate; And refer &c., to tax and settle the bill of costs (fees and disbursements) of the said R., delivered to the said C. on the — day of —, for business done for the said Petr.—Usual directions for parties to produce and be examined; as to costs of reference, exclusive of costs of application, and for payment of balance and delivery of papers.—Petr to pay costs of application.—*Re Roberts*, M. R., 9 March, 1844, B. 593.

This order would now be made on summons: O. LV. 2 (15).

For order for delivery, taxation, and payment, on notice after action brought, see *Gardner v. M. Townshend*, M. R., 31 Jan. 1815, B. 207; referred to as the common order: *Re Pender*, 2 Ph. 74; but the forms above are those in use under the Act.

NOTES.

An order of course for taxation may be obtained by the client after action brought for recovery of costs, but before notice of it: *Re Farington*, 33 Beav. 346; and see *Re Hair*, 10 Beav. 187.

After final or conclusive judgment in the action there can be no taxation under the statute: *Re Barnard*, 2 D. M. & G. 359; 16 Beav. 5.

But a judgment obtained by default will not, it seems, bar the right to tax: *Re Gedye*, 15 Beav. 254.

In ordering the taxation, after action brought, of a bill claimed against two persons, on the application of one of them, the action was stayed, and liberty was given to both to question the retainer; the taxing master being directed to distinguish by and to whom each sum found due was to be paid: *Re Kitton*, 35 Beav. 369, 1866, A. 193.

In general, if the order to tax is after action brought, the client has to pay the costs of the action: *Re Hair*, 11 Beav. 96; and see *Re Smith*, *ibid.* 468.

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SECTION VI.—SPECIAL ORDER FOR TAXATION AFTER PAYMENT.

UPON the application of A., and upon hearing the solrs for the applicant and for the above-named solrs, and upon reading &c.—Refer &c. to tax and settle the bill of fees, charges, and disbursements, amounting to the sum of £—, delivered by the said solrs to the applicant, and paid by the applicant to the said solrs; And Let the applicant and the said solrs produce &c.; And Let the said solrs give credit &c. [Form 1, p. 230]; And in case it shall appear that the said bill is over-

paid, the said master is to certify the amount overpaid; And Let the said solrs (*names*), within &c. [Form 1, p. 230], repay to A. what shall be certified to be the amount so overpaid by him; And the said master is to be at liberty to state any circumstance specially at the request of either party, as he shall think fit.—Reserve the consideration of costs of taxation and of application until after certificate.—*Re Winterbottom*, V.-C. M. at Chambers, 11 Nov. 1872, B. 2871.

For the like order, see *Re Sankey*, V.-C. W. at Chambers, 12 July, 1872, B. 2725, where the direction as to costs was: “the costs of the application and of the said reference are to be dealt with as the Judge shall direct.”

In *Re Alcock*, V.-C. K. B., 3 May, 1845, A. 1351, the direction for repayment was omitted, and was reserved for further order.

In *Re Wells*, M. R., 4 March, 1845, B. 536, S. C., 8 Beav. 416, taxation, at the instance of the mortgagor, was to be as between the mortgagee and his solr, and the direction to give credit was not inserted; for further order for payment to solr of costs of taxation, and of the application, less than one-sixth being taken off, see S. C., M. R., 24 July, 1845, B. 1291.

In the cases given above, the costs of taxation were reserved, but in *Re Barrow*, M. R., 3 Dec. 1853, A. 252, 17 Beav. 547, the alternative direction as to such costs was given, the amount of the bill to be taxed being only £20; and this is the more convenient form of the order.

#### NOTES.

##### TAXATION AFTER PAYMENT.

By 6 & 7 V. c. 73, s. 41, payment of the bill is not to preclude a reference for taxation, if the special circumstances of the case appear to require the same, upon such terms and conditions and subject to such directions as to the Court shall seem right, provided the application be made within twelve calendar months after payment.

Before the Act, to obtain taxation after payment without pressure or undue influence, the petition had to state, and the evidence to show in particular, items so gross as to evidence fraud, and not merely items which would not be allowed on taxation: *Horlock v. Smith*, 2 M. & Cr. 495; *Waters v. Taylor*, *Ib.* 526; *Re Stephen*, 2 Ph. 562; *Massie v. Drake*, 4 Beav. 433; *Nokes v. Warton*, 5 Beav. 448; and see Dan. 2025.

Since the Act, “special circumstances” entitling the client to taxation after payment have generally been held to signify either, (a) pressure accompanied by manifest overcharges; (b) overcharges or errors so gross as to amount to fraud: see *Re Lacey and Son*, 25 Ch. Div. 301; *Re Boycott*, 29 Ch. Div. 571; *Re Norman*, 16 Q. B. Div. 673 (*q. v.*, as to the limits of the discretion of the Court); *Re Chown*, 52 L. T. N.S. 75; (c) undue influence, misconduct, or fraud on the part of the solr: see *Watson v. Rodwell*, 11 Ch. Div. 150; 7 *Ib.* 625; or, (d) the pendency of a charge of felony against the solr’s managing clerk, on which depends the legality of the charges in the bill of costs, delivered before such charge was raised, and settled in account: *Re Fisher*, 42 L. T. N.S. 261.

- (a) If the bill is produced at the last moment, and reasonable facility for taxation is refused after the opportunity for taxation has been asked for, and, looking at the bill, there appears substantial ground for taxation, though the overcharges may not be so gross as to show fraud: *Re Newman*, 2 Ch. 707; *Re Pugh*, 32 Beav. 173; 1 D. J. & S. 673; *Re Wells*, 8 Beav. 416; *Re Bennett*, *Ib.* 467; *Re Heritage, Exp. Docker*, 3 Q. B. D. 726.

—so also payment under protest, in order to obtain possession of papers: *Re Lett*, 31 Beav. 488; *Re Tryon*, 7 Beav. 496; *Re Wilkinson*, 2 Coll. 92. As to the meaning of payment “under protest,” see *Re Cheesman*, (1891) 2 Ch. 289; 39 W. R. 497.

—or as the only means of getting a transaction completed (*e.g.*, the transfer of a mortgage): *Re Phillpotts*, 18 Beav. 84 (and see *Re Abbott*,

18 Beav. 393; *Re Boycott*, 29 Ch. Div. 571); or a purchase: *Parker to George*, 32 W. R. 222; or of preventing a threatened sale: *Re Moseley*, 15 W. R. 975.

But payment, on settling a transaction, of a draft bill of costs only then produced gives no right *per se*, without showing fraud, gross overcharge, or pressure, to taxation: *Re Fyson*, 9 Beav. 117; *Re Finch*, 16 Beav. 585, 586, n.; nor payment, owing to a threat by the solr at once to enforce securities of the client in his possession: *Re Foster*, 2 D. F. & J. 105; *Re Rance*, 22 Beav. 177; *Re Sladden*, 10 Beav. 488; *Re Kinneir*, 5 Jur. N.S. 423; 7 W. R. 175; nor generally, where the necessity for paying the bill without investigation does not arise by act or default of the solr: *Re Boycott*, 29 Ch. Div. 571; nor payment under a common mistake that the scale fee under the Solicitors' Remuneration Act was payable: *Re Glascodine*, 52 L. T. N.S. 781; nor the fact that the higher scale instead of the lower has been charged: *Re Durnford*, W. N. (83) 29; nor refusal by solr to hand over title deeds, lawfully in his possession, until he is paid: *Re Munns and Longden*, 50 L. T. N.S. 356; nor the fact that on payment the solr did not tell the clients (trustees) that the charges might be disallowed if an admon action followed: *Re Layton, Steele & Co.*, W. N. (90) 112.

Pressure alone is not sufficient, and some specific items of overcharge must still be alleged and proved: *Re Lacey and Son*, 25 Ch. Div. 301; *Re Boycott*, 29 Ch. Div. 571; *Secretary of State for War v. Deane*, 33 W. R. 120; *Re Thompson*, 8 Beav. 237; *Re Browne*, 1 D. M. & G. 322; *Re Finch*, 4 D. M. & G. 108; *Re Brady*, 15 W. R. 632.

And that the doctrine of pressure is not to be extended, see *Re Barrow*, 17 Beav. 547; *Re Hubbard*, 15 Beav. 253; nor generally the allowance of taxation after payment: *Re Browne*, 15 Beav. 61, 64, n.

- (b) If the overcharge is so gross as to amount to fraud, taxation will be ordered: *Re Harding*, 10 Beav. 250; *Re Currie*, 9 Beav. 602, 608; and see *Re Dickson*, 8 D. M. & G. 655. And since the Jud. Acts, items unreasonably large, charges requiring explanation, or gross blunders, have been held to be special circumstances entitling the client to taxation after twelve months from delivery of the bills, and *semble*, after payment: *Re Norman*, 16 Q. B. D. 673; and see *Re Robinson*, L. R. 3 Ex. 4.

Instances of overcharge amounting to fraud so as to authorize taxation after payment, are—(a) a charge by solr for business never done, and known to have been never done: see *Re Harle*, 17 W. R. 21; (b) or the charge of a scale fee, not being one of the charges specified in the scale in the Gen. Ord. under the Solicitors' Remuneration Act, 1881: *Re Pybus*, 35 Ch. D. 568; *Re W. Eley*, 37 Ch. D. 40.

Taxation after payment will not, however, be directed if the items of overcharge are merely trifling, and there has been no pressure: *Re Drake*, 8 Beav. 123; or the items are such as would be disallowed or reduced on taxation: *Re Towle*, 30 Beav. 170.

No rigid rule can be laid down as to what are "special circumstances." The question is one for the discretion of the Judge, and with that discretion the Court of Appeal will not readily interfere: *Re Cheesman*, (1891) 2 Ch. C. A. 289.

And after payment the onus of showing overcharge is upon the client: *S. C.*

An application for taxation after payment should be speedy, and a very short time has been held sufficient for examination of the bill after delivery: *Re Towle*, 30 Beav. 170; *Re Barrow*, 17 Beav. 547; *Re Browne*; *Re Mask*; *Re Hubbard*, 15 Beav. 61, 80, 251; *Re Drew*, 10 Beav. 368; *Re Currie*, 9 Beav. 602; *Re Jones*, 8 Beav. 479.

Even though the bill paid under circumstances of pressure contains an objectionable item, unexplained acquiescence for a period short of twelve months may preclude taxation: *Re Bayley*, 18 Beav. 415; *Re Browne*, 1 D. M. & G. 322; *Re Pugh*, 32 Beav. 173.

On application to tax paid bill, taxation must be on it as paid and delivered: *Re Wells*, 8 Beav. 416; and a previously paid bill could not be added: *Re Gregg*, 10 W. R. 127.

The application is now by summons: O. LV. 2 (15); and see *Re Becke*, 5 Beav. 406; *Re Carew*, 8 Beav. 150, that an *ex parte* order for taxation after payment was irregular.

Further evidence of "special circumstances" will not be received in support of a motion to discharge the refusal in Chambers of an application to tax after payment: *Re Munns*, 32 W. R. 675.

The lapse of twelve months will absolutely preclude taxation after payment: *Re Massey*, 8 Beav. 458; and this applies to applications under s. 38 (third-party clause): *Re F. E. Smith*, 32 W. R. 408; and although it is alleged that trust money was improperly paid to the solr with notice of breach of trust: *Re Jackson*; *Re Cottrell*; *Boughton-Leigh v. B.*, 40 Ch. D. 495; and although the bill is not signed: *Re Sutton and Elliott*, 11 Q. B. Div. 377.

Notwithstanding payment, within four days after service of the writ of summons, of the amount claimed by the indorsement for debt or liquidated demand and for costs, the Deft is entitled to have the costs taxed: O. III. 7; and see *sup.* p. 246.

#### WHAT CONSTITUTES PAYMENT.

As to the legal effect of paying a bill of costs under protest or with intimation of taxing, see *Re Massey*, 8 Beav. 462; *Re Harrison*, 10 Beav. 57; *Re Neate*, *ibid.* 183; *Re Stirke*, 11 Beav. 305; *Re Welchman*, *ibid.* 319; *Re Browne*, 15 Beav. 61; 1 D. M. & G. 322; *Re Bayley*, 18 Beav. 415; *Re Cheesman*, (1891) 2 Ch. C. A. 289; which seem to establish that mere protest on payment is simply a reservation of the right to tax, and does not give to the payment those incidents of pressure which are required for taxation after payment, especially when the application for taxation is delayed.

Giving a security, acceptance, or promissory note for the amount of the bill of costs is payment: *Re Boyle*, 5 D. M. & G. 540; *Re Currie*, 9 Beav. 602; *Re Harper*, 10 Beav. 284; but the twelve months from payment has been reckoned not from delivery but from payment of the note or bill, unless the giving was treated by the parties as actual payment: *Sayer v. Wagstaff*, 5 Beav. 415.

Retention by solr of client's money for the amount of his costs is not payment within sect. 41 so as to preclude taxation after the lapse of twelve months: *Re Street*, 10 Eq. 165; *Re Stogdon*, 56 L. T. N.S. 355; 56 L. J. Ch. 420; and see *Re Cawley and Whatley*, 18 W. R. 1125; *Re Brady*, 15 W. R. 632; *Re Bignold*, 9 Beav. 269; nor a settlement in account with client, a married woman, without independent advice: *Re Stogdon*, *sup.*; nor, *a fortiori*, an agreement by a solr with an illiterate client to retain out of the proceeds of the subject-matter of the suit his bill of costs taken at a given amount: *Re Ingle*, 21 Beav. 275.

Where Deft's solr accepted cheque of Plt's solr in payment, it was an accord and satisfaction precluding a subsequent claim by Deft for interest on the costs: *Bidder v. Bridges*, 37 Ch. Div. 406.

Whether payment by mortgagor to satisfy principal, interest and costs, so as to avoid bringing in accounts in a foreclosure action, is payment within the section, *quære*: *Re Griffith, Jones & Co.*, 53 L. J. Ch. 303.

#### SECTION VII.—TAXATION AT INSTANCE OF THIRD PARTY.

##### 1. *Order of Course to tax on Application of Third Party*—s. 38.

UPON the petition of B. of &c. [*State the circumstances, as, that the Petr some time since agreed to take a lease of certain premises of one C., who employed the above-named A. as his solr to prepare such lease, and the Petr is liable to pay the said A.'s bill for preparing the same*]; that the said solr, on or about the — day of —, delivered unto the Petr his bill of fees and disbursements which, as the Petr



is advised, ought to be taxed, [*If so*, and which contains charges for work not done on his retainer, and which the Petr is not liable to pay, and the same does not contain any item for business done in any Court, *see sup.* p. 230]; that the Petr submits to pay what shall appear to be due to the said solr on the taxation of his bill; It was therefore prayed, and it is accordingly ordered, that it be referred &c. to tax and settle the said bill; And that the Petr and also the said solr do produce &c.; And that they be examined &c.; And it is ordered that if such bill when taxed be less by a sixth part &c. [Sect. I. Form 1, p. 230]; And it is ordered that the amount so to be certified be paid by the party from whom to the party to whom the same shall be certified to be due within twenty-one days after service of this order and of the taxing master's certificate to be made in pursuance thereof, unless the Court shall, upon special circumstances to be certified by the said master, otherwise order, upon application to be made within one week after the date of the said master's certificate by the party liable to pay such amount; And it is ordered that no proceedings be commenced against the Petr in respect of the said bill pending this reference, but the said master is to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate); or this order is to be of no effect.

And for special orders in the like form, made on application by summons at Chambers, see *Re Burne*, V.-C. W. at Chambers, 8 Dec. 1871, A. 3077; *Re Adams*, M. R. at Chambers, 30 Nov. 1875, A. 1879.

The directions to give credit or charge for sums received or paid, and to deliver papers, are not inserted in an order for taxation by a third party liable.

As to the form of special order under sect. 38, and that it will be to tax the bill actually paid, not limiting it to that which would be the proper bill as between the party liable and the party whose costs he agrees to pay, see *Re Newman*, 2 Ch. 707.

## 2. Order on Special Application by Party interested—s. 39.

THE applicant B. (*legatee*), by his solr, submitting to pay what, if anything, shall appear to be due to A. (*solr*), upon the taxation of his bill of fees and disbursements, and for business done, as hereinafter mentioned, Let the said A. deliver to the applicant a bill of all such fees, charges, and disbursements over and above those included in the bills hereinafter mentioned, which are now claimed by the said A. against C. and D., as exors of the will of E. deceased, the testator in the petition named, and payable out of the residuary or general estate of the testator; And refer &c. to tax and settle the bill of fees and disbursements, amounting to the sum of £—, delivered by the said A. to the said C. and D. as such exors, and also the bill to be delivered to the applicant as aforesaid; And Let the applicant B., and the said C. and D., and the said A. produce &c., and be examined &c.; (And Let the said A. give credit for all sums of money by him received of or on account of the said exors in respect of the said bills of costs, or either of them;) And if the amount of the said bills so taxed shall be

less by a sixth part &c. [Form 1, p. 230] (exclusive of the costs of the application); And Let the said master certify the amount due from the said exors and the applicant to the said A., or from the said A. to the said exors and the applicant, or either of them, as the case may be, having regard to the costs of such reference (exclusive of the costs of this application); And Let such amount be paid &c., unless &c. [Form 1, p. 230]; No costs of this application on either side.—See *Re Downes*, M. R., 19 Feb. 1844, A. 581; S. C., 5 Beav. 425.

3. *Same—Copy Bill to be delivered—ss. 39, 40.*

LET H., within one month from this time, deliver to the applicant a copy of the bill of costs, amounting to £—, delivered by him to T. &c., as the trustees of the applicant under the indenture of &c., upon payment by the applicant of the costs of such copy, to be taxed by the taxing master in case the parties differ; And refer &c. to tax and settle the said bill of costs; And Let the said H. and the applicant produce &c. [see Form 1, p. 230].—*Re Higham*, 25 June, 1853, A. 1231.

For further order for delivery of a copy of the bill within one week, S. C., 1 Dec. 1853, A. 144.

For order, on petition by exors under the Act, to tax their bills, for delivery and taxation of their and testator's bills, against their and his solr, and account of moneys received and paid, see *Re Dalby*, 8 Beav. 471.

NOTES.

Taxation under 6 & 7 V. c. 73, s. 38 (third-party-liable clause), is by order of course when within s. 37.

Under s. 39 (third-party-interested clause) it is by special application: *Re Straford*, 16 Beav. 27; *Re Bracey*, 8 Beav. 338; now made by summons: O. LV. 2 (15).

After payment, an *ex parte* order to tax, though at the instance of a third party, is irregular: *Re Becke*, 5 Beav. 406; *Re Carew*, 8 Beav. 150 (though there discharged without costs).

Taxation at the instance of a third party interested or liable to pay is regulated by the relation of the other two parties: *Re Brown*, 4 Eq. 464; *Re Baker*, 32 Beav. 526; *Re Harrison*, 10 Beav. 57; *Re Fyson*, 9 Beav. 117.

The third party stands in the position of the client; so that if the client is not entitled to tax the bill as against the solr, the third party could not claim taxation against the solr, nor, under the Act, without bill filed against the client who has paid: *Re Massey*, 34 Beav. 463 (correcting the decision in *Re Jessop*, 32 Beav. 406; *Re Baker*, *ib.* 526, that a bill may be taxed as against trustees without the solr having any interest or concern in the taxation); and see *Re Press and Inskip*, 35 Beav. 34; *Re Forsyth*, 2 D. J. & S. 509; 34 Beav. 140; *Re Gold*, 19 W. R. 343; *Re Holliday and Godlee*, 58 L. T. N.S. 301; *Re Cusack*, 21 L. R. Ir. 493; *Re Donaldson*, 27 Ch. D. 544.

A bankrupt is not, pending the bankruptcy, a "party interested" in the estate in the hands of the trustee in bankruptcy, so as to entitle him, after discharge and payment of creditors in full, to obtain delivery and taxation under sect. 39 of a bill of costs paid by such trustee out of the estate: *Re Leadbitter*, 10 Ch. Div. 388; and see *Rochfort v. Battersby*, 2 H. L. C. 388.

Taxation is as between solr and client: *Re Neate*, 10 Beav. 181; the clause not being applicable to taxation as between party and party: *Re Grundy and Kershaw*, 17 Ch. D. 108; *Re Cowdell*, 31 W. R. 335; 52 L. J. Ch. 246; but in taxation on behalf of c. q. tr. the solr will not be allowed to charge the trust estate for anything not necessary for the admon thereof: and see *Re Carthew*, 27 Ch. D. 487. And if such charges have resulted from fanciful

directions given by the trustee, to the trustee personally must he look for payment: *Re Brown*, 4 Eq. 464.

For taxation at the instance of c. q. tr. before and after payment, see *Re Downes*, 5 Beav. 525; *Re Massey*, 8 Beav. 458; *Re Rees*, 12 Beav. 256; *Re Robertson*, 42 Ch. D. 553; of mortgagee's solr's bill at the instance of mortgagor or subsequent incumbrancer, *Re Lees*, 5 Beav. 410; *Re Bignold*, 9 Beav. 269; or trustee in bankruptcy of mortgagor, *Re Allingham*, 32 Ch. Div. 36.

The proviso in sect. 41, that applications for taxation must be made within twelve months after payment, applies to applications under sect. 38: *Re F. E. Smith*, 32 W. R. 407; *Re Massey*, 8 Beav. 458; as to whether sect. 41 applies to cases under sect. 39, see *Re Chown*, 52 L. T. N.S. 75; *Re Dickson*, 8 D. M. & G. 655; *Re Dawson*, 28 Beav. 605; 8 W. R. 554; *Re Drake*, *inf.*; *Re Neate*, 10 Beav. 181; *Re Rees*, *sup.*; *Re Massey*, *sup.*

Where a mortgagor obtains an *ex parte* order to tax the bill of a solr, one of a body of mortgagees, he cannot object to allowance of profit costs: see *Re Donaldson*, 27 Ch. D. 544.

The petition (*now* summons) should be served on the mortgagee: see *Re Jessop*, 32 Beav. 406; *Re Baker*, *ibid.* 526.

Specific items of overcharge must be alleged and proved on an application under the third-party clause after payment, as in the case of an application by the client: *Re Bennett*, 8 Beav. 467; *Re Dickson*, 8 D. M. & G. 655.

And see *Dunt v. D.*, 9 Beav. 146, where mortgagor's petition to tax mortgagee's solr's bill after payment was dismissed with costs, as alleging neither pressure nor specific overcharge.

But it is not necessary to show fraudulent overcharge: *Re Drake*, 22 Beav. 438.

Before the Married Women's Property Act, 1870, a husband liable for costs due from his wife before marriage was entitled to tax: *Waring v. Williams*, 2 Beav. 1.

But in *Re Godfrey*, M. R., 1 July, 1875, A. 1228, an order obtained by husband and wife for taxation was discharged with costs, on the ground (*inter alia*) that the husband was not liable.

Voluntary payment by a party under no liability to pay gives him no right to tax: *Re Becke*, 5 Beav. 406; *Re Heritage*, 3 Q. B. D. 726; unless such payment has been made as part of the terms of compromising a suit: *Re Hartley*, 30 Beav. 620 (subject to explanation given in *Re Grundy*, 17 Ch. D. 108); and see *Vincent v. Venner*, 1 My. & K. 212; *Waters v. Taylor*, 2 My. & Cr. 556. And see Dan. 1744; Morg. 14.

## SECTION VIII.—TAXATION BY OR AGAINST REPRESENTATIVES.

### 1. Order of Course to tax Bill delivered by Solr's Represe.

Upon the petition of B., of &c., it was alleged that the Petr employed the above-named A. as his solr in &c. [Form 1, p. 230]; that the said A. is since deceased, and D. as the admor of the effects [*or* exor of the will] of the said A., on or about the — day of —, delivered unto the Petr the bill of fees and disbursements of the said A., which, as the Petr is advised [contains, *if so*, charges for work not done on his retainer, and which the Petr is not liable to pay, and], ought to be taxed; that the Petr submits to pay what shall appear to be due to the said D. as such admor [*or* exor] as aforesaid on the taxation of the said bill; It was therefore prayed, and it is accordingly ordered, that it be referred &c. to tax and settle the said bill; and that the Petr and also the said D. do produce &c.; And that they be examined &c. [see



Form 1, p. 230]; And it is ordered, that the said D. do give credit for all sums of money received by him or the said A., of or on account of the Petr; And be at liberty to charge all sums of money paid by him or the said A. to or on account of the Petr; And it is ordered, that if such bill when taxed be less by a sixth part &c.; And the said master is to certify the amount due from the Petr to the estate of the said A., having regard to the costs of such reference so to be taxed as aforesaid, or from the estate of the said A. to the Petr, as the case may be, having regard to any sum or sums of money which may have been so received or paid as aforesaid; And it is ordered, that any amount so to be certified to be due from the Petr to the estate of the said A., be paid by the Petr B. to the said D. within twenty-one days after service of this order, and of the taxing master's certificate to be made in pursuance thereof, unless the Court shall upon special circumstances to be certified by the said master otherwise order, upon application to be made within one week after the date of the said master's certificate by the Petr; And it is ordered, that upon payment by the Petr to the said D. of what may be certified to be due to him as such admor [*or exor*], or in case it shall appear that there is nothing due to him, he, the said D., do deliver to the Petr upon oath, all deeds, books, papers, and writings in his custody or power as such admor [*or exor*] as aforesaid, belonging to the Petr; And it is ordered that no proceedings be commenced against the Petr in respect of the said bill pending this reference, but the said master is to make his certificate in a month, unless the said master shall extend the time to enable him to make his certificate, or this order is to be of no effect; And in case the said master shall certify that any amount is due from the estate of the said A., and the said bill when taxed shall be less by a sixth part than the said bill as delivered, It is ordered that the said D. do pay to the Petr the amount which the said master shall certify to be due for the costs of this reference.

The above form is applicable, where the order is to tax a bill delivered by the trustee in bankruptcy of a bankrupt solr, *mutatis mutandis*.

## 2. *Order of Course to deliver Bill to Client's Represve, and to Tax.*

UPON the petition of B. &c., the admor of the effects [*or exor* of the will] of C., of &c., deceased, it was alleged that the said C. in his lifetime employed the above-named A. as his solicitor in &c.; that the said C. has since died, and that letters of admon to his effects [*or probate* of his will] have [*or has*] been granted to the said B.; that the Petr is desirous of obtaining the papers in the possession of the said solr belonging to the Petr as such admor [*or exor*] as aforesaid; but the said solr refuses to deliver up the same until his bill of costs is paid; that the said solr, although applied to, has not delivered his bill of costs against the Petr as such admor [*or exor*] as aforesaid; that the Petr submits to pay what shall appear to be due in respect of the said bill; It was therefore prayed, and it is accordingly ordered,

that the said solr do, within fourteen days after notice hereof, deliver to the Petr a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he has been employed as the solr for the said C., deceased; And that it be referred &c. to tax and settle the said bill, and that the Petr and also the said solr do produce &c.; And that they be examined &c.; And it is ordered, that the said solr do give credit for all sums of money by him received of or on account of the said C., deceased, and be at liberty to charge all sums of money paid by him to or on account of the said C., deceased.—Usual directions as in Form 1, *sup.*, adding after “Petr” the words “as such admor, or exor.”

### 3. *Order to continue Proceedings and carry on Taxation after Payment.*

UPON motion &c. by counsel for M. of &c., who alleged that by an order dated &c., It was ordered that it should be referred to the taxing master to tax and settle the bill of fees, charges, and disbursements, amounting to the sum of £—, delivered by the above-named S. &c. (*the solicitors*) to T. in the said order named and paid by him to the said solrs on &c. (that no proceedings have been taken under the said order dated &c.), and that the said T. died on &c. intestate, and that on the &c. letters of admon of his estate were granted to the said M. whereby she became and now is his legal pers. represve; Let the said order and the proceedings thereunder be continued, and the taxation thereby directed be carried on between the said M. and the said solrs; And Let the said M. and the solrs produce &c., and be examined &c.; And Let the said solrs give credit &c. [Form 1, p. 230]; and in case it shall appear the said bill is overpaid, Let &c. [see Section VI., p. 246].—See *Re Sankey*, V.-C. W., 25th Nov. 1872, B. 3039.

As to orders to revive proceedings which had abated since taxation was directed, see *Re Nicholson*, *Re Waugh*, 29 Beav. 665, 666.

By the Attorneys and Solicitors Act, 1870 (33 & 34 V. c. 28), s. 19, “any person interested under a decree or order” for payment of costs in any suit may obtain an order to revive such suit, and thereupon to prosecute and enforce such decree or order.

This section did not enable a solr, to whom costs have been ordered to be paid, to obtain an order to revive: *Hunter v. Wortley*, W. N. (73) 4.

The practice in cases where, formerly, by marriage, death, or bankruptcy, &c., an order of revivor would have been required, has been simplified by O. XVII. 2, 4, under which an order to carry on proceedings may be obtained *ex parte* on application to the Court or a Judge, or by petition of course, or in Chambers: *Walker v. Blackmore*, W. N. (76) 132; and *v. sup.* Chap. IX., “CHANGE OF PARTIES,” p. 105.

For order to proceed with a taxation against the surviving Plts in the absence of a legal pers. represve of one deceased, see *Aspden v. Seddon*, W. N. (77) 207; 1877, A. 1766.

### 4. *Costs of a Deceased Solr and Exor moderated, though no longer Taxable.*

[The testator's solr and exor retained his costs out of the assets. Many years afterwards, under a decree for the usual admon accounts, the solr's

represve claimed such payment as a discharge. Although the bill was no longer taxable, the beneficiaries were allowed to have it moderated.]

“VARY the order dated &c., by striking out &c., and the direction to tax and settle &c.; And instead thereof, Let the taxing master inquire and certify whether any and which of the disputed items marked &c., in the bills referred to are fair and proper to be allowed, and to (any and) what amount respectively.”—No costs on either side.—*Jarris v. Allen*, 4 Ch. 616, 23 June, 1869, A. 2148.

For order in similar form as to items in bill of costs delivered to testator which were disputed by exor, see *Re Park, Coles v. Park*, 41 Ch. Div. 326.

As to the power of the Court to direct the taxing officer to assist in settling an account which consists in part of any bill of costs, see O. LXV. 27 (26).

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## SECTION IX.—REVIEW OF TAXATION.

### 1. *Order for Review of Taxation—Costs of Application—Set-off.*

THE application of J. &c., to review the certificate dated &c. of the taxation of the bill of costs &c., which, upon hearing the solrs for the applicant and for the L. Co. in Chambers, was adjourned to be heard in Court, coming on this day to be heard accordingly, and upon hearing counsel &c.; And the Court being of opinion that such of the items of the said bill of costs, and charges, and expenses as relate to the examination of the title to the hereditaments comprised in Lot 2, part of the estates directed to be sold by the order dated &c., ought to be disallowed, Doth order that it be referred to the said taxing master to review his said certificate.—Costs of the applicant in Chambers, and of drawing up this order and consequent thereon, to be taxed, and set off against any costs, and costs, charges, and expenses to be paid by the applicant to the said company under the said order dated &c.—*Raymond v. Lakeman*, M. R., 27 March, 1865, B. 1317.

### 2. *Review of Taxation—O. LXV. 41..*

THE application of the Deft, which upon hearing &c. was adjourned &c., and upon hearing counsel for the Deft and for the Plt; And the Court being of opinion that on the taxation of the costs under the judgment dated &c. the Plt is liable to pay the whole of the Deft's costs, except so far as they have been increased by the Deft's counter-claim, and that there ought to be no apportionment of the Deft's general costs of the action, and that the Deft is liable to pay to the Plt only the amount by which the Plt's costs have been increased by the Deft's counter-claim; Let it be referred to the taxing master to review his taxation accordingly.—*Saner v. Bilton*, Fry, J., 19 March, 1879, B. 648.

### 3. *Review of Taxation—Order on Objections—Costs apportioned—Set-off.*

THE application of the Plt to review the taxing master's certificate, dated &c., which, upon hearing the solrs for the applicant and for the Deft in Chambers, was adjourned to be heard in Court, coming on this day to be heard accordingly, and upon hearing counsel for the Plt and for the Deft, and upon reading the objections &c.; Let the said taxing master's certificate stand and be allowed as to the subject-matter of the first objection, and be varied as to the subject-matter of the second objection, by the disallowance of three counsel to the Deft, and by allowing the Deft two counsel only on the trial of this action and counter-claim; And Let it be referred to the taxing master to tax the costs of the Plt and of the Deft of this application; And Let the Plt pay the amount of three-fourths of the said costs and the Deft pay one-fourth of the said costs; And Let the amount of the costs of the Plt be set-off against the costs of the Deft, having regard to the variation in the said taxing master's certificate, and the taxing master is to certify to whom the balance is to be paid.—*Directions for payment.—Mason v. Brentini*, V.-C. M., 5 June, 1880, B. 1354; affirmed on appeal, 1880, B. 1642, 15 Ch. Div. 287.

### 4. *Objections to Taxing Master's Certificate—Subsequent Order as to Costs.*

UPON the application of A. &c., and upon reading the order dated &c., the objections dated &c. left by the applicants with the taxing master, the taxing master's certificate dated &c., and the affidavits therein referred to, Let the said objections dated &c., so far as they relate to the items in Part 2 thereof, be allowed; And Let it be referred back to the taxing master to vary his certificate accordingly.—Tax the costs of the applicants of obtaining the said order, and of the taxation thereby directed, and deduct the same from the amount which shall appear to be due from the applicants to the solrs.—The balance to be certified, and to be paid by the applicants to the solrs within twenty-one days from the date of the taxing master's certificate.—*Re Cartwright*, M. R., 13 Nov. 1875, A. 2305.

### 5. *Objections to Taxing Master's Certificate.*

LET the objections No. 1 &c. left by the applicant with the taxing master be allowed; And Let it be referred back to the taxing master to vary his certificate accordingly.—*Re Searle*, M. R. at Chambers, 4 Dec. 1872, B. 3137.

For order to review taxation on application made before certificate, see *Coulton v. Senior*, V.-C. H. at Chambers, 4 Nov. 1878, A. 2059.

#### REVIEW.

By O. LXV. 27 (39—42), any party dissatisfied with the allowance or disallowance by the taxing officer of the whole or any part of any item

or items, may at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein the items or parts objected to, and the grounds and reasons for such objection, and apply to the taxing officer to review the taxation in respect of the same. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and may, if he think fit, receive further evidence, and if so required by either party he shall state, either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision, and any special facts or circumstances relating thereto. Any party dissatisfied with the certificate or allocatur as to any item, &c. objected to may apply to a Judge at Chambers for an order to review the taxation as to the same item, &c., and the Judge may thereupon make such order as he may deem just, but the certificate or allocatur shall be final and conclusive as to all matters not objected to in manner aforesaid. Such application shall be heard and determined by the Judge upon the evidence brought in before the taxing officer, and no further evidence shall be received upon the hearing unless the Judge shall otherwise direct.

Where a person not a party to an order for taxation desires to have the taxation reviewed, he should not apply to review, but should move to set aside the order: *Charlton v. C.*, 31 W. R. 237.

Where a taxing master, on the day on which the objections were carried in, gave notice that they would be proceeded with the next day, it was held under the circumstances sufficient: *Re Hill*, 33 Ch. Div. 266.

The application to review is by summons, and not on motion: *Webster v. Manby*, 4 Ch. 372; unless made to the junior Judge of the Chancery Division for the time being with no chamber staff: *Millard v. Burroughes*, W. N. (79) 198; and cannot be entertained unless an objection in writing, under r. 27 (39), as to each item objected to has been first carried in: *Strousberg v. Saunders*, 38 W. R. 117.

If the objection is to the general principle on which the taxation has proceeded, and not to specific items, the certificate may be discharged on summons, without carrying in objections under r. 27 (39): *Re Castle*, 36 Ch. D. 194.

As a general rule, the certificate is reviewed on questions of principle only, and not of mere *quantum*, which is left to the discretion of the taxing master: *Re Mortimer*, 4 Eq. 96; *Alsop v. Lord Oxford*, 1 M. & K. 564; *Re Catlin*, 18 Beav. 508.

And the discretion of the taxing master applies not only to the *quantum*, but to the *quoties*, e. g., in the case of interviews, to the number of interviews as well as to the sum to be allowed for each: *Re Brown*, 4 Eq. 464.

On the other hand, the allowance of the higher instead of the lower scale was a question of principle on which the taxation would be reviewed: *Paddon v. Winch*, 20 Eq. 449. And see "Morgan and Wurtzburg, Costs," 576.

And the Court or a Judge has now discretion, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, to order the higher scale to be applied in any particular case: O. LXV. 9; *Paine v. Chisholm*, (1891) 1 Q. B. 531; but not to delegate such discretion to the master: *Corticene, &c. Co. v. Tull & Co.*, 27 W. R. 373. On the question whether special grounds in fact existed, an appeal will lie: *Paine v. Chisholm*, *sup.*

The taxation of counsel's fees, solicitor's charges, separate appearances, and other items not involving any question of principle, is not, as a general rule, open to review: *Parkinson v. Hanbury*, 13 W. R. 1056; *Cousens v. C.*, 7 Ch. 48; *A. G. v. Drapers' Co.*, 9 Eq. 69; *Webb's Estate*, 21 W. R. 745; *Beattie v. Lord Ebury*, 22 W. R. 68; *Merchants' Bank Co. v. Maud*, 20 Eq. 453.

But, in a proper case, the certificate may be reviewed even upon questions of *quantum*: *Smith v. Buller*, 19 Eq. 473; especially as to counsel's fees on the hearing of an appeal; a question which the Court below is best able to decide: *Gilbert v. Guignon*, 21 W. R. 745; and see *Mason v. Brentini*, 15 Ch. Div. 287.

The following cases, upon the discretion of the taxing master, may also be consulted: *Re Harrison*, 33 Ch. D. 52; *Re Page*, 32 Beav. 485, 487; *Hallows v. Fernie*, 16 W. R. 175; *Potter v. Rankin*, L. R. 4 C. P. 76; 5 *ib.* 518; *Yglesias v. Royal Exchange, &c. Corporation*, L. R. 5 C. P. 141; *Ryan v. Dolan*, I. R. 7 Eq. 92; *Wakefield v. Brown*, L. R. 9 C. P. 410.



## ALLOWANCES.

The costs of proceedings in the Supreme Court of Judicature are regulated by O. LXV.; but in special matters of pleading, discretion is given to the taxing officer, in lieu of the allowances for instructions, and preparing or drawing, to make such allowance for work, labour, and expenses of preparation, as he may think proper: see *Turnbill v. Janson*, 3 C. P. D. 264. He may also make special allowance in respect of agency correspondence in country agency causes and matters, when it is shown to have been special and extensive: O. LXV. 27 (10).

In matters at Chambers, which from the length of the attendance, or difficulty of the case, or from the extraordinary skill and labour required and received from the solr, shall appear to deserve higher remuneration than the ordinary fees, the Judge or master may allow the solr, by a memorandum made for the purpose and signed by the Judge, a fee not exceeding ten guineas, instead of the fees of two guineas, three guineas, and five guineas: *Ib.* 12.

By r. 27 (38), all fees or allowances which are discretionary, are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who is to take into consideration the other fees and allowances to the solr and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

By r. 27 (38a) (R. S. C. May, 1889), where costs directed to be taxed, with a view to payment out of a fund or estate (real or personal), or out of the assets of a co. in liquidation, shall have been increased by unnecessary delay, or by improper, vexatious, or unnecessary proceedings, or by other misconduct or negligence, or if from any other cause the amount of the costs, in the opinion of the taxing master, is excessive, having regard to the value of the fund, estate, or assets to which they relate, or other circumstances, the taxing master is to allow only such an amount of costs as would, in his opinion, have been incurred if the litigation had been properly conducted, and to assess the same at a gross sum, and (if necessary) apportion the amount among the parties.

By O. LXII. 15, "the registrar shall, at the time of any attendance before him for the purpose of settling the terms of, and passing any judgment or order, if requested to do so by any party, on the ground that it is of a special nature, or of unusual length or difficulty, certify, for the information of the taxing officer, whether, in his opinion, any special allowance ought to be made in taxation of costs in respect thereof."

And for the rule under the former practice as to solrs' remuneration for particular services, and their right to charge for services warranted by practice, though not absolutely necessary, see *Lucas v. Peacock*, 8 Beav. 1; *Davenport v. Stafford*, *Ib.* 503, 516; *Stephens v. L. Newborough*, 11 Beav. 403.

As to payments to be entered in the bill of costs, and allowed as professional charges and disbursements, see certificate of taxing masters in *Re Remnant*, 11 Beav. 603, 611; *Re Lamb*, 23 Q. B. D. 5.

Items in a bill of costs will not be disallowed solely on the ground that the solr at the particular time was uncertificated: *Re Jones*, 9 Eq. 63. And see *Fullalove v. Parker*, 8 Jur. N.S. 1078; *Holdgate v. Slight*, 21 L. J. Q. B. 74; *Re Hope*, 7 Ch. 766. Payment of costs of proceedings taken by an uncertificated solr cannot be enforced: *Verlander v. Eddolls*, 51 L. J. Q. B. 55; *Fowler v. Monmouthshire Canal Co.*, 4 Q. B. D. 334; *Irving v. Sanger*, 58 L. J. Q. B. 64; 59 L. T. N.S. 894; affirmed, C. A., 5 Times Law Reports, 171.

The following are instances of allowance or disallowance on review of particular items (except where otherwise indicated) as between party and party:—

*Abstracts of Title:—*

Are not included in the words "deeds, wills, and other documents," cited in Schedule II. to Gen. Ord., August, 1882 (Solicitors' Remuneration Act, 1881), and the old scale of 6s. 8d. for perusal of every brief sheet of eight folios each remains unaltered: *Re R. A. Parker*, 29 Ch. D. 199.

For disallowance of costs of abstract of title to accompany case for counsel,

see *Davis v. Earl Dysart*, 8 D. M. & G. 33; 21 Beav. 124; *Re Pinder*, 10 Beav. 390; *Rumsey v. R.*, 21 Beav. 40.

*Accountants' Charges :—*

See *Meymott v. M.*, 33 Beav. 590—on the scale allowed by the Gen. Ord. in Bankruptcy : and see O. LXV. 27 (36).

*Affidavits :—*

See *Camille v. Donato*, 13 W. R. 358; *Catholic Publishing Co. v. Wyman*, 11 W. R. 49; *Davies v. Marshall*, 1 Dr. & S. 354 (costs of settling by counsel allowed); *Bagley v. Searle*, W. N. (87) 71 (costs of affidavit verifying statement of claim not allowed); and see O. LXV. 27 (1), (4), (5), (15), (45).

*Agency :—*

As to what the usual agency terms are, see *Ward v. Lawson*, 43 Ch. Div. 353.

If shown to the satisfaction of the taxing officer that agency correspondence has been special and extensive, he is at liberty to make such special allowance in respect thereof as in his discretion he may think proper : O. LXV. 27 (10).

*Amendments :—*

See O. LXV. 27 (31, 32), and *sup.*, Chap. VII.

*Attendances :—*

At Chambers : special allowances in cases of difficulty, &c. : O. LXV. 27 (12).

Upon Registrars : special allowances upon certificate of Registrar under O. LXII. 15; O. LXV. 27 (11).

*A. G.'s Fees :—*

*A. G. v. Drapers' Co.*, 4 Beav. 305—brief for A. G., in addition to two other counsel, allowed; *Nichols v. Haslam*, 15 Sim. 49; *Re Dulwich College*, 15 Eq. 294.

*Auctioneers' Charges :—*

See *Re Page* (3), 32 Beav. 487 (whole amount, exceeding what would be allowed under the bankruptcy scale, allowed in taxation between solr and client).

*Briefs* (O. LXV. 27 (3)) :—

—prepared, but not used : see *Friend v. Solly*, *Re Pender*, 10 Beav. 329, 390; *Davenport v. Stafford*, 9 Beav. 106; *Haslam v. O'Connor*, I. R. 6 Eq. 615; *Exp. Hutchinson*, I. R. 7 Eq. 57; *Hughes v. Meyrick*, L. R. 5 C. P. 407.

*Clerk's Fees :—*

Now regulated by O. LXV. 27 (51).

*Conferences :—*

Fees for, not to be allowed, unless it shall appear to the taxing master, for some special reason, that a conference was necessary or proper : O. LXV. 27 (45).

*Consultations :—*

See *Re Harrison*, 33 Ch. D. 52; *Smith v. Earl Effingham*, 10 Beav. 378; *Davies v. Earl Dysart*, 21 Beav. 124; 8 D. M. & G. 33; *Sturge v. Dimsdale*, 9 Beav. 170; *Lucas v. Peacock*, 8 Beav. 1; *Ernest v. Partridge*, 11 W. R. 715; *Hill v. Peel*, L. R. 5 C. P. 172; *Tillett v. Stracey*, *ib.* 185; *Bell v. Aitkin*, L. R. 3 C. P. 321.

*Conveyancing Business :—*

Costs of, are regulated by Solicitors' Remuneration Act, 1881, and the General Order under it: *v. inf.* p. 266, Section X. As to fees to conveyancing counsel, see O. LXV. 27 (36).

*Copies of Proceedings and Documents :—*

See O. LXV. 27 (18), as to allowance of 4*d.* per folio for copies of documents in possession of other party; O. LXX. 7 (c), as to printed copies furnished by party printing.

It is the duty of the taxing master to consider in each case whether copies of pleadings, &c. are, upon an interlocutory application, "necessary or proper for the attainment of justice, &c.," under O. LXV. 27 (29): *Warner v. Mosses*, 19 Ch. D. 72; and see *Simmons v. Storer*, 14 Ch. D. 154.

In *Kennedy v. George*, 6 W. R. 218; *Sharp v. Wright*, 1 Eq. 634; *Under-*





party taxation: *Blyth and Fanshaw*, 10 Q. B. Div. 207; *Re Broad*, 15 Q. B. Div. 420.

Although there was no rule that two additional counsel might always be allowed, where the counsel who drew and advised upon the pleadings was called within the bar before the hearing (*Betts v. Cleaver*, *sup.*, *Green v. Briggs*, 7 Ha. 279), yet such allowance, on the ground that a leader had been already retained and actually employed, has been made in *Cousens v. C.*, 7 Ch. 48; *Horsley v. Cox*, 7 Eq. 464; *Laffitte's Claim*, 20 Eq. 650.

But the rule has been since laid down by the L. C., in concurrence with the L.JJ., and after communication with the taxing masters, that the mere fact that a junior counsel in a cause has been called within the bar is not a sufficient reason for allowing, on taxation, the costs of briefs to three counsel: 10 Ch. 540. And see *Parish v. Poole*, 34 W. R. 365.

The *quantum* of counsel's fees (except perhaps on the hearing of an appeal) is generally in the taxing master's discretion, which will not be interfered with, unless exercised in a manifestly erroneous, or unreasonable manner, or except in extreme cases: *Brown v. Sewell*, 16 Ch. Div. 517; *Hargreaves v. Scott*, 4 C. P. D. 21; *Tillett v. Stracey*, L. R. 5 C. P. 185; and this discretion extends (though to be very jealously exercised) to the allowance of an addition to fees as originally marked: *Easton v. London Joint Stock Bank*, 38 Ch. D. 25.

Special fees may be allowed where clients have authorized them, but where special fees are paid to a leader, fees to juniors are not, in absence of such authority, necessarily to be according to the same scale: *Re Harrison*, 33 Ch. Div. 52.

Fees to counsel ought not to be reduced merely because he is employed in two separate though similar actions by two Plts against the same Deft: *Re Met. Coal Consumers' Assoc.*, *Grieb's case*, 45 Ch. D. 606.

No fee to counsel is to be allowed unless vouched by his signature: O. LXV. 27 (52).

Retaining fee to counsel is not to be allowed on taxation as between party and party: O. LXV. 27 (44).

According to O. LXV. 27 (16), no costs of counsel's attendance in Chambers are in any case to be allowed unless the Judge certifies it to be a proper case for counsel to attend; but this must be read in conjunction with O. LV. 1a., which provides that "in any proceeding before the Judge in Chambers, any party may, if he so desire, be represented by counsel."

The rule has been held to apply to taxation as between solr and client: *Re Chapman*, 10 Q. B. Div. 54.

The costs of settling drafts by counsel for the parties, after a direction for settling them by the conveyancing counsel of the Court, will not be allowed unless the Judge otherwise directs: *Jones' Estate*, 4 Jur. N.S. 887; and see O. LXV. 22.

And see, as to counsel's fees generally, *Smith v. Buller*, 19 Eq. 473; *Robb v. Connor*, I. R. 9 Eq. 373.

#### Diagrams:—

On briefs in a patent case were disallowed as "luxuries": *Smith v. Buller*, 19 Eq. 473.

But in a similar suit the allowance by the taxing master of a sum for preparing a model was not disturbed: *Batley v. Kynock*, 20 Eq. 632.

#### Evidence:—

Such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed: O. LXV. 27 (9).

Costs of procuring evidence may be allowed Deft, though action is discontinued or witnesses not actually called: *Windham v. Bainton*, 21 Q. B. D. 199; *Wicksteed v. Biggs*, 52 L. T. N.S. 428.

#### Exhibits:—

Without special direction from the Judge, the costs of perusing exhibits to affidavits will not be allowed: *Rymer v. De Rosaz*, 24 Ch. D. 684 (where, following *Concha v. Murietta*, V.-C. B., 1st May, 1880, the order was made for the taxing master to be at liberty to allow a special charge for perusal and consideration, &c., the amount thereof, if any, to be in the discretion of the taxing master).

*Experts :—*

See O. LXV. 27 (36), and *inf.* p. 265, referring to witnesses.

*Extension of Time :—*

See O. LXV. 27 (24).

*Forma pauperis :—*

Costs directed to be paid to a party thus suing or defending are to be taxed as in other cases, unless the Court shall otherwise direct: O. XVI. 31.

*Interpreter's Charges :—*

See *Earl Shrewsbury v. Trappes*, 10 W. R. 663.

*Improper, Vexatious, or Unnecessary Matter, or Prolixity :—*

May be disallowed by the Court or Judge, or the taxing master may be directed to look into the same, and to disallow the costs thereof: see O. LXV. 27 (20), *sup.* p. 225, and a gross sum only is to be allowed where taxation is directed with a view to payment out of fund, or estate, or assets of co.: O. LXV. 27 (38A), *v. sup.* p. 258.

For cases under the corresponding Cons. Ord. 40, rr. 9, 10, see *Re Will's Trusts*, 12 W. R. 97; *Scottish Union Co. v. Steele*, 9 L. T. N.S. 677.

Without special direction, the taxing master could not under the above rules look into the pleadings to discover what was of unnecessary or improper length: *Re Farington*, 33 Beav. 347; *Re Skidmore*, 1 Jur. N.S. 696.

*Inspection of Documents :—*

Under O. XXXI. 15; no allowance unless for good and sufficient reasons shown: O. LXV. 27 (17).

*Journeys :—*

Costs of, when taken by authority of the client, but not otherwise, for the purpose of conferring with counsel, and otherwise conducting proceedings in the action, will be allowed in taxation against the client: *Re Storer*, 26 Ch. D. 189 (dissenting from *Re Foster*, 8 Ch. D. 598); and see *Re Snell*, 5 Ch. Div. 815; *Alsop v. E. Oxford*, 1 My. & K. 564; *Re Pine*, 9 Beav. 234; *Re Pender*, 10 Beav. 390; *Re Bevan*, 20 Beav. 146; *Churton v. Frewen*, 15 W. R. 559.

As to allowance for journeys in respect of conveyancing business (whether transacted in an action or not: *Stanford v. Roberts*, 26 Ch. D. 155), see Solicitors' Remuneration Act, General Order, Schedule II., and *inf.* p. 266.

*Letters :—*

As against the client will not be allowed unless properly required for the purpose of advancing client's business: *Re Brady*, 15 W. R. 632; *Re Harle*, 17 W. R. 21.

In country agency causes and matters the taxing officer may make a special allowance for correspondence shown, to his satisfaction, to have been special and extensive: O. LXV. 27 (10).

*Negligence or Mistake :—*

Costs rendered necessary by, unless going to loss of whole action, may be disallowed: *Re Massey and Carey*, 26 Ch. Div. 459; but see *The Papa de Rossie*, 3 P. D. 160.

*Parliamentary Business :—*

Will be taxed under the common order, upon the scale of parliamentary allowances: see *Re Sudlow*, 11 Beav. 400.

*Costs of opposing Private Bill :—*

See 28 & 29 V. c. 27; *Williams v. Swansea Canal Co.*, L. R. 3 Ex. 158; *Mallett v. Hanley*, 18 Q. B. Div. 787.

*Corrupt Practices Act, 1863 (26 & 27 V. c. 29), sect. 2 :—*

Payments by solr as local sub-agent, not made through expense agent, disallowed as illegal: *Re Parker*, 21 Ch. Div. 408.

*Parliamentary Elections Act, 1868 :—*

By sect. 41, the costs of a petition under, are to be taxed by the master of the Court of Common Pleas, according to the same principles as costs between solr and client are taxed in a suit in Chancery: see *Hill v. Peel*, L. R. 5 C. P. 172; *Hughes v. Meyrick*, *ib.* 407.

*Perusing Affidavits and Documents :—*

Charges for, in separate suits relating to the same subject-matter were disallowed where, having taken an office copy in one suit, solr merely

examined at the Record Office the affidavits which he had been told were identical in the other suits, see *Betts v. Cleaver*, 7 Ch. 513.

Costs of producing documents at the office of his own solr, and of inspecting his opponent's documents, will not be allowed to the successful party: *Brown v. Sewell*, 16 Ch. Div. 517; *Wicksteed v. Biggs*, 54 L. J. Ch. 967; 52 L. T. N.S. 428.

*Perusing Depositions taken Abroad:—*

A reasonable sum will be allowed for: see *Wentworth v. Lloyd*, 2 Eq. 607.

*Pleadings:—*

See O. LXV. 27 (1), (2), (6).

*Postage:—*

Profit upon addressing and posting documents for client not allowed: *Exp. Ditton, Re Woods*, 13 Ch. Div. 318.

*Printing Evidence:—*

See O. XXXVIII. 30; O. LXVI. 5—7; *The Mammoth*, 9 P. D. 126.

The costs of transcribing and printing (not of taking) the shorthand notes of the evidence in the Court below for the Appeal Court were, under the circumstances, allowed: *Bigsby v. Dickinson*, 4 Ch. D. 24.

And see O. LVIII. 11 (6), 12, enabling the Court below, or a Judge thereof, or the Court of Appeal, &c., to order the whole or any part of the evidence which has not been printed in the Court below to be printed for the purpose of the appeal.

Under this order a copy of the Judge's notes was ordered to be printed to be used on appeal: W. N. (76) 23.

*Proceedings:—*

Costs of proceedings to strike solr off rolls allowed to an admor as being incurred for benefit of estate: *Re Davis, Muckalt v. Davis*, 57 L. J. Ch. 3; as to costs of admors and exors, see *inf.*, Chap. XLI., "TRUSTEES."

*Profit Costs:—*

As to allowance of charges of solr who is trustee or mortgagee for business not strictly professional, see *Ames v. Cadogan*, 25 Ch. D. 72; *Re Donaldson*, 27 Ch. D. 544; *Field v. Hopkins*, 44 Ch. Div. 524; *Re Wallis, Exp. Lickorish*, 25 Q. B. Div. 176; *Re Roberts*, 43 Ch. D. 52; *Stone v. Lickorish*, (1891) 2 Ch. 363; and *inf.*, Chap. XL., "SOLICITORS."

*Refresher Fees:—*

Are now regulated by O. LXV. 27 (48). This rule applies to all taxations: *Re Harrison*, 33 Ch. Div. 52; it is not limited to *vivâ voce* evidence trials, but includes hearings before the Court of Appeal: *Svendsen v. Wallace*, 16 Q. B. Div. 27; 34 W. R. 151; see also *Easton v. London Joint Stock Bank*, 38 Ch. Div. 25, that the additional fees in such cases are not refreshers in the strict sense, and are to be allowed with caution. The rule does not prevent a client from giving his solr (who has fully explained the matter to him) authority (express or implied) to give a particular leader special fees exceeding the *maximum* fixed by the rule, and does not limit the taxing master's discretion as to the *quantum* to be allowed, though exceeding the ordinary scale, having regard to such special authority: *Re Harrison*, 33 Ch. Div. 52; *Easton v. London Joint Stock Bank*, 38 Ch. Div. 25.

For earlier cases before the rule (introduced 1883), see *Harrison v. Wearing*, 11 Ch. Div. 206; *Brown v. Sewell*, 16 Ch. Div. 517; *Smith v. Buller*, 19 Eq. 473.

It is now provided that, in taxations between solr and client, larger fees may be allowed under special circumstances to be stated: O. LXV. 27 (49).

The taxing master has discretion, in special circumstances, to disallow refreshers, though the trial has lasted more than the five hours specified: *Smith v. Wills*, 34 W. R. 30; 53 L. T. N.S. 386; or to reduce the original fee if, together with the refresher, too large: *Wicksteed v. Biggs*, 52 L. T. N.S. 428.

The mid-day adjournment is not to be deducted in calculating refresher fees: *Collins v. Worley*, 60 L. T. N.S. 748. Where a trial lasted four days and three hours, and on the fifth day the Judge required a further hearing on one point, which occupied the whole of a subsequent day, refreshers for that day were allowed: *Boswell v. Coaks*, 36 Ch. Div. 444.

The right to a refresher fee cannot arise unless the trial has lasted a "clear day" beyond the first five hours: *Walker v. Crystal Palace Gas Co.*, (1891) 2 Q. B. 300; as to the meaning of "clear day," *qu.*, *Ib.*

*Retaining Fee to Counsel:—*

Not to be allowed on party and party taxation: O. LXV. 27 (44).

*Scientific Persons:—*

Allowance to: see O. LXV. 27 (36); and *inf.*, p. 265, "*Witnesses.*"

*Separate Appearances:—*

By O. LV. 40, in proceedings before the Judge in Chambers, he may require parties, whose interests he thinks can be classified, to be represented by the same solr, and nominate him if the parties cannot agree; and any parties insisting on appearing by distinct solrs, pay their own and other parties' consequent costs.

For cases upon this rule, see *Morgan*, 144; *Bull v. West London Sch. Bd.*, 34 L. T. N.S. 674, where two partners who had been made Defts for the purpose of discovery only were not allowed separate costs when they had severed in their defence (though before the hearing they had dissolved partnership).

By O. LXV. 27 (8), "where the same solr is employed for two or more Defts, and separate pleadings are delivered or other proceedings had by or for two or more such Defts separately, the taxing officer shall consider in the taxation of such solr's bill of costs, either between party and party or between solr and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed."

A Deft appearing by leave of the Court in distinct capacities by different solrs was allowed costs: *Woolley v. Colman*, W. N. (86) 6, 36; as to costs of trustees severing in defence, *v. inf.*, Chap. XLI., "*TRUSTEES*;" as to severance of defence by joint tort-feasors, *Shumm v. Dixon*, 37 W. R. 92; for case where certificate of taxing master was varied by allowing costs of separate counsel of Defts having separate defences, *Ager v. Blacklock*, 56 L. T. N.S. 890; and that successful Plts appearing by the same solr in separate actions against the same Deft for same object are entitled to have the actions treated as distinct on taxation, see *Metropolitan Coal Consumers' Association*, *Grieb's case*, 45 Ch. D. 606. Where the taxing master was directed by the House of Lords to consider whether Defts had sufficient reason for severing, there was no appeal from his discretion: *Boswell v. Coaks*, 36 Ch. Div. 444.

As to the costs of persons appearing separately to oppose a winding-up petition, see *Re Humber Ironworks Co.*, 2 Eq. 15; *Re Anglo-Egyptian Navigation Co.*, 8 Eq. 660; and see *Buckley*, Cos. Acts, 232, 233.

By r. 41, the Judge may require parties employing the same to appear by distinct solrs.

*Settling Minutes:—*

In *Re Reece*, 2 Eq. 609, solrs were allowed to make this charge in respect of an order which was not given out in the form of minutes by the registrar; and see O. LXII. 15; LXV. 27 (11).

*Shorthand Notes:—*

Without a special direction from the Judge when judgment is given, or before it is drawn up, the costs of shorthand notes of the evidence will not be allowed on taxation: *Earl de la Warr v. Miles*, 19 Ch. Div. 80; *Kirkwood v. Webster*, 9 Ch. D. 239; *Ashworth v. Outram*, *Ib.* 483; but the costs of shorthand notes of the judgment which have been used on appeal will be allowed: *Smith v. Chadwick*, 51 L. J. Ch. 597, 621; *Exp. Cocks*, 21 Ch. D. 397, 407; *Humphrey v. Sumner*, 55 L. T. N.S. 449; *Re Medland*, *Eland v. Medland*, 41 Ch. Div. 476.

Neither Judge nor taxing master has jurisdiction to order a shorthand note to be taken; but where it was done, and the parties did not object, the same costs were allowed on taxation as if they had agreed on one shorthand writer: *Re Hilleary and Taylor*, 36 Ch. Div. 262.

And the discretion of the taxing master in disallowing the costs of shorthand notes was not interfered with: see *Marcus v. G. S. N. Co.*, W. N. (76) 157.

For cases in which shorthand notes of evidence were allowed as essential to the hearing, see *Watson v. G. W. Ry. Co.*, 6 Q. B. D. 163; *Lee Conservancy Board v. Button*, 12 Ch. D. 383.

The costs of a MS. copy of shorthand notes, taken by order of a County Court Judge, of the proceedings before him, were allowed as part of the costs of an appeal: *Exp. Sawyer*, 1 Ch. D. 698; and in *Bigsby v. Dickinson*, 4 Ch. Div. 24, the costs of transcribing and printing (not of taking) shorthand notes of the evidence in the Court below for the appeal were allowed.

A direction for allowance of shorthand notes of evidence could not be given after the order of the Court of Appeal had been passed and entered: *Glasier v. Rolls*, 59 L. J. Ch. 63; 62 L. T. N.S. 305; 38 W. R. 113.

*Solicitor defending in person*:—

Allowed same costs as if he had employed a solr, except as to items which the fact of his acting renders unnecessary: *London Scottish Ben. Soc. v. Chorley*, 13 Q. B. Div. 872; so where he acts by a firm of which he is a partner: *Bidder v. Bridges*, W. N. (87) 208.

*Special Retainer*:—

Of a leader practising in another Court will not be allowed: *Smith v. Effingham*, 10 Beav. 378.

*Statute of Limitations*:—

The taxing master ought to tax statute-barred items, where the taxation is to ascertain costs for which solr has a lien; but whether he ought to strike them out under common order to tax, *quere*; *Curwen v. Milburn*, 42 Ch. Div. 424.

*Surveyors' Charges*:—

Commission on "Ryde's Scale," varying from 5 to  $\frac{1}{2}$  p. c., according to the amount of purchase-money, was allowed: *A. G. v. Drapers' Co.*, 9 Eq. 69.

*Travelling Expenses*:—

Allowed under special circumstances: *Howell v. Tyler*, 2 Y. & C. Ch. 284; *Clarke v. Malpas*, 31 Beav. 354; *Re Snell*, 5 Ch. D. 815.

*Unnecessary Appearances*:—

Costs disallowed unless otherwise directed: O. LXV. 27 (23).

*Witnesses*:—

A reasonable sum, in the discretion of the taxing master, will ordinarily be allowed to a scientific or skilled witness for getting up the case to qualify himself for giving evidence, but not, in the case of an accountant, the costs of putting in order the books of the party for whom he is engaged to give evidence: *Laffitte's claim*, 20 Eq. 650; *Smith v. Buller*, 19 Eq. 473; *Murphy v. Nolan*, 1 R. 7 Eq. 498; *Batley v. Kynoch*, 20 Eq. 642; *L. C. & D. Rail. Co. v. S. E. Rail. Co.*, 60 L. T. N.S. 753.

For loss of time in attending during the trial, one guinea a day (excluding Sundays) will be allowed; and, if summoned from the country, one guinea a day for maintenance while in town, and first class return railway fare: see *Re Working Men's Mutual Society*, 21 Ch. D. 831; *Wiltshire v. Marshall*, W. N. (66) 80; *Clarke v. Gill*, 1 K. & J. 19; *Ryan v. Dolan*, 1 R. 7 Eq. 92.

The costs of more than three experts to prove a country custom will not be allowed on taxation: *Stanger-Leathes v. S.*, W. N. (79) 86.

*Written Affidavits*:—

The provisions of O. LVIII. 11, requiring production, on appeal, of printed copies of the affidavits which have been printed, and office copies of those not printed, have been dispensed with to save expense: *Sickles v. Morris*, 24 W. R. 102; and so with respect to office copies of those not printed: *Crawford v. Hornsea, &c. Co.*, 24 W. R. 422.

#### SPECIAL ALLOWANCES—INTEREST ON COSTS.

Under 1 & 2 V. c. 110, ss. 17, 18, interest at 4 p. c. is recoverable on costs which one party is ordered to pay to another (but not on costs ordered to be paid out of a fund: *A. G. v. Nethercote*, 11 Sim. 529; *West v. W.*, 17 L. R. Ir. 49); and by 23 & 24 V. c. 127, s. 27, supplementing the former Act, the Court may order costs as taxed, including costs of taxation, to be paid with interest at 4 p. c., payable and recoverable out of the same fund, or in the same manner, as the amount of costs.

Interest on costs now runs, as at law, from date of judgment, and not, as formerly (in Equity), from the date of the certificate: *Pyman & Co. v. Burt*,



W. N. (84) 100; *Boswell v. Coaks*, 36 W. R. 65; 57 L. J. Ch. 101; 57 L. T. N.S. 742; *Schræder v. Clough*, 35 L. T. N.S. 850; *Re London Wharfage, &c. Co.*, 53 L. T. N.S. 112; 54 L. J. Ch. 1137; and a *fi. fa.* will issue to enforce payment: see O. XLII. 17.

Independently of 23 & 24 V. c. 127, s. 27, interest at 4 p. c. is payable upon a sum of taxed costs ordered to be added to money secured by an equitable charge: *Lippard v. Ricketts*, 14 Eq. 291; but only from the date of the taxing master's certificate: *Eardley v. Knight*, 41 Ch. D. 537.

By 33 & 34 V. c. 28, s. 17, the taxing officer may allow interest at such rate and from such time as he thinks just on moneys disbursed by the solr for his client, and on moneys of the client in the hands of the solr and improperly retained by him.

The discretion thereby given applies only to dealings between a solr and his client, and not to cases of taxation where the costs are to be paid out of a fund not belonging wholly to the client: *Hartland v. Murrell*, 16 Eq. 285; and the Act is not retrospective so as to include interest on disbursements prior to passing of Act: *Ward v. Eyre*, 15 Ch. Div. 130, and does not apply to accounts between country solr and town agent: *Ibid.*; if the agent agrees to suspend his right to payment, he is not entitled to interest unless he expressly stipulates for it: *Ward v. Lawson*, 43 Ch. Div. 353.

A solr who had made disbursements and received sums generally on account, could not appropriate such sums to costs for which he had not delivered a bill, so that he might claim interest on disbursements under s. 17: *Re Harrison*, 33 Ch. Div. 52.

Where the solr had accepted a cheque in accord and satisfaction, the client could not afterwards, on discovering that he was so entitled, claim interest on the costs: *Bidder v. Bridges*, 37 Ch. Div. 406.

A solr could not, formerly, on taxation, be charged with interest on balances in hand; *secus*, if he had debited himself with interest in his cash account: *Re Savery*, 15 Beav. 58.

Taking up bills for a client was treated as an ordinary cash advance giving the solr no right to charge interest thereon: *May v. Biggenden*, 24 Beav. 207.

By the Solicitors' Remuneration Act, 1881, Gen. Ord. r. 7, a solr may charge interest at 4 p. c. p. a. on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client (see *Blair v. Cordner*, 19 Q. B. Div. 516, that delivery of the bill is sufficient demand). And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.

This rule (see r. 2) applies to non-contentious business only (not being conveyancing, but in any action: *Stanford v. Roberts*, 26 Ch. D. 155), and does not, in the absence of special direction, enable a party to an admon action, whose costs have been ordered to be taxed and paid out of a fund prior to distribution of such fund, to recover interest: *Re Marsden, Withington v. Neumann*, 40 Ch. Div. 475.

## SECTION X.—SOLICITORS' REMUNERATION ACT.

The Solicitors' Remuneration Act, 1881 (44 & 45 V. c. 44), s. 2, authorizes the making of General Orders for prescribing and regulating the remuneration of solrs "in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court, or in the Chambers of any Judge or master, and not being otherwise contentious business"; and (by sect. 5) as to the taking by a solr from his client of security for future remuneration in accordance with any such order, and the allowance of interest; and provides, by sect. 7, that "as long as any General Order under this Act is in operation, the taxation of bills of costs of solrs shall

be regulated thereby," and a General Order taking effect from the 31st December, 1882, has been made in pursuance of the Act.

The words "not being business in any action, &c.," are to be read as only qualifying the words "other business," which immediately precede; and the Act and Order accordingly apply to conveyancing business transacted in an action, or under the direction of the Court: *Stanford v. Roberts*, 26 Ch. D. 155; *In re Merchant Taylors' Co.*, 30 Ch. Div. 28.

A mortgagor who agrees to pay a lump sum to his solr for procuring a mortgage, though such sum includes the costs of the mortgagee, is a "client," and has employed the solr within the meaning of the Act: *Re Palmer*, 45 Ch. Div. 291; and as to the meaning of the word "client," see sect. 1, and *Re Allen*, 34 Ch. Div. 433, 442; *Hester v. H.*, *Ib.* 607; *Re Metcalfe*, 36 W. R. 137.

By r. 2 of the General Order, in respect of (a) sales, purchases and mortgages completed, the remuneration of the solr having the conduct of the business is to be according to a scale of *ad valorem* charges on the purchase or mortgage money contained in Schedule I. Part 1; and (b) in respect of leases, agreements for leases of certain kinds, and conveyances reserving rent or agreements for same, according to a scale of charges varying with the amount of the rent contained in Schedule I. Part 2; and (c) in respect of other business, including uncompleted business, settlements, mining leases, or licences or agreements therefor, reconveyances, transfers of mortgage, or further charges, the remuneration is to be according to the existing system as altered by Schedule II., which relates to charges for instructions for and drawing and perusing deeds, wills, and other documents, for attendances, for abstracts of title, and for journeys.

Schedule I. does not apply to transactions respecting real property, title to which is registered under 25 & 26 V. cc. 53, 67, and 38 & 39 V. c. 87: see Gen. Ord. r. 1.

The General Order does not apply to a sale of land not situated in England: *Re Greville's Settlement*, 40 Ch. D. 441; but, by virtue of sect. 7 of the Act, extends to bills of costs in respect of business commenced or completed before the order came into operation, if taxed while it is in force: *Re Field*, 29 Ch. Div. 608; *Re Stewart*, 41 Ch. D. 494; *Fleming v. Hardcastle*, 52 L. T. N.S. 851; 33 W. R. 776.

Grants by way of sale of easements of laying and maintaining pipes on land are not conveyances of property within Schedule I. Part 1, and the scale is not applicable to solrs' charges in respect of them: *Re Stewart*, 41 Ch. D. 494.

The scale fee under Schedule I. Part 1, for "deducing title" and "perusing and completing conveyance" is only chargeable where the whole of such business is done; where there is no deducing of title, but only perusing and completing conveyance, the remuneration must be under r. 2 (c): *In re Lacey and Son*, 25 Ch. Div. 301; and see *Re Harris, Powell, and Goodale*, 56 L. T. N.S. 477; *Ferguson & Co. to Buckley*, 21 L. R. Ir. 392.

But the schedule applies although the only investigation of title required is the perusal of a single section of a private Act of Parliament: *Ex parte Lord Mayor of London*, 34 Ch. D. 452; or the purchase is effected under the direction of the Court, so that the responsibility of the solr is diminished: *Re Merchant Taylors' Co.*, 30 Ch. Div. 28.

The scale fee for "preparing, settling, and completing lease and counterpart" (see Schedule I. Part 2) includes costs of negotiations for the lease: *Re Field, sup.*; *i.e.*, negotiations with the person to whom the lease is actually granted, other negotiations falling within r. 2 (c): *Re Martin*, 41 Ch. Div. 381; and of the preparation of a prior agreement for the lease: *Re Emanuel and Simmonds*, 33 Ch. Div. 40; and the fee for "agreements for leases" refers to agreements intended to be relied on as regulating the tenancy, not to agreements which, though referring to the lease, are collateral to it: *S. C.*

Where on sale in a partition action the Plt, owner of one-fourth, had the conduct, and his solr was paid under r. 2 (a), the solrs of Defts were held entitled to costs of perusal of conveyance, and obtaining execution under r. 2 (c): *Humphreys v. Jones*, 81 Ch. Div. 30.

By r. 3, drafts and copies made in course of business are to be the property of the client.

By r. 4, the remuneration prescribed by Schedule I. does not include stamps, counsel's fees, auctioneers' or valuers' charges, travelling or hotel expenses, fees paid on searches to public officers, on registrations, or to stewards of manors, costs of extracts from any register, record, or roll or other disbursement reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of business, such as death or insolvency of a party, nor business of a contentious character, nor proceedings in any Court, but includes law stationers' charges, allowances for time of solr and his clerks, and for copying and parchment, and all other similar disbursements.

By r. 5, proper additional remuneration may be allowed for special exertions in exceptional cases.

Rule 6 provides that in all cases to which the scales apply a solr may, "before undertaking any business," by writing communicated to the client, elect that his remuneration shall be according to the existing system, as altered by Schedule II.; but if no such election is made, remuneration is to be according to the scale.

The notice of election must be given before any business in the particular matter is "undertaken": *Hester v. H.*, 34 Ch. Div. 607; as to the acts which amount to undertaking the business within the rule, see *Re Allen*, 34 Ch. Div. 433; *Re Stewart*, 41 Ch. D. 494; *Re Metcalfe, M. v. Blencowe*, 57 L. J. Ch. 82.

An election properly made as against the client, a first mortgagee, binds the mortgagor and subsequent mortgagees: *Hester v. H.*, *sup.*; and see *Re Bridewell Hospital*, 57 L. T. N.S. 155.

An official liquidator should not, without the leave of the Court, employ a solr who gives notice of election under the rule: *Re United Kingdom Land and Building Assoc.*, 37 W. R. 486.

Rule 7 provides that a solr may accept from his client, and a client may give to his solr, security for the amount to become due to the solr for business to be transacted by him and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. For the provision of the same rule as to interest, *v. sup.* p. 229.

The charges to be made in case of attempted or ineffectual sales are provided for by r. 2 of the series of rules applicable to Sched. I. This rule does not apply where an attempted ineffectual sale and subsequent effectual sale are not conducted by the same solr; in such a case costs must be taxed under r. 2 (c) of Gen. Ord.: *Re Dean, Ward v. Holmes*, 32 Ch. D. 209; and so must costs of an attempted ineffectual sale of property where there is no probability of the sale being effected for some years to come, the money required having been raised by mortgage: *Re Smith, Pinsent & Co.*, 44 Ch. D. 303; and, *semble*, if in such case the same solr afterwards conducts a successful sale, and claims to be paid on scale, he must bring into account what he has already received.

By r. 9, where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases. The rule applies where the property of a bankrupt is sold subject to incumbrances: *Re Gallard, Exp. Harris*, 21 Q. B. D. 38.

By r. 10, the scale as to mortgages is not to apply to transfers or further charges where the title has been previously investigated by the same solr.

Where, under a private Act, trustees mortgaged the fee of a settled estate in order to pay off a mortgage on the life estate and other incumbrances, the mortgage was held a further charge within the rule: *E. of Aylesford v. E. Poulett*, (1891) 1 Ch. (C. A.) 248.

By r. 11 of the same series, "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solr of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent. As to a mortgagee's solr, it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts. In case of sales under the Lands Clauses Consolidation Act,



or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply."

Where commission (which includes a lump sum; *Burd v. B.*, 40 Ch. D. 628) is paid by the client to an auctioneer, the solr is not entitled to the scale charge, though the auctioneer merely offers the property for sale: *Re Sykes*, S. v. S., 56 L. J. Ch. 238; 56 L. T. N.S. 425; *Wood v. Calvert*, 55 L. T. 53; *Re Wilson*, 29 Ch. Div. 790; but the solr is not in such case deprived of all remuneration, but is entitled to charge under r. 2 (c): *Re Faulkner*, 36 Ch. D. 566; *Parker v. Blenkhorn*, *Newbould v. Bailward*, 14 App. Ca. 1; reversing *Re Newbould*, 20 Q. B. Div. 204. Fees paid to valuers in order to obtain the sanction of the Court to a conditional contract for sale are not commission within the rule: *Re Macgowan*, *M. v. Murray*, (1891) 1 Ch. (C. A.) 105; and on such a sale the work of the solr in negotiating is completed when the terms are agreed between the parties; and if the Court sanctions the sale he will be entitled to the scale fee: *Ib.*

A sum paid to a local agent in respect not only of the particular sale, but of work previously done, is "commission paid" within r. 11: *Re Withall*, 39 W. R. 529.

The vendor's solr was not entitled to charge purchasers with a negotiating fee where a fee had been paid by them to a surveyor: *Re Harris, Powell, and Goodale*, 56 L. T. N.S. 477; and the mortgagor's solr is not entitled to a negotiating fee for merely introducing a lender: *Re Eley*, 37 Ch. D. 40.

A re-investment in land under the Lands Clauses Act, is not within the exception in the last clause of this rule, but may be charged for according to the scale: *Re Merchant Taylors' Co.*, 30 Ch. Div. 28; *S. C.*, 29 Ch. D. 209; and the exception extends only to vendor's, and not to the purchasers' costs: *Re Stewart*, 41 Ch. D. 494.

By r. 5 of the rules applicable to Sched. I., Part 2, where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration thereby prescribed in respect of the rent, there is to be paid "a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium."

Payment for one and the same piece of business must be either according to the scale, or wholly independent of it, and when a lease is granted in consideration of premium and rent, the scale fee is applicable, even though no abstract of the lessor's title has been furnished to the lessee: *Re Robson*, 45 Ch. D. 71; and see *Re Hickley and Steward*, 54 L. J. Ch. 608; 33 W. R. 320; *Re Hasties and Crawford*, W. N. (88) 95.

Under Sched. II., the fee of 1s. per folio for perusing is not payable to a solr making advances to his client upon security of real property and perusing title deeds for that purpose: *Re Robertson*, 19 Q. B. D. 1; nor to the perusing of abstracts of title, as to which the old fee of 6s. 8d. for three sheets of eight folios remains: *Re A. Parker*, 29 Ch. D. 199.

The directions empowering the taxing master to increase or diminish the charges in Sched. II. for special reasons apply to the items for "drawing, &c.": *Re Reade's Trusts*, *Salthouse v. R.*, W. N. (89) 26; and see *Re Rees*, *R. v. R.*, 58 L. T. N.S. 68.

## SECTION XI.—ENFORCING ORDER FOR PAYMENT OF COSTS.

1. *Order, under Debtors Act, 1869, for Committal of Client for Six Weeks for Non-payment of Taxed Costs, and a Sum fixed for Costs of Application.*

WHEREAS by an order dated &c., it was ordered [*recite so much as directs payment, and the taxing master's certificate*]. Now upon motion &c., and upon hearing counsel &c., and upon reading the said order and certificate, and an affidavit of G., filed &c., of service of notice of this motion, and the said order and certificate upon C., and an affidavit of E. filed &c., whereby it appears that the said C. has, since the date

of the said order, had the means to pay the said sum of £—, and in respect of which he has made default, and has refused or neglected [*or refuses or neglects*] to pay the same; Let the said C. pay to the said A. the sum of £— for his costs of this application; And Let the said C. for default in payment of the said sum of £— be committed to Holloway prison for the term of six weeks from the date of his arrest, including the day of such arrest, unless he shall sooner pay the said sum of £— and the sheriff's fees for the execution of this order. And Let any sheriff or officer to whom an office copy of this order shall be directed by the masters of the Supreme Court take the said C. for the purpose aforesaid, if he be found within his bailiwick.

This order would now, since the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 103, and the Bankruptcy Rules, 1886, 355—362, be made by the Judge or registrar in bankruptcy, to which jurisdiction the power is transferred.

In this case an office copy of the order was endorsed with a direction to the sheriff of Staffordshire for the committal of the Defts, the *præcipe* for which was dated the 20th Jan. 1871. The return of the sheriff stated that the Defts were arrested by him on the 27th Jan. 1871.

The order ought to direct an immediate committal, and not a committal in default of payment within a week from service, and should direct payment of a sum in gross in lieu of taxed costs, to avoid detention in prison until the costs are taxed: see also Ord. 7 Jan. 1870, r. 13; L. R. 5 Ch. xxxvii.

For previous order directing payment by monthly instalments, and in default liberty to apply for committal, see *Hewitson v. Sherwin*, 10 Eq. 53.

## 2. *Attachment against Solicitor for non-payment of Balance found due from him on Taxation.*

WHEREAS by an order dated &c., It was ordered (*inter alia*) that A. B., the above-named solr, should, within a fortnight after service of the said order, deliver to C. D. a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he had been employed as the solr for the said C. D., and that it be referred to the taxing master to tax and settle the said bill with all usual and consequential directions; And whereas the taxing master, by his certificate dated &c., certified that there was due from the said solr to C. D. £—. Now, upon motion &c. by counsel for the said C. D., and upon hearing counsel for the said solr; And it appearing to the satisfaction of the Court that the said A. B. has made default in payment of the said £—, and that such default is a default by a solr in payment of a sum of money when ordered to pay the same in his character of an officer of the Court within the meaning of the Debtors Act, 1869; Let the said C. D. be at liberty to sue out a writ of attachment against the said A. B. for his contempt in not having paid the said £— to the said C. D., pursuant to the said order and taxing master's certificate.—Costs.—*Re Peters*, Kay, J., 6 May, 1887, B. 650.

### NOTES.

As to enforcing judgment or order for payment of costs by *fieri facias*, writ of sequestration, or other process of execution under O. XLII., see *inf.*, Chap. XXVII., "EXECUTION."

An order of Court for payment of costs constitutes a debt within the exceptions under sect. 4 of the Debtors Act, 1869 (32 & 33 V. c. 62), capable of being enforced by committal to prison, on application by motion on notice (Gen. Ord. 7 Jan. 1870, r. 10), for a term not exceeding six weeks, under sect. 5, in default of payment of the debt (under £50, exclusive of costs) or instalments: *Hewitson v. Sherwin*, 10 Eq. 53; *Rogers v. R.*, *sup.*, Form 1; and see *Reg. v. Pratt*, L. R. 5 Q. B. 178. The above rule has not been expressly repealed, but the jurisdiction under sect. 5 has now been transferred to the Judge and registrars in bankruptcy; Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 103, and rules thereunder; Bankruptcy Rules, 1886, rr. 355—362.

An order on a solr for payment of costs for misconduct as a solr, or for payment of a sum of money in his character of an officer of the Court, is also within the exceptions under sect. 4, and may be enforced by sequestration or by attachment, which now, under O. XLIV. 2, is not to be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued.

The term of imprisonment is limited to one year: 32 & 33 V. c. 62, s. 4.

Cases in which an attachment has been ordered against a solr for default in payment of a balance found due from him upon taxation, are: *Re Rush*, 9 Eq. 147; *Re White*, 19 W. R. 39; and see *Re V.*, I. R. 8 Eq. 355.

The liability of a solr to attachment is for non-payment of money or costs as an officer of the Court; not as an unsuccessful litigant: *Re Hope*, 7 Ch. 523, overruling *Re Barfield and Rush*, 19 W. R. 466, where a solr was attached for non-payment of a balance due from him *quid* client: but see *Esdaile v. Visser*, 13 Ch. Div. 421.

A solr or other person who has been imprisoned under sect. 4 (4) will not be discharged without an order obtained in Court from the Judge by whom the attachment was granted: *Re Thompson's Estate*, 22 W. R. 857.

The order for payment must be personally served unless otherwise directed.

In a proper case, substituted service of an order upon a solr to pay a balance may be directed: *Re Mourilyan*, 13 Beav. 84; *Re Stevenson*, 14 Beav. 27; *Re Wisewold*, 16 Beav. 357.

A suit could not be revived for the purposes of costs only (see Dan. 1387). But the Solicitors Act, 1870 (33 & 34 V. c. 28), s. 19, provides that whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive [continue] such suit [action], and thereupon to prosecute such decree or order. This section applied only to an abatement which took place after the Act, although the decree or order for payment of costs might have been made before: *Doggett v. E. C. R. Co.*, 6 Ch. 474; and see *Huntley v. Wortley*, W. N. (73) 4.

Payment of taxed costs may be enforced, notwithstanding the solr has omitted to furnish cash accounts of money received in respect of separate transactions of which the client was at the time aware: *Re Lee, Exp. Neville*, 4 Ch. 43. The Court will enforce against a firm of solrs an undertaking to pay a sum for costs: *Re Woodfin and Wray*, 30 W. R. 422.

Under 6 & 7 V. c. 73, s. 26, and 23 & 24 V. c. 127, s. 22, a solr's debt for costs is not extinguished by his being uncertificated, but only his remedy; and the want of a certificate does not exempt the client from payment of costs: *Re Hope*, 7 Ch. 766.

And items will not be disallowed solely on the ground that at the particular time the solr was uncertificated: *Re Jones*, 9 Eq. 63.

The Attorneys and Solicitors Act, 1874 (37 & 38 V. c. 68), s. 12, imposes a penalty not exceeding £10 for wilfully and falsely pretending to be duly qualified to act as an attorney or solr; and provides that no costs, fee, reward, or disbursement on account of, or in relation to, any act or proceeding done or taken by any person who acts as an attorney or solr without being duly qualified shall be recoverable in any action, suit, or matter by any person or persons whomsoever.

Under this section, not only an uncertificated solr, but also his client is prevented from recovering costs from the party otherwise liable: *Fowler v. Monmouth, &c. Co.*, 4 Q. B. D. 334; *Verlander v. Eddolls*, 51 L. J. Q. B. 55.

## CHAPTER XVIII.

### CHAMBERS, AND PROCEEDINGS UNDER JUDGMENT.

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#### SECTION I.—PROCEEDINGS IN CHAMBERS GENERALLY.

##### 1. *General Adjournment to Chambers.*

LET this action [*or matter, or petition, or application*] be adjourned for consideration in Chambers.

##### 2. *Particular Reference—Accounts and Inquiries.*

LET the following accounts and inquiries be taken and made, that is to say: 1. An account &c.: 2. An inquiry &c.

##### 3. *Order on Summons in Chambers.*

Mr. Justice K., at Chambers.

UPON the application of the Plt [*or Deft*] A., and upon hearing the solrs for the applicant, and for &c. [*Name any parties or persons appearing*], and upon reading [*an affidavit of &c., filed &c., of service of the summons on &c.: Name any parties or persons served and not appearing, and enter any evidence*], It is ordered that &c.

##### 4. *Order on Summons adjourned into Court.*

THE application of (the Plt *or* Deft) A., which upon hearing the solrs for the applicant, and for &c., in Chambers, was adjourned to be heard in Court, coming on (the — day of — and) this day to be heard accordingly, and upon hearing counsel for the applicant and for &c., and upon reading &c., This Court doth &c.

For order on further consideration of action commenced by admon summons adjourned into Court, see Chap. XX.

##### 5. *Summons refused or dismissed in Chambers.*

UPON the application of (the Plt *or* Deft) A. that [*Recite summons*], and upon hearing &c. (Form 3, *sup.*), the Judge doth not think fit to make any order upon this application [*If so, But doth order that the said (Plt or Deft) A. do pay unto the said (Deft or Plt) B. the costs of this application, to be taxed by the taxing master*], [*Or, if on*

*summons originating proceedings in Chambers*, the Judge doth order that the summons filed in this action do stand dismissed out of this Court], [*If so*, with costs to be taxed by the taxing master; And Let the said (Plt) A. pay to the said (Deft) B. the amount of such costs when taxed].

If on adjournment into Court, vary introduction as in Form 4; and as to costs, see *inf.* pp. 278, 284.

#### APPLICATIONS AND PROCEEDINGS IN CHAMBERS.

By Jud. Act, 1873, s. 39, any Judge of the High Court may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by the Act vested in the High Court, in all such proceedings as before the passing of the Act might have been heard in Court or in Chambers respectively by a single Judge, or as may be directed or authorized to be so heard by any rules of Court.

By the 18 & 19 V. c. 134, s. 16, the jurisdiction of the Judge in Chambers comprised such of the matters, in respect of which the Court was empowered by Act of Parliament to make orders in a summary way on petition or motion, as the L. C., with the advice of the Master of the Rolls and Vice-Chancellors, or any two of them, might by general order direct. But by Jud. Act, 1873, s. 17, all rules of Court must now be made in the mode there prescribed.

By Jud. Act, 1884, s. 13, the provisions of sect. 16 of 18 & 19 V. c. 134, are extended to all applications under any Act passed or thereafter to be passed under or by virtue of which the High Court of Justice or any Judge thereof is empowered to make any orders in respect of trust funds, or any other matters upon petition or motion in a summary way.

Applications and proceedings in Chambers are now regulated by O. LIV. and O. LV.

By O. LIV. 1, every application at Chambers not made *ex parte* is to be by summons; and by r. 2, every application for payment or transfer out of Court made *ex parte*, and every other application made *ex parte* in which the Judge or proper officer shall think fit so to require, is to be made by summons. Summonses are not to be altered after they are sealed except upon application at Chambers: r. 3.

An originating summons, where service is necessary, is to be served seven clear days before the return thereof; and every other summons two clear days, unless otherwise ordered: r. 4.

Rule 5 provides as to proceeding *ex parte* when any of the parties fail to attend; and r. 6 for the re-consideration of *ex parte* proceedings, and as to costs caused by the non-attendance of the party failing to attend; and r. 7 for costs thrown away by such non-attendance when the Judge does not think it expedient to proceed *ex parte*.

By r. 8, where matters in respect of which summonses have been issued are not disposed of, the parties are to attend again from time to time without further summons.

A party making an application in Chambers may include in it all matters upon which he then requires an order or the directions of the Judge; any such application may be adjourned by the Judge from Chambers into Court, or from Court into Chambers: r. 9; and as to the power of one official to dispose of business for another, see r. 9a.

#### PROCEEDINGS IN CHAMBERS IN THE CHANCERY DIVISION—APPLICATIONS TO BE MADE THERE.

By O. LV. 1, the business in Chambers in the Chancery Division is to be carried on by the Judges to whom Chambers are attached in conjunction with their Court business, and, by r. 1a, in any proceeding in Chambers any party may, if he so desires, be represented by counsel.

The business to be disposed of in Chambers by Judges of the Chancery



Division, in addition to the matters which by any other rule or by statute may be disposed of there, consists of the following matters, as set forth in O. LV. 2 :—

“(1.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights, or where the title depends only upon proof of the identity, or the birth, marriage or death of any person.”

The generality of this sub-section is not qualified by those which follow : *Re Brandram*, 25 Ch. D. 366 ; *Re Broadwood*, 55 L. J. Ch. 646 ; 55 L. T. N.S. 312 ; so that an application under the Trustee Relief Act for payment of a fund exceeding £1,000 to a person whose title depends merely upon proof of his birth must be made by summons : *Re Broadwood*, *sup.*

As to what amounts to an “order declaring rights,” see *Re Brandram*, *sup.*

The mere fact that the fund exceeds £1,000 is not sufficient ground for presenting a petition : *Bates v. Moore*, 38 Ch. D. 381 ; commenting on *Re Rhodes*, 31 Ch. D. 499.

As to the safeguards afforded by the mode of procedure by petition, see *Re Rhodes*, *sup.* ; *Re Broadwood*, *sup.* ; *Slater v. Slater*, W. N. (88) 320.

“(2.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter, where the cash does not exceed £1,000, or the securities do not exceed £1,000 nominal value.”

This sub-section (like sub-sect. 1) is of general application : *Exp. Maidstone and Ashford Rail. Co.* ; *Exp. Bala and Festiniog Rail. Co.*, 25 Ch. D. 168 ; and extends to applications for payment out of Court under the Lands Clauses Act, 1845 : S. C. ; *Re Calton's Will*, 25 Ch. D. 240 ; *Re Madgwick*, 25 Ch. D. 371 ; and the summons, if under s. 85, should be sealed by the company as a petition formerly was : *Exp. Maidstone and Ashford Rail. Co.*, *sup.* ; *Re Madgwick*, *sup.* But where the fund exceeds £1,000, application for payment out of a share less than £1,000 must be by petition : *May v. Dowse*, W. N. (84) 122 ; and see *Re Evan Evans*, 54 L. T. N.S. 527 ; *Re Haworth*, W. N. (85) 48.

As to the necessity of an affidavit of no incumbrances on payment out of Court of money representing real estate, see *Williams v. Ware*, 57 L. J. Ch. 497.

“(3.) Applications for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise.”

“(4.) Applications under 36 Geo. 3, c. 52, s. 32 (the Legacy Duty Act), in all cases where the money or securities in Court do not exceed £1,000, or £1,000 nominal value.”

As to payment out of Court under this Act, *v. inf.* Chap. XXXVIII., “INFANTS.”

An application for advancement out of a fund exceeding £1,000 must be by petition : *Re Coore*, W. N. (83) 169 ; and for a case in which a fund exceeding £1,000 was transferred out on motion, it being doubted whether application could be made under sub-s. 1, see *Re Barker*, W. N. (84) 237.

“(5.) Applications under 10 & 11 V. c. 96, and 12 & 13 V. c. 74 (the Trustee Relief Acts), in all cases where the money or securities in Court do not exceed £1,000, or £1,000 nominal value.”

As to the procedure under the Trustee Relief Acts, *v. inf.* Chap. XLI., “TRUSTEES.”

“(6.) Applications under 9 & 10 V. c. 20 (the Parliamentary Deposits Act), or any other Act relating to Parliamentary deposits, for investment, payment of dividends, and payment out of Court.”

As to procedure under the Parliamentary Deposits Acts, *v. inf.* Chap. LV.

“(7.) Applications for interim and permanent investment and for payment of dividends, under the Lands Clauses Consolidation Act, 1845, and any other Act whereby the purchase-money of any property sold is directed to be paid into Court.”

As to the practice under the Lands Clauses Acts, *v. inf.* Chap. LIV.

That this sub-section is not *ultra vires*, see *Exp. Lord Mayor of London*, 25 Ch. D. 384.

“(8.) Applications under the Trustee Acts, 1850 and 1852, in all cases where a judgment or order has been given or made for the sale, conveyance, or

transfer of any stock, or of any hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein."

By r. 13a, "in all cases in which the Court has jurisdiction to appoint new trustees upon petition, an application may be made to a Judge in Chambers by summons, and thereupon new trustees may be appointed, and by the same or any subsequent orders to be made on the same or any other summons for the purpose, such vesting and other consequential orders may be made as the Court has jurisdiction to make upon petition for the appointment of new trustees."

As to the procedure under this rule, and generally under the Trustee Acts, *v. inf.* Chap. XLI., "TRUSTEES," and that, notwithstanding this rule, a petition may be presented in a complicated case, see *Re Morris's Settlement*, 60 L. T. N.S. 96; 37 W. R. 317.

"(9.) Applications on behalf of infants under 1 Will. 4, c. 65, ss. 12, 16 and 17, when the infant is a ward of Court, or the admon of the estate of the infant, or the maintenance of the infant, is under the direction of the Court."

As to applications in reference to infants, *v. inf.* Chap. XXXVIII., "INFANTS."

"(10.) Applications under 18 & 19 V. c. 43, for the settlement of any property of any infant on marriage."

As to the procedure under the Infants' Settlement Act, *v. inf.* Chap. XXXVIII., "INFANTS."

"(11.) Applications under the Copyhold Acts respecting any securities or money in Court. Notice of any such application is not to be given to the Copyhold Commissioners unless the Judge shall so direct."

As to the Copyhold Acts, *v. inf.* Chap. LVII.

"(12.) Applications as to the guardianship and maintenance or advancement of infants." See Chap. XXXVIII., "INFANTS."

"(13.) Applications connected with the management of property."

"(14.) Applications for or relating to the sale by auction or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase-money."

"(15.) All applications under 6 & 7 V. c. 73 (not being applications for orders of course), for the taxation and delivery of bills of costs, and for the delivery by any solr of deeds, documents and papers."

As to these applications, *v. sup.* Chap. XVII., "Costs," pp. 211 *et seq.*

"(16.) Applications for orders on the further consideration of any cause or matter where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders."

As to further consideration, *v. inf.* Chap. XX.

"(17.) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and, generally, all applications relating to the conduct of any cause or matter."

"(18.) Such other matters as the Judge may think fit to dispose of at Chambers."

By r. 3, any of the following persons—(1) the exors or admors of a deceased person; (2) trustees under any deed or instrument; (3) persons claiming as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir, or as c. q. tr., or by assignment or otherwise under any such creditor or other person, may take out, as of course, an originating summons for the determination, without an admon of the estate or trust, of any of the following questions or matters:—

"(a.) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or c. q. tr.;

"(b.) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;

"(c.) The furnishing of any particular accounts by the exors or admors or trustees, and the vouching (when necessary) of such accounts;

"(d.) The payment into Court of any money in the hands of the exors or admors or trustees;

"(e.) Directing the exors or admors or trustees to do or abstain from doing

any particular act in their character as such exors or admors or trustees;

“(f.) The approval of any sale, purchase, compromise, or other transaction;

“(g.) The determination of any question arising in the admon of the estate or trust.”

And by r. 4, “any of the persons named in the last preceding rule may in like manner apply for and obtain an order for:—

“(a.) The admon of the personal estate of the deceased;

“(b.) The admon of the real estate of the deceased;

“(c.) The admon of the trust.”

Upon a summons under r. 3 there is no jurisdiction to determine questions which could not formerly have been determined in an action for the admon of an estate or execution of a trust: *Re Davies, D. v. D.*, 38 Ch. D. 210; *Re Carlyon, C. v. C.*, 56 L. J. Ch. 219; *Re Royle, R. v. Hayes*, 43 Ch. Div. 18; *Conway v. Fenton*, 40 Ch. D. 512; *ex. gr.*, a question arising between legal devisees: *Re Davies, sup.*; or between a person claiming under the will and a person claiming adversely: *Re Bridge, Franks v. Worth*, 56 L. J. Ch. 779; unless the person so claiming submits to have the case heard on summons: *Re Royle, sup.*; but a claim by heir-at-law, named as devisee, to real estate as undisposed of by the will, could be tried on originating summons: *Re Hargreaves, Midgley v. Tatley*, 43 Ch. Div. 401.

This procedure is only intended for the decision of simple questions: *Re Giles, Real and Personal Advance Co. v. Michell*, 43 Ch. Div. 391; and the Court will not, on originating summons, try such questions as priority between mortgagees: *S. C.*; a dispute as to a debt turning on matters of fact; *secus*, where before the Court merely on a point of law: *Re Powers, Lindsell v. Phillips*, 30 Ch. Div. 291; a claim by c. q. trs. involving the setting aside of a release: *Re Ellis's Trusts, Kelson v. Ellis*, 37 W. R. 91; *Re Garnett, Gandy v. Macaulay*, 31 Ch. Div. 1; whether Deft was co-trustee with Plt: *Elworthy v. Harvey*, 60 L. T. N.S. 30; 37 W. R. 164; whether there has been a complete declaration of trust of additions to an existing trust fund: *Re Walter's Trusts, Neison v. W.*, W. N. (90) 132.

Upon such a summons there is jurisdiction to give costs out of the estate, provided the proper parties are before the Court: *Re Medland, Eland v. Medland*, 41 Ch. Div. 476; and where the summons was for general admon new trustees might (previously to r. 13a) be appointed: *Re Allen, Simes v. S.*, 56 L. T. N.S. 611; distinguishing *Smith v. Gill*, 53 L. T. N.S. 623; 34 W. R. 134; and a receiver may be appointed: *Gee v. Bell*, 35 Ch. D. 160; *Barr v. Harding*, 36 W. R. 216; before final judgment: *Re Francke, Drake v. F.*, 58 L. T. N.S. 305.

An objection to the jurisdiction ought to be taken in Chambers: *Re Davies, D. v. D.*, 38 Ch. D. 210; *Re Turcan*, 58 L. J. Ch. 101.

R. 5 specifies the persons who are to be served with the summons under rr. 3 and 4.

By r. 5a, the procedure by originating summons is extended to the following relief sought in respect of mortgages, viz., sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee; and by r. 5b, the persons to be served in such cases are those who, under the existing practice in the Chancery Division, would be proper Defts to an action for the like relief.

The Court refused under this rule to decide a question of priority between mortgagees; and *quære* whether it has jurisdiction to do so: *Re Giles, Real and Personal Advance Co. v. Michell*, 43 Ch. Div. 391.

As to proceedings in Chambers in admons, foreclosures, and redemption, see *inf.* Chap. XLIV., “ADMINISTRATION,” and Chap. XLVII., “MORTGAGES.”

By r. 13, any application to a Judge in Chambers under the Charitable Trusts Act, 1853, s. 28, is to be made by summons; but no order under the Act by the Judge in Chambers, where the gross annual income of the charity has not been declared by the Charity Commrs to exceed £100, is to be subject to appeal except by leave of the Judge: r. 14.

For the limits of the jurisdiction of the masters in the Queen's Bench Division, and of the registrars in the Probate Division, see O. LIV. 12.



Injunctions are not granted in Chambers in the Chancery Division (see *English v. Vestry of Camberwell*, W. N. (75) 256), except by consent.

By O. XIV. 2, applications for leave to enter final judgment are to be by summons in Chambers.

By O. XV. 2, an application for an account where the writ is indorsed under O. III. 8, is to be by summons in Chambers.

By O. XXXV. 6, 7, in actions "proceeding" in district registries, the registrar may exercise the jurisdiction of a Judge in Chambers, except such as the masters are by O. LIV. 12, precluded from exercising, and the procedure is the same as in Chambers: *v. sup.* pp. 151—153.

By r. 6a, where a cause is proceeding in the Liverpool or Manchester district registries, the district registrar is to act as chief clerk, and as registrar and taxing master according to directions to be given by the Judge; but no order for payment out of Court to an amount exceeding £50 is to be made except by the Judge in person, and no district registrar, who is a practising solicitor, is to tax costs.

On an application by petition for a stop-order the costs were disallowed, on the ground that it should have been by summons, though the mortgagor did not concur: *Walsh v. Wason*, 22 W. R. 676; and where Defts offered to submit to a perpetual injunction to be obtained on summons, and the Plt set the action down on motion for judgment, costs of summons only were allowed: *London Steam Dyeing Co. v. Digby*, 57 L. J. Ch. 505; *Allen v. Oakley*, 62 L. T. N.S. 724; and Defts having offered proper terms in Chambers, the Plts had to pay costs of an adjournment into Court: *Real and Personal Advantance Co. v. M'Carthy*, 14 Ch. D. 188.

An application for a further affidavit in answer should be by summons: *Chesterfield, &c. Co. v. Black*, 24 W. R. 783.

#### ADJOURNING TO AND FROM CHAMBERS.

The power to adjourn matters for consideration in Chambers given by 15 & 16 V. c. 80, s. 27 (now repealed), is still frequently exercised.

By O. LIV. 9, in any cause or matter where any party thereto makes any application at Chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of the Court or Judge. Upon the hearing the Court or Judge may make any order, and give any directions relative to or consequential on the matter of such application as may be just; "any such application may, if the Judge thinks fit, be adjourned from Chambers into Court, or from Court into Chambers"; and by r. 9a, on the application of any party, any master, registrar, taxing master, or chief clerk may, and, if the circumstances require it, shall, hear and dispose of any application on behalf of any other master, registrar, taxing master, or chief clerk respectively by whom the application would otherwise have been heard; and any taxing master may tax costs under O. XIV., or other short bills of costs, in all causes or matters, whether assigned to him or to any other taxing officer of the same division.

As to obtaining the registrar's note on adjournment to Chambers, when no order is drawn up, *v. inf.* p. 342, and O. LV. 29.

As to the adjournment of petitions for consideration in Chambers, see Chap. XXV., "PETITIONS."

The course of adjourning the whole matter to Chambers is also sometimes conveniently adopted in other cases.

An adjournment from Chambers into Court is not an appeal from the decision of the chief clerk, but a continuation of the hearing in Chambers, and any party has a right to go before the Judge at the risk of costs, at any time before the chief clerk's order becomes operative: *Scott v. Homer*, 60 L. J. Ch. 238; 63 L. T. N.S. 618; but if the chief clerk makes an order which is drawn up, then a motion may be made to discharge it: *Leeds v. Lewis*, 3 Jur. N.S. 1290.

On the hearing of a summons adjourned into Court, where the chief clerk has fixed a time for filing evidence, affidavits subsequently filed cannot be used: *Re Chifferiel, C. v. Watson*, 58 L. J. Ch. 177.

Where accounts are being taken, particular items ought not to be adjourned before the Judge unless a question of principle is involved, and a solr un-

reasonably insisting on an adjournment may be made to pay costs: *Upton v. Brown*, 20 Ch. Div. 731.

When the further consideration of an admon summons is adjourned into Court, the course is to send a note to the registrar to the effect that the further consideration of the matter and cause is adjourned into Court, to be set down in the cause book, after the causes already set down; and if the parties desire to have it heard as a short cause, the note directs it to be put in the paper on a short cause day. See O. xxxvi. 21.

For form of summons for further consideration in Chambers, see O. LV. 72.

#### COSTS OF ADJOURNMENT.

Any objection to the jurisdiction on an originating summons should be taken in Chambers, or the costs of the adjournment, even though the summons be dismissed with costs, will not be allowed: *Re Davies*, 38 Ch. D. 210; and a solr will be ordered personally to pay the costs of an unnecessary adjournment on which he insists: *Barnard v. Scoles*, 37 W. R. 668; *Upton v. Brown*, *sup.*

#### POWERS AND DUTIES OF CHIEF CLERKS.

By O. LV. 15, the Judges of the Chancery Division have power, subject to the rules, to order what matters shall be heard by the chief clerks, and what matters shall be heard by themselves, and particularly if the Judge shall so direct, his chief clerks shall take such accounts and make such inquiries as have usually been taken and made by the chief clerks, and the Judge shall give such aid and directions as he thinks fit, subject to the suitor's right to bring any point before him; but "no order appointing a new trustee, or for general admon, or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person, or other property held upon any trust, or concerning the parties entitled thereto, and no vesting or other order consequential on the appointment of new trustees, shall be made, except by the Judge in person," and summonses under O. LV. 3, for the opinion of the Court or a Judge upon the construction of a document or any question of law, and any application for the appointment of a provisional liquidator, and applications for substituted service, and for service out of the jurisdiction, are to be brought before the Judge in person.

Summonses are generally disposed of in Chambers by the chief clerk, but every suitor has the right, under this rule and r. 69, to be heard before the Judge personally: *Re Agricultural, &c. Co.*, 3 D. F. & J. 194; *Hayward v. H.*, Kay, 31; *Re London, &c. Assurance Co.*, 5 W. R. 794; *Re Mitchell*, 12 W. R. 39; *Re Watts, Smith v. Watts*, 22 Ch. Div. 5; *Scott v. Homer*, 60 L. J. Ch. 238; 63 L. T. N.S. 618.

As to the powers of the chief clerks, see r. 16; and by r. 17, parties and witnesses summoned to attend before a chief clerk are bound to attend, and are liable to process of contempt for disobedience.

As a general rule, chief clerks should not personally take examinations, but should send them to the examiners of the Court: *McAlister v. Walters*, W. N. (90) 204; *et v. Ib.* 224, and *sup.* p. 99.

In prosecuting inquiries under an admon decree, any person able to give information as to the assets may be summoned as a witness, and must answer the receiver's questions, but not so as to make himself liable in a pending action brought by the receiver: *Venables v. Schweitzer*, 16 Eq. 76.

But after attending before an examiner appointed with his consent, under the Companies Act, 1862, s. 115, a witness could not refuse to attend because his depositions were being used against him in an action by a shareholder: *Re Lisbon, &c. Co.*, 2 Ch. D. 785.

A party summoned as a witness cannot refuse to be sworn because he cannot have the aid of counsel: *Re Electric Telegraph Co.*, 24 Beav. 137.

A practice excluding further evidence by a party after cross-examining on the evidence on the other side may, as a convenient general rule, be properly adopted in Chambers: *Issard v. Lambert*, 44 Ch. Div. 253.

If a witness, summoned by the chief clerk, refuses to attend, an order for his attendance, under O. xxxvii. 13, must be made before attachment can issue: *Powell v. Nevitt*, 55 L. T. N.S. 728.

As to whether a Judge at Chambers can commit for a contempt committed before him there, see *Re Johnson*, 20 Q. B. Div. 68.

## ASSISTANCE OF EXPERTS.

The Judge in Chambers may, in such way as he thinks fit, obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons the better to enable any matter at once to be determined, and he may act upon the certificate of any such persons: r. 19, in substitution for 15 & 16 V. c. 80, s. 42. For instances, see *A. G. v. Chambers*, 4 D. & J. 58; *Case v. Metropolitan Rail. Co.*, 27 Beav. 427.

The report of such an expert was merely to inform the Court, and evidence in opposition could be received: *Ford v. Tynte*, 2 D. J. & S. 127; *Morris v. Llanelly Rail. Co.*, W. N. (68) 46; and the chief clerk could not refer the whole case to an accountant and adopt his report as part of the certificate: *Hill v. King*, 3 D. J. & S. 418.

Though the provision in the repealed Act giving this power to the Court as well as the Judge has not been repeated, the Court still directs experts to inquire and report to it, and the report is filed and entered in the order: *Charlton Chalk, Land, and Ballast Co., Limited v. Fuller*, M. R., 18 June, 1877; but such an order can apparently be made only by consent. The expert has often been treated as a special referee, and so described in the order appointing him: *Bond v. Tone*, 8 Feb. 1884 (G. L. Reg. fo. 131). But (notwithstanding the suggestion of Fry, L. J., in the case of *Lady Wenlock v. River Dee*, 19 Q. B. Div. 159) *semble*, this is not correct, as the procedure laid down in the rules applying to the report of a special referee is not applicable when a report from an expert is required to assist the Court in arriving at a decision based on other evidence besides the report.

In *Bendelow v. Wortley Union*, 15 Nov. 1887, Stirling, J., considered that it was not proper to describe an expert so nominated as a special referee, and it was not necessary to draw up the order directing him to report. The report was filed and entered in the order as "The report of S. F. M., the person nominated by consent of the Plts and Defts to inquire and report whether, by reason of the situation of the place called 'The Hirst,' and now used as a small-pox hospital, or the management thereof or otherwise, there is danger created to the Plts, or any of them, which report is filed at the Central Office." See form of order, *inf.* p. 521.

And now, as to referring questions to official or special referees, see Arbitration Act, 1889 (52 & 53 V. c. 49), and O. xxxvi. 43—55, and *inf.*, Chap. XXVI., "ARBITRATIONS."

## SUMMONSES IN CHAMBERS.

By O. LV. 20, an originating summons is prepared by the applicant or his solr, and sealed in the Central Office, and when sealed is deemed to be issued. A copy of the summons, properly stamped, is to be left at the Central Office to be filed: O. LV. 20. For form of originating summons, see R. S. C., Appx. L., Form 25.

By r. 21, the day and hour for attendance under an originating summons are left blank and added after the sealing thereof when the day and hour have been fixed at Chambers, and the summons is then sealed with the seal in use there.

As to an originating summons under the Jud. Acts being an "action," *v. sup.* pp. 3, 7.

If the summons is not served in time a new time is fixed: see O. LV. 22.

By r. 23, parties served with an originating summons are to enter appearances in the Central Office and to give notice thereof.

The third party procedure under O. xvi. 48—55, is not applicable to proceedings by originating summons: *Re Wilson, A. G. v. Woodall*, 45 Ch. D. 266.

As to making application by motion, in lieu of summons, to Judge who does not sit in Chambers, see *Snow v. Bolton*, 17 Ch. D. 433.

## SECTION II.—PROCEEDINGS UNDER JUDGMENT OR ORDER.

1. *Service of Notice of Judgment abroad.*

UPON the application of the Plt, and upon hearing the solrs for the Plt, and it appearing by the affidavit &c. that B., who is required to be served with notice &c. [Form 1], is resident at — in the United States of America, and upon reading the said judgment and affidavit, It is ordered that the Plt be at liberty to serve notice of the said judgment upon the said B. in the United States of America, and that the time to be specified in the indorsement on such notice within which the said B. may apply to this Court to add to or vary the said judgment is to be (two calendar months) after such service; And it is ordered that a copy of this order be served with the said notice.—*Re Bailey, Bailey v. B.*, V.-C. M. at Chambers, 16 Jan. 1877, A. 50.

2. *Service on Infants and other Persons abroad of Notarial Translation of Notice of Judgment.*

UPON the application of the Plt, and it appearing by the affidavit &c. that F. and A., who are respectively required to be served with the notice of the judgment pursuant to O. xvi. 40, are respectively infants, and are residing at &c., in Paris, in the Republic of France, and that R. and E. his wife, who are also required to be served with notice of the said judgment pursuant to the said rule, are residing at &c., in Paris aforesaid; and upon reading the said judgment, dated &c., and an affidavit of &c., filed &c., It is ordered that a notarial translation of notice of the said judgment, and of this order, into the French language be served upon the said F. and A., the infants, by serving the same upon R. their father, at &c. or elsewhere in Paris aforesaid, and upon the said R. and E. at &c. or elsewhere in Paris aforesaid, and that the time to be indorsed on such notices within which the said F., A., R., and E., may apply to this Court to add to or vary the said judgment, is to be (six weeks) after service of the said notice.—*Ayrton v. Badger*, V.-C. M. at Chambers, 21 June, 1876, A. 93.

This order is usually made at Chambers; for the practice thereon, see O. xvi. 40—44.

For order dispensing with service of notice of decree, under Cons. Ord. 35, r. 18, now O. IV. 35, see *Gavin v. Osborne*, V.-C. S., 25 Nov. 1858, A. 247. No order is necessary to serve this notice, except where the party is out of the jurisdiction. An order will be made extending the time specified in the notice: *Hasluck v. H.*, V.-C. W. at Chambers, 9th June, 1863, A. 1084; and see *Maybery v. Brooking*, 7 D. M. & G. 673.

3. *Leave to attend Proceedings under Judgment or Order—**O. xvi. 47.*

UPON the application of &c., and it being alleged that the said applicant is a claimant upon [or interested in] the estate of B., the testator [or intestate] in the pleadings named, and that the Plts on the —

obtained a judgment [*or order*] for the admon of the estate of the said testator [*or intestate*], that the said A. hath not been served with a copy of the said judgment [*or order*], and is desirous of having liberty to attend the proceedings under the same, and upon reading the said judgment [*or order*], It is ordered that the said A. be at liberty to attend the proceedings under the said judgment [*or order*], dated &c.

#### 4. *Classification Order—O. LV. 40.*

UPON the application of the Plt, and upon hearing the solrs for the Plt, and for the Defts, and for C., D., and E., who have been served with notice of the judgment, and have entered appearances, and upon reading the judgment [*or order*] dated &c., It is ordered that, for the purposes of the proceedings in Chambers, except proceedings in reference to the accounts of the said A., Mr. X. be nominated to represent the class of [*describe the class*].

#### 5. *Another Form.*

UPON the application of &c., Let, for the purposes of the future proceedings in this action before the Judge in Chambers under the judgment dated &c., Mr. P. be nominated, in pursuance of O. LV. 40, to represent the following persons who are residuary legatees under the will of D., that is to say &c.—*Re Docwra, D. v. Faith, V.-C. B. at Chambers, 17 July, 1884, A. 1468.*

This order was altered and framed as it now stands by the Court of Appeal.

#### 6. *Conduct of Action given to Plt in a prior Action.*

UPON the application of L., the Plt in the first above-mentioned action, and upon hearing &c., and upon reading &c., It is ordered that the conduct of the secondly mentioned action be committed to the said L.—Costs of application to be included in costs of the second action.

As to the conduct of admon proceedings, see Chap. XLIV., "ADMINISTRATION."

#### 7. *Service of Notice of Judgment on Infants or Persons of Unsound Mind—O. XVI. 40.*

UPON the application of the Plt, and upon hearing the solr for the applicant, and it being alleged that A., B., and C., who are respectively required to be served with notice of the judgment [*or order*], dated &c., pursuant to r. 40 of O. XVI., are respectively infants [*or persons of unsound mind not so found by inquisition*], as by the affidavit &c. appears; And upon reading the said judgment [*or order*] and affidavit, It is ordered, that notice of the said judgment [*or order*] be served upon the said A., and that a copy of this order be also served with each of the said notices.

This notice is to be served in the same manner as a writ of summons in an action: O. XVI. 44.

8. *Order to bring in Accounts and Answers to Inquiries within a Time Limited.*

UPON the application of (the Plt) A., and upon hearing the solr for the applicant, and for (the Deft) B., and upon reading the judgment [or order], dated &c., It is ordered that the said (Deft) B. do within — days after service of this order [or on or before &c., or subsequently, within — days after service of this order], leave in the Chambers of Mr. Justice N., situate &c., the following accounts and statements, duly verified by affidavit, that is to say &c. [*state them from the judgment or order*].

For such orders, see *Russell v. B.*, M. R. at Chambers, 3 Dec. 1853, B. 172; *Price v. P.*, M. R. at Chambers, Aug. 1853, B. 1241; *Reece v. Grimley*, M. R., 5 June, 1854. For like order to leave further account, *Paterson v. P.*, M. R., 2 Dec. 1861, B. 2307.

## NOTES.

By O. XVI. 40, "wherever, in any action for the admon of the estate of a deceased person, or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made—

(a) Under O. XV.;

(b) Under O. XXXIII.;

(c) Affecting the rights or interests of persons not parties to the action; the Court or a Judge may direct that any persons interested in the estate or under the trust or in the hereditaments, shall be served with notice of the judgment or order; and after such notice such person shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or Judge to discharge, vary, or add to the judgment or order."

By r. 4, "it shall not be necessary for any person served with notice of any judgment or order to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend the proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a Deft entering an appearance."

And as to leave to attend admon proceedings, see *inf.* Chap. XLIV., "ADMINISTRATION."

Where notice was served by Plts on a person not affected by the judgment, he was held right in appearing, and Plts paid all costs in Court below and Court of Appeal: *Re Symons, Betts v. B.*, 54 L. T. N.S. 501.

## CONDUCT OF PROCEEDINGS.

By O. XVI. 49, the Judge may give the conduct of the action or proceeding to such person as he may think fit.

As to the conduct of proceedings in admon actions, *v. inf.* Chap. XLIV., "ADMINISTRATION;" and in the case of concurrent actions, *inf.* Chap. XXXIV., "TRANSFER AND CONSOLIDATION."

Where the conduct is taken away from one party and given to another, the former will not be allowed costs of proceedings taken subsequent to the date of the order, but before it is drawn up: *Re Minter, Slater v. Callaway*, W. N. (81) 31.

## SUMMONS TO PROCEED.

By O. LV. 32, every judgment or order directing accounts or inquiries to be taken or made is to be brought into Chambers by the party entitled to

prosecute the same within ten days after the same shall have been passed and entered, and in default thereof any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution of such judgment or order unless the Judge shall otherwise direct.

Upon the judgment or order being left, a summons to proceed (r. 33) is to be issued, and upon its return the Judge, if satisfied by proper evidence that all necessary parties have been served, will give directions as to the manner of prosecuting the accounts and inquiries, the evidence to be adduced, the parties who are to attend, and the time within which each proceeding is to be taken, and will from time to time give any further necessary directions.

Where the judgment or order directs a deed to be settled, the party entitled to prepare the draft deed is, on the return of the summons to proceed, directed to deliver a copy of the draft to the party entitled to object thereto, who is to deliver his objections, if any, within eight days, for which period the proceeding is adjourned: r. 34.

By r. 35, the Judge may dispense with service of notice of the judgment or order, or may direct substituted service.

If all necessary parties are not parties to the action, advertisements for creditors may be issued, but no proceeding is to be taken until all necessary parties are bound: r. 36.

The chief clerk may decide all questions necessary under the inquiry: *Wadham v. Rigg*, 2 Dr. & S. 78.

#### PROCEDURE ON SUMMONS IN CHAMBERS.

By O. xxxviii. 1, the evidence on any summons may be given by affidavit, subject to the deponents being ordered to be cross-examined on the application of either party; and as to giving evidence, see O. xxxvii. 28, and O. xxxviii. 20, 21.

By O. xxxiii. 7, any directions for accounts or inquiries are to be numbered as in R. S. C., App. L., Form 28. The object of this order is that the answers in the chief clerk's certificate may be numbered to correspond. And so directions for sale of estates ought to be numbered, but other directions ought not. By O. xxxiii. 8, in taking any account directed, all just allowances are to be made, without any direction for that purpose in the judgment or order.

It is not usual to send to Chambers an inquiry merely involving a point of law: *Sladen v. Whitting*, V.-C. W., 26 April, 1860, Reg. Min.; but see *Prichard v. Norris*, 10 Ha. lii.; *Duffield v. Denny*, 1 W. R. 74; and mixed questions of law and fact are often so sent.

By O. xxxiii. 2, the Court or a Judge may, at any stage of the proceedings, direct any necessary inquiries or accounts to be made or taken.

By O. lv. 40, the Judge may direct classes of persons to be represented by one solr whom he may nominate. And by r. 41, may require any parties to be represented by distinct solrs. By O. xxxiii. 9, in case of delay, the Judge may give directions for the better prosecution of the proceedings by the official solr.

By O. lv. 37, the ordinary course of proceeding is to be as in Court on motions. Copies, abstracts, or extracts of or from accounts, deeds, or other documents and pedigrees, &c., are to be supplied for the use of the Judge and chief clerk, and, where so directed, copies are to be handed to the other parties, but no copies are to be made where the originals can be brought in, without special directions.

O. xxxviii. 20, 21, relate to notice of using affidavits, and O. xxxvii. 28, relates to compelling witnesses to attend.

By O. xxxiii. 4, accounts are to be verified by affidavit, and the items on each side of the account to be numbered, and the account referred to as an exhibit.

By O. xxxiii. 5, notice of surcharging is to be given.

O. lv. 45-59, provide for advertisements, and the mode of making and disposing of claims.

Under O. lv. 73, notes are to be kept of all proceedings in Chambers; and by O. xxxviii. 11, any scandalous matter contained in any affidavit may be struck out by the Judge with costs as between solr and client.

By O. li. 7, the Judge at Chambers may receive and act on the opinion of

the conveyancing counsel of the Court; but (r. 8) any party may object to such opinion, and the Judge may decide thereon in Court or at Chambers.

By O. LV. 1a, it is provided that in any proceedings before the Judge in Chambers any party may, if he so desire, be represented by counsel.

By Jud. Act, 1873, s. 50, every order made by a Judge in Chambers (except orders by consent, or as to costs only, which by law are left to the discretion of the Court, see s. 49) may be set aside or discharged upon notice by any Divisional Court, or by the Judge in Court, according to the course and practice of the particular division, and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal.

The time for moving to discharge an order made in Chambers is (subject to the discretion of the Judge) twenty-one days, by analogy to O. LVIII. 15: see *Re Hardwidge*, 52 L. T. N.S. 40; *Re Munns and Longden*, 50 L. T. N.S. 356; *Heatley v. Newton*, 19 Ch. D. 326; *Re Lewis, L. v. Williams*, 31 Ch. Div. 623; 54 L. T. N.S. 198. And the rule is the same whether the order be final or interlocutory: *Re Johnson, Manchester and Liverpool Banking Co. v. Beales*, 42 Ch. D. 505.

As to appeals from orders made in Chambers, see Chap. XXXVI., "APPEALS."

#### COSTS OF PROCEEDINGS IN CHAMBERS.

By O. LXV. 27 (12), costs of proceedings in Chambers on the higher scale may be allowed on account of the difficulty of the case, &c.

By r. 27 (13), parties may be made to pay costs caused by their own neglect or non-attendance, and are not to be allowed to charge such costs.

By r. 27 (16), no costs of counsel attending in Chambers are to be allowed, unless the Judge certifies it to be a proper case, and this rule has been held to apply to solicitor and client taxations in Q. B. D.: *Re Chapman*, 9 Q. B. D. 254; 10 Q. B. Div. 54.

By r. 27 (23), a party appearing upon any application in Court or at Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, is not to be allowed the costs without express direction. Persons attending proceedings in Chambers under the common order without special leave may be ordered not only to bear their own costs, but to pay the extra costs occasioned by their unnecessary attendance: see *Sharp v. Cash*, 10 Ch. D. 468; *Re Marshall, Bowyer v. M.*, W. N. (79) 12.

By r. 27 (24), the costs of only one application for further time are to be allowed without special order.

As to costs of creditors establishing their debts in Chambers under any judgment or order, see O. LV. 58.

A claimant failing in Chambers to make out his claim may be ordered to pay costs: *Re Knight*, 57 L. T. N.S. 238; *Hatch v. Searles*, 2 S. & G. 157, L. JJ., 16 Nov. 1854, B. 106, though not applied for at the time: *Yeomans v. Haynes*, 24 Beav. 127; *Colyer v. C.*, 10 W. R. 748.

As to costs of proceedings in Chambers generally, see Dan. 1167; *Lister v. Bell*, 5 Jur. N.S. 115; *Halliley v. Henderson*, 4 Jur. N.S. 202. By O. LXV. 20, 21, the chief clerk is, on the taxing master's request, to transmit to him any books, papers, or documents relating to the proceedings.

More liberty to attend proceedings in Chambers does not entitle the persons having such liberty to their costs of attendance as a matter of course; and to entitle them to such costs the order giving liberty to attend should make express provision to that effect: *Day v. Batt*, 21 Ch. D. 830.

Costs of action include the costs of properly working out the judgment: *Krehl v. Park*, 10 Ch. 334, *sup.* pp. 221—223.



SECTION III.—CERTIFICATE AND APPLICATIONS TO VARY SAME.

1. *Order on Summons to vary Certificate heard in Chambers.*

High Court, &c.

Mr. Justice X. &c. at Chambers.

[*Date and Title.*]

UPON the application of (the Plt, or Deft) A. to vary the chief clerk's certificate dated the — day of —, and upon hearing the solrs for the applicant, and for &c., and upon reading &c., It is ordered &c.

2. *The like Order—on Summons Adjourned to Court.*

THE application of (the Plt, or Deft) A. to vary the chief clerk's certificate dated the — day of —, which upon hearing the solrs for the applicant, and for &c. in Chambers, was adjourned to be heard in Court, coming on (the — day of — and) this day to be heard accordingly, and upon hearing counsel for the said (Plt, or Deft) A. and for &c., and upon reading the judgment [*or order*] dated the — day of —, and the said certificate, This Court doth, &c.

If application refused, see p. 272.

3. *Order on Motion to vary the Certificate.*

UPON motion this day made unto this Court by &c., counsel for (the Plt, or Deft) A. to vary the chief clerk's certificate dated the — day of —, and upon hearing counsel for (the Plt, or Deft) A., and for &c., and upon reading &c., This Court doth &c.

If application refused, see p. 272.

4. *If Certificate is to be reviewed.*

THIS Court doth order that the chief clerk's certificate, dated &c. [*If as to part only*, as to that part which is contained in the — paragraph thereof, *or*, so far as it is thereby certified that &c.] be reviewed.—*Wakefield v. Jones*, V.-C. S., 14 Feb. 1857, B. 562; *Willoughby v. Sanders*, V.-C. K., 20 Dec. 1856; and see *White v. Coram*, 3 K. & J. 652.

5. *Where Certificate varied without referring back to Chambers, or Discharged—O. LV. 71.*

THIS Court being of opinion that, &c., doth order that the chief clerk's said certificate be varied so far as the same certifies that &c., and that the said certificate, as varied, be as follows &c., *or* be discharged.

CHIEF CLERK'S CERTIFICATE.

For the form of the chief clerk's certificate, see R. S. O., Appx. L. Form No. 10.

By O. LV. 65, the result of the proceedings is to be stated in the shape of a certificate, which is to be signed by the chief clerk, and, unless an order to

discharge or vary is made, is to be deemed to be approved and adopted by the Judge.

By r. 69, any person may, before the proceedings before the chief clerk are concluded, take the opinion of the Judge.

By r. 70, the certificate is to be filed at the Central Office, and shall thenceforth be binding on all parties to the proceedings, unless discharged or varied.

By O. LV. 68, where an account is directed, the certificate is to state the result, not set it out by schedule, but refer to the account verified by the affidavit filed, and specify by number any items disallowed or varied, and any additions by surcharge, and, if necessary, a fair transcript is to be made; the accounts and transcripts, if any, are to be filed with the certificate.

By r. 66, unless the circumstances require it, the judgment or order, or any documents, or evidence, or reasons, are only to be referred to, and not set out.

If the Judge shall so direct, the certificate shall be prepared by the solr of one of the parties, who shall obtain an appointment to settle the certificate and give notice to the other parties: r. 66a.

The certificate is not an order for payment of money within the 1 & 2 V. c. 110, s. 18, so as to make a sum certified to be due carry interest: *E. Mansfield v. Oyle*, 4 D. & J. 38.

By O. LXIII. 13, "any Judge of the Chancery Division whose Chambers may be open for business during any vacation, or any vacation Judge acting on his behalf, may issue summonses for the purpose of any proceeding before any other Judge of that division at Chambers after the vacation."

By r. 14, "in the interval between the close of any sittings and the commencement of the next sittings, the judgments or orders of any Judge may be prosecuted at the Chambers of any other Judge by his permission; and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the Chambers of the same Judge if and so far as he shall think fit."

By O. LV. 70, the time within which an application may be made by summons to discharge or vary any certificate is eight clear days after the filing of such certificate. But in the case of certificates to be acted on by the Paymaster, without further order, or certificates on passing receivers' accounts, the time limited is two clear days.

A party who has not taken out a summons to vary the certificate cannot dispute it: *Smith v. Armstrong*, 6 D. M. & G. 150; *Jaquet v. J.*, 7 W. R. 543; *Mackintosh v. G. W. Ry.*, 4 Giff. 683; 11 Jur. N.S. 681; *Lambe v. Orton*, 6 Jur. N.S. 61; 8 W. R. 111; even as to matters appearing on the record: *Leigh v. Turner*, 14 W. R. 361.

A motion for payment into Court of money found due by the certificate should not be made until the eight days have expired: *Douthwaite v. Hensley*, 18 Beav. 74; and motion for leave to receiver to distrain for rent fixed by the certificate was adjourned to come on with a summons to vary the finding: *Craven v. Ingham*, 58 L. T. N.S. 486; W. N. (88) 83.

By r. 71, if the special circumstances require it, a certificate may, upon an application by motion or summons, be discharged or varied at any time.

By O. LV. 70, the certificate (with the accounts, if any, to be filed therewith) is to be transmitted by the chief clerk to the Central Office to be there filed.

Where the application to vary a certificate is by summons, which is the more usual way, it will be disposed of in Chambers or adjourned into Court, according to circumstances. If the cause is about to come on for further consideration, and the application to vary the certificate involves any point requiring to be argued by counsel, the summons is usually adjourned into Court to come on with the cause: see *Mackintosh v. G. W. Ry.*, 4 Giff. 683; *Cooper v. Everett*, 2 W. R. 388; *Hudson v. Carmichael*, 18 Jur. 851. It is set down in the cause book upon a note from the chief clerk for that purpose, and is placed in the paper for hearing with the cause. Notice of the summons having been so set down must be given by the solr of the applicant to the solrs of the other parties. If the cause is not about to come on for further consideration, the application by summons to vary the certificate will either be disposed of by the Judge in Chambers, or if any of the parties desire to have it argued in Court, the summons will be adjourned

into Court without discussion, and placed in the paper for hearing by the registrar on a note from the chief clerk. An application to vary the chief clerk's certificate cannot be made on the hearing on further consideration unless a summons has been taken out for that purpose: *Re Dove, Bousfield v. Dove*, 27 Ch. D. 687.

An irregularity in the certificate may be waived by attending to settle it with knowledge of the irregularity: *Buckeridge v. Whalley*, 23 W. R. 224.

Where a certificate has been discharged for irregularity, a summons to proceed must be taken out on the original judgment and not on the order discharging the certificate: *Cross v. Maltby*, 8 W. R. 646.

Where by a slip the cause was set down on further consideration without a summons to vary the certificate being taken out, notice of motion was allowed to be given after the time: *Ashton v. Wood*, 8 D. M. & G. 698.

In the winding-up of a co. the certificate found a large sum due to certain policy-holders; and a summons to vary the certificate, though not taken out till six months afterwards, when a call was about to be made, was allowed to be heard: *In re Arthur Average Association*, 10 Ch. 545, 562.

As to proceedings to vary chief clerk's certificate, see Dan. 1147—1153.

The physical act of varying the chief clerk's certificate by striking out and altering portions of the original will not be ordered: *Fox v. Bearblock* (2), 30 W. R. 119, 342.

Upon a summons to vary, the Court will regard only the evidence entered in the certificate as that upon which the finding is based; but where the finding was not warranted by the evidence, and further evidence was adduced, the Court dealt with the matter on the whole evidence instead of sending it back to Chambers: *Re Miller, Chapman v. M.*, 58 L. J. Ch. 728; 60 L. T. N.S. 634.

## CHAPTER XIX.

## SALES BY THE COURT.



## SECTION I.—PROCEEDINGS UP TO CERTIFICATE.

1. *Order for Sale of Unincumbered Estate.*

LET a sufficient part of the hereditaments comprised in the indenture dated &c., in the pleadings [*or* chief clerk's certificate &c.] mentioned [*or* of the real estate of A. deceased, the testator, *or* intestate, in the pleadings, *or* summons, named; *or* of the testator's, *or* intestate's, real estate in the chief clerk's certificate mentioned] to make good the deficiency of his personal estate, *or*, if necessary, the whole thereof, be sold with the approbation of the Judge; And Let the money to arise by such sale be paid into Court to the credit of this action &c., to an account to be intituled "Proceeds of sale of [testator's, *or* intestate's] real estate," subject to further order.

As to raising separate accounts of the sale proceeds, and for leave to apply at Chambers for their distribution, see Chap. XLIV., "ADMINISTRATION."

The sale, unless directed to be made out of Court, should be directed to be made "with the approbation of the Judge": O. LI. 3; *Nash v. Worcester Impt. Commrs.*, 1 Jur. N.S. 973; and see *Re Adam's Estate*, 27 W. R. 110.

For orders for sale free from *or* subject to incumbrances, see Chap. XLIV., "ADMINISTRATION."

2. *Leave to bid.*

LET the Plt [*or* Deft, *or* any of the parties not having the conduct of the sale] be at liberty to bid for and become the purchaser at the sale of the estates directed to be sold by the judgment [*or* order] dated the — day of —, *or* of any part thereof.

For an order allowing a Deft to be the purchaser, notwithstanding he had not obtained leave to bid, see *Heath v. Barlow*, V.-C. H. at Chambers, 10 Jan. 1878, A. 45.

3. *Sale out of Court—O. LI. 1A.*

UPON the application of the Plt, and upon hearing the solrs for the Plt, and for the Defts, and upon reading the judgment, dated &c.; And the Judge being satisfied by the evidence aforesaid that all persons interested in the estate to be sold are before the Court, *or* are bound by the said judgment, doth order that the estate in the pleadings

mentioned be sold out of Court subject to a reserve price and the auctioneer's remuneration being fixed by the Judge. And Let the Plt [or Deft] receive the moneys to arise from such sale, and within — days after the receipt thereof lodge the same in Court as directed in the schedule hereto. [Add Lodgment Schedule, Form, No. 3.]

This form may be adapted to a case of a mortgage, partition or exchange.

*4. Order to sell four-fifths of Leasehold, or, by consent of Party interested, to join in selling the whole.*

LET the four undivided fifth parts of the leasehold estate at P., in the second schedule to the chief clerk's certificate stated to form part of the testator's personal estate now outstanding, be sold, together with the other undivided fifth part thereof belonging to the Deft S., in case she shall consent to join in such sale in respect of her said one-fifth, with the approbation of the Judge; And in that case, Let one-fifth part of the money to arise by the said sale be received by the Deft S., and the other four-fifth parts thereof be paid into Court &c., to the credit of this action &c. "Proceeds of testator's leasehold estate at P." subject to further order; But if the Deft S. shall not consent to join in such sale as regards her said one-fifth, then Let the testator's said four undivided fifth parts be sold, with the approbation of the Judge; And Let the money to arise by such sale be paid into Court to the same credit.—*Smith v. S.*, M. R., 16 Mar. 1857, B. 973.

For order for sale of remaining nine months of a 200 years' term (granted in March, 1862) on bill of a c. q. tr. with leave for c. q. trs. to bid, and advertisement for reversioner, see *Edwards v. L. Foley*, M. R., 22 July, 1861, A. 1963; 7 Jur. N.S. 1268.

*5. Order to sell a Diamond Ring.*

"LET the diamond ring in the pleadings mentioned be sold with the approbation of the Judge, by a proper person to be appointed by the Judge, on his first giving security; and for the purpose of such sale, Let the said ring be delivered out of the Central Office to the person so to be appointed; And Let the person so to be appointed (and to be named in the chief clerk's certificate), receive the money to arise by such sale, and, after deducting what shall be allowed by the Judge for the expenses attending the same, within fourteen days after such sale, lodge the residue of what he shall so receive in Court, as directed in the schedule hereto;—Liberty to apply. [Adapt Lodgment Schedule, Form, No. 1.]—See *Kaye v. Harvey*, V.-C. K., 5 Dec. 1861, A. 2204.

For order upon admission in the pleadings for sale of bonds in Court, see *Coddington v. Jacksonville, &c. Co.*, C. A., 27 Mar. 1878, A. 1232.

For order under O. L. 2, on "just and sufficient reason," for the sale of a horse, without prejudice to the rights of the parties as to any question in the action, see *Bartholomew v. Freeman*, 3 C. P. D. 316.

### 6. *Payment into Court of Security Fund for Deposits.*

LET L., the person appointed to receive the deposits payable by the respective purchasers on the sale directed by the judgment [*or order*] dated &c., be at liberty on or before &c., to lodge £— New Consols, standing &c. in Court as directed in the schedule hereto, as security for the deposits to be received by him as aforesaid. [Add Lodgment Schedule, Form No. 2.]

### 7. *Enforcing Payment of Deposits into Court.*

LET A., in the chief clerk's certificate [*or the order*], dated &c., named, on or before the — day of — (or within — days after service of this order), lodge the sum of £—, appearing by the said certificate [*or the affidavit of &c.*] to have been received by him as the deposits [*or deposit*] made by the several purchasers [*or the purchaser*] therein named on the several lots therein mentioned, in Court as directed in the schedule hereto. [Add Lodgment Schedule, Form No. 2.]

### 8. *Order to carry into effect conditional Contract of Sale.*

LET the conditional contract, dated &c., entered into between A. of the one part, and B. of the other part, for the sale to the said B., at the sum of £—, of the hereditaments therein mentioned, being (part of) the estates directed to be sold by the judgment [*or order*] dated &c., be carried into effect.

Where there are several contracts they may be specified in a schedule.

Where the purchaser appears and accepts the title, directions to pay in and complete may be added to the order confirming the contract: see *Leach v. Westall*, V.-C. M. at Chambers, 18 Jan. 1870, B. 143.

For order to carry a contract into effect, notwithstanding the fact that the purchaser was specially interested and a Deft, see *Chaplin v. Rickards*, V.-C. M. at Chambers, 1 Aug. 1878, A. 2545.

### 9. *The Like—with Variation in Price.*

By consent of A. (*purchaser*), Let the conditional contract, dated &c., be varied by inserting therein the sum of £—, as the purchase-money for the said hereditaments, instead of the sum of £—, therein mentioned, and as so varied, Let the same be carried into effect.

For order to carry into effect a contract for sale at a reduced price of so much of the hereditaments as had not, subsequently to the date of the contract, been taken by a railway co., see *Burgess v. B.*, 1 Feb. 1877, A. 559.

### 10. *Increased Price offered by Third Party before Confirmation of Purchase by Private Contract.*

UPON the application of the Deft on &c. to confirm conditional contract &c.; And it appearing that since the date of the said conditional contract H. had tendered a sum in excess of the sum mentioned in the said contract, it was thereupon ordered that the said

application should be adjourned to this day that notice might be given to the persons bidding to attend as they might be advised and desire to bid, and the said parties and the said W. and the said H. having severally bid for the said property, and the said H. having eventually bid £1,600 for the same, and no advance having been made on such bidding, and the said H. having signed a contract this day as purchaser, and appearing by his solr and accepting the title;—Usual directions for carrying contract into effect, and for payment in of the purchase-money.—*Re Patterson, Wade v. Patterson*, V.-C. H. at Chambers, 24 Nov. 1874, B. 3925.

#### 11. *Auctioneer's Security reduced.*

UPON the application of the Deft &c., Let the recognizance for £12,000, dated &c., entered into &c., and the bond of the said &c., dated &c., for £12,000 given as a security by the said A. B. on his appointment as auctioneer on the sale &c., and reduced from the said £12,000 to £10,000 by an order dated &c., be respectively further reduced, and stand as security to the extent of £2,500 only; And Let the same as so reduced (the said guarantee association, by their solr consenting thereto), be accepted as the security given by the said A. B.—*Re Hartley, Stedman v. Dunster*, North, J., 29 March, 1887, A. 787, P.

#### 12. *Sale under 25th Section of Conveyancing Act.*

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Deft, Let the properties comprised in the several mortgage securities in the pleadings mentioned (other than the policies of assurance mentioned in the security, dated &c.) be sold with the approbation &c., free from the incumbrances &c. Purchase-money to be paid into Court.—*London and Westminster Bank v. Ridgway*, V.-C. B., 22 May, 1885, B. 711.

#### 13. *Inquiry as to Abatement in Purchase-Money.*

DECLARE &c., And Let the following inquiry be made, that is to say:—(1) An inquiry what allowance ought to be made to the applicant by way of abatement from the purchase-money in respect of its having been so stated as aforesaid; And Let such sum (if any) as shall be allowed to the applicant on the said inquiry be deducted from the purchase-money agreed to be paid by him under the said contract.—*Re Buckley and Caton's Contract*, Pearson, J., 21 Feb. 1885, A. 226.

#### NOTES.

By Jud. Act, 1873, s. 34, all causes and matters involving the sale of real estates are assigned to the Chancery Division of the High Court.

By 15 & 16 V. c. 86, s. 55, the Court was empowered to order real estate to be sold at any time after the institution of a cause relating to real estate,

where it appeared to be necessary or expedient that it should be sold for the purposes of the suit.

For the protection of property or other like cause, sales under the section were made at any time with the same effect as on the hearing: see *Tulloch v. T.*, 3 Eq. 574; *Heath v. Fisher*, 17 W. R. 69; *Bell v. Turner*, 2 Ch. D. 411; on showing a case upon which such an order would be made at the trial: *Davis v. Ashwin*, 47 L. J. Ch. 70; *Mandeno v. M.*, Kay, ii.

By O. L. 1 (which has been substituted for the repealed 15 & 16 V. c. 86, s. 55), "if in any cause or matter relating to any real estate it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a Judge may order the same to be sold, and any party bound by the order and in possession of the estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be thereby directed."

It has been held that the rule does not give the Court any power to direct a sale where it had none previously; and that, notwithstanding the omission in the rule of the words "for the purposes of the suit," contained in the repealed section, a sale of real estate can only be ordered when necessary or expedient for the purposes of the particular action: *Re Robinson, Pickard v. Wheeler*, 31 Ch. D. 247. The words were held to show that the section applied only to admon suits: *London and County Bank v. Dover*, 11 Ch. D. 204; but in *Davis v. Ashwin*, 47 L. J. Ch. 70; 26 W. R. 139, an order for sale was made on the application of debenture holders.

An action to administer personal estate and rents and profits of real estate is not a "cause or matter relating to any real estate" within the rule: *Re Staines, S. v. S.*, 33 Ch. D. 172.

The order was made on the application of persons beneficially interested under a trust for sale, pending an inquiry and before certificate: *Martin v. Hadlow*, 1 W. R. 101; even where infants were interested: *Mandeno v. M.*, *sup.*; *Mears v. Best*, 10 Ha. li.; but not when the object was to obtain a decision of the material question before the hearing: *Prince v. Cooper*, 16 Beav. 546; nor in an admon action against the will of a person beneficially interested who submitted to pay his share of the costs for raising which the sale was proposed: *Lees v. L.*, 15 Eq. 150.

By 15 & 16 V. c. 86, s. 48, the Court was empowered to direct a sale instead of a foreclosure of mortgaged property, and now by the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 25 (1), any person entitled to redeem mortgaged property may have an order for sale, and (2) in any action for foreclosure, redemption, sale or raising and payment of mortgage money, on the request of the mortgagee, or of any person interested in the mortgage money or right of redemption, and notwithstanding the dissent of any other person, and that the mortgagee or any other person interested does not appear, and without allowing any time for redemption or payment of mortgage money, the Court may direct a sale on such terms as it thinks fit, including deposit in Court of a reasonable sum fixed by the Court to meet expenses of sale, and secure performance of the terms; but (3) in an action by a person interested in the right of redemption, the Court may, on the application of any Deft, direct the Plt to give security for costs, and give the conduct of the sale to any Deft, and give directions respecting the Deft's costs; and (4) a sale may be ordered without previously determining priorities of incumbancers; and (*Woolley v. Colman*, 21 Ch. D. 169) at any stage of a redemption action. As to sales generally in actions for foreclosure and redemption, and as to orders under the Judgment Law Amendment Act, 1864, on the application of judgment creditors for the sale of their debtor's interest in lands delivered to them in execution by virtue of the judgment, see *inf.* Chap. XLVII., "MORTGAGES"; and as to sales in lieu of partition under the Partition Acts, Chap. XLVI., "PARTITION."

As to the procedure by originating summons under O. LV. 5a, b, *v. sup.*, Chap. XVIII., p. 276.

As to the jurisdiction of the Court to order the winding-up of a water company, though it might not be possible to sell the undertaking and property, without the authority of an Act of Parliament, see *Re Barton-upon-Humber and District Water Co.*, 42 Ch. D. 585.

Power is also given by O. L. 2, for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person



named in the order, in such manner, &c., as may seem desirable, of any goods, wares, or merchandise of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once: see *Bartholomew v. Freeman*, 3 C. P. D. 316; and, upon admission of the facts in the pleadings, an immediate sale of Florida State bonds was directed under O. XXXII. 6: see *Coddington v. Jacksonville, etc. Rail. Co.*, 39 L. T. N.S. 12; C. A. 27 Mar. 1878, A. 1232; and a sale of a foreign ship has been ordered: *The Hercules*, 11 P. D. 10.

By O. LI. 3, a sale of property under an order of the Court, unless otherwise ordered, is to be with the approbation of the Judge, to the best purchaser that can be got, the same to be allowed by the Judge, and all proper parties are to join in the sale and conveyance as the Judge shall direct.

Although the usual practice in Chambers is to direct a sale in the ordinary way by an auctioneer, the property may still be sold by auction before the chief clerk: see *Pemberton v. Barnes*, 13 Eq. 349; *Waterhouse v. Wilkinson*, 1 H. & M. 636; Sugd. V. & P. 98; Dart, V. & P. 1313.

#### PARTICULARS AND CONDITIONS.

By O. LI. 7, "the Court or a Judge may refer to the conveyancing counsel of the Court any matter relating to the investigation of the title to an estate with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof, or to the settlement of a draft of a conveyance, mortgage, settlement, or other instrument, or any other matter which the Court or Judge may think fit to refer, and may receive and act upon the opinion given."

By O. LI. 2, before a sale by the Court an abstract of the title is, unless otherwise ordered, to be laid before a conveyancing counsel for his opinion, to enable the Court to give the necessary directions respecting the conditions, and other matters connected with the sale; and a time for delivery of the abstract is to be specified in the conditions; but the Court has discretion to dispense with his assistance: see *Gibson v. Woollard*, 5 D. M. & G. 835; *Re Jones*, 1 Jur. N.S. 817; *Ralph v. Horton*, 19 W. R. 220.

When the Court or a Judge in Chambers has directed the abstract to be laid before one of the conveyancing counsel, a short memorandum of the direction is prepared by the registrar if given in Court, or by the chief clerk if given in Chambers, and the party prosecuting the direction, or his solr, takes the memorandum to the registrar's clerk, who names the conveyancing counsel in rotation (ascertained by ballot) in a note at the foot, and that memorandum when left with the counsel is a sufficient authority for him to act: see O. LI. 9—13.

The conveyancing counsel must, as between vendor and purchaser, be treated as the agent of the purchaser: *Re Banister, Broad v. Munton*, 12 Ch. Div. 131.

As to allowing the costs of a private counsel, in addition to the conveyancing counsel of the Court, in advising upon the title, see *Re Jones' Estate*, 6 W. R. 762, 614; O. LXV. 22; and *sup.*, Chap. XVII., "Costs."

The formal conditions are prepared by the solr of the party having the conduct of the sale, and are, together with the abstract and memorandum of reference, laid before the conveyancing counsel, by whom the special conditions are prepared and settled.

For the ordinary conditions of sale as to an estate sold under an order of the Chan. Div., see R. S. C., App. L., Form 15.

It is the practice in sales by the Court to fix a reserved bidding for each lot: see *Dav. Conv.*, vol. i., p. 501; Dart, V. & P. 1327; Dan. 1079; and see *Re Peyton*, 10 W. R. 515, that a power of sale given to trustees authorizes them to fix a reserved bidding.

By the Sale of Land by Auction Act, 1867 (30 & 31 V. c. 48), s. 5, the particulars or conditions of sale must state whether the land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved.

Where, therefore, the particulars merely state that the sale is subject to a reserved bidding, the employment of a person to bid up to the reserved price is illegal: *Gilliat v. G.*, 9 Eq. 60; and see as to the former practice in

Equity, *Mortimer v. Bell*, 1 Ch. 10; *et v. inf.*, Chap. L., "SPECIFIC PERFORMANCE."

The Court will not knowingly pass off a bad title by the aid of special or misleading conditions: *Else v. E.*, 13 Eq. 196; *Williams v. Wood*, 16 W. R. 1005; *Bennett v. Wheeler*, 1 Ir. Ch. 18; *Hume v. Bentley*, 5 D. & S. 527; *Dart, V. & P.* 1326; and a purchaser cannot be required to assume what is known to be untrue; but where the conditions on the face of them purport to give only a good holding title, the purchaser, if relieved from them, will only be entitled to such a title: *Re Banister, Broad v. Muntion*, 12 Ch. D. 831.

And generally as to the preparation of conditions and particulars of sale, see *Dart, V. & P.* 127, 1325; *Dav. Conv.*, vol. i., pp. 415 *et seq.*; and for forms, *Ib.* 607 *et seq.*

As soon as the particulars and conditions of sale settled at Chambers have been printed, two prints certified by the solr to be correct prints of the particulars, &c., as settled at Chambers, are to be left there: O. L. 5.

Affidavits for the purpose of enabling the Judge to fix reserved biddings are to state the value of the property by reference to an exhibit, so that the value may not be disclosed by the affidavit when filed: *Ib.* 4.

For the practice preliminary to and at the auction, see *Dan.* 1071; *Dart, V. & P.* 1325; *Sugd. V. & P.* 94—99; *Dav. Conv.*, vol. i., 499.

#### CONDUCT OF SALE.

The conduct of the sale has (except in cases of admon, where the property ordered to be sold is vested in an exor, admor or trustee) been usually given to the Plt or other person having the carriage of the judgment: *Knott v. Cottee*, 27 Beav. 33; though but for the action he might not have been entitled to interfere in the sale: *Dale v. Hamilton*, 10 Ha. vii.; unless he has leave to bid: *Domville v. Berrington*, 2 Y. & C. 723; *Sidney v. Ranger*, 12 Sim. 118.

But the Court will give the conduct to another where a probable benefit, by saving expense, &c., will result to the parties: *Dixon v. Pynner*, 7 Ha. 331; *Knott v. Cottee*, 27 Beav. 33; *e. g.*, under 15 & 16 V. c. 86, s. 48, to first mortgagee in a suit by puisne mortgagee: *Hewitt v. Nanson*, 7 W. R. 5; and in an action to foreclose an equitable mortgage, the conduct was, in the absence of contest, given to the Defts, because it was most to their interest to obtain the best price: *Davies v. Wright*, 32 Ch. D. 220; and as they would alone be liable for the costs of sale, they were not required, as was done in *Woolley v. Colman*, 21 Ch. D. 169, to give security.

By O. L. 10, "whenever in an action for the admon of the estate of a deceased person, or execution of the trusts of a written instrument, a sale is ordered of any property vested in any exor, admor, or trustee, the conduct of such sale shall be given to such exor, admor, or trustee, unless the Court or a Judge shall otherwise direct."

If the sale directed is, as in the case of shares, to be made out of Court, the trustee or exor is the proper person to have the conduct: *Cobden v. Maynard*, 1 N. R. 354.

If the conduct of the sale has been given to some independent person, neither Plt nor Deft, with liberty to bid, will be allowed to interfere by advertising the sale, without leave of the Court: *Dean v. Wilson*, 10 Ch. D. 136.

The solr of the party having the conduct is considered, as between vendor and purchaser, to be the agent of all parties to the sale: *Dalby v. Pullen*, 1 Russ. & M. 296; *Dale v. Hamilton*, *sup.*

Every party having the title-deeds is bound to facilitate the sale: *Knott v. Cottee*, *sup.*; *Livesey v. Harding*, 1 Beav. 343.

#### LEAVE TO BID.

In general, a party to the action will not be allowed to bid at the sale, or become the purchaser without previously obtaining leave: *Elworthy v. Billing*, 10 Sim. 98; but the sale will not necessarily be set aside because a

party to the action has without leave bid and become the purchaser: *Wilson v. Greenwood*, 1b. 101, n.; and see *Sidney v. Ranger*, 12 Sim. 118.

By the Partition Act, 1868, s. 6, on any sale under the Act the Court may allow any of the parties interested in the property to bid at the sale on such terms as to the Court seem reasonable.

For orders under this section, see Chap. XLVI., "PARTITION."

Leave to bid is sometimes contained in the judgment or order for sale, but an order for that purpose is usually obtained at Chambers on notice to the other parties.

Leave to bid will not in general be given to the party having the conduct of the sale: *Domville v. Berrington*, 2 Y. & C. 723; *Sidney v. Ranger*, *sup.*; and see *Verrall v. Cathcart*, 27 W. R. 645, where (not following *Pennington v. Dalbiac*, 18 W. R. 684) leave to the party having the conduct of the sale in a partition action was refused;

—nor to an exor in an admon action: *Geldard v. Randall*, 9 Jur. 1085; and *quere* whether to the solr for the exor: *Coaks v. Boswell*, 11 App. Cas. 232, 242, 245;

—nor to a receiver: *Alvine v. Bond*, 1 Flan. & K. 196;

—nor to a guardian *ad litem*: *Dodson v. Bishop*, V.-C. W. at Chambers, 29 May, 1862;

—nor to a trustee, unless all the c. q. trs. who are *sui juris* consent, and no other purchaser at an adequate price can be found: *Tennant v. Trenchard*, 4 Ch. 537, 547; *Farmer v. Dean*, 32 Beav. 327; and see Lowin, 489.

Generally the solr of a party who cannot buy, is equally unable to buy; but where the client is at liberty to buy, his solr will not be disqualified from buying by the mere fact of his name appearing on the particulars: *Guest v. Smythe*, 5 Ch. 551.

As to the effect of leave to bid in putting an end to disability to purchase, see *Coaks v. Boswell*, *sup.*

#### CONSENT OF INCUMBRANCERS.

When the estate is subject to a mortgage or other incumbrance it cannot be sold free therefrom unless the incumbrancer consents, and if a party, he must elect at once whether it shall be so sold: *Langton v. L.*, 1 Jur. N.S. 1078; *Wickenden v. Rayson*, 6 D. M. & G. 210.

An incumbrancer electing that the sale should be free from his incumbrance was ordered to produce and leave the title-deeds necessary for the sale; but notice was to be given to him before their delivery to the purchaser: *Livesey v. Harding*, 1 Beav. 343.

Unless the estate has been ascertained to be free from incumbrances, the order for sale usually directs a preliminary inquiry what incumbrances affect it, and what are their priorities: *v. inf.* Chap. XLIV., "ADMINISTRATION"; and the estate is ordered to be sold free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent, leaving the incumbrancers to consent at Chambers to the sale, if they think fit.

By the Conveyancing Act, 1881, s. 5(1), where land subject to any incumbrance is sold by or out of the Court, the Court is empowered, on the application of any party to the sale, to "direct or allow" payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, will be sufficient by the dividends to provide for that charge, "and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount." (2) Thereupon the Court may, either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court. (3) After notice served on the persons interested,

the Court may direct payment or transfer of the money or fund in Court to the persons entitled, and give directions respecting the application and distribution of the capital or income thereof.

Applications under the section should be made in Chambers: *Patching v. Barnett*, 30 W. R. 244.

On a sale of land charged with legacies, where releases could not be procured from all the legatees, and the purchase-money largely exceeded the incumbrances, the Court made an order under the section: *Archdale v. Anderson*, 21 L. R. Ir. 527.

The Court will not (even if it can) oblige a vendor to pay money into Court for the purpose of discharging an incumbrance, where so to do would inflict great hardship; e.g., where the amount necessary to procure discharge of a rent-charge far exceeded the amount of the purchase-money: *Re G. N. Rail. Co. & Sanderson*, 25 Ch. D. 788; and (*semble*) the words "direct and allow" apply respectively to sales by and out of Court: *Ibid*.

#### DEPOSIT.

The ordinary conditions of sale provide that the purchaser is at the time of sale to pay a deposit on the amount of his purchase-money to the person appointed by the Judge to receive it.

The person appointed to receive the deposit is usually required to enter into a recognizance with one or more sureties duly to account for and pay what he may receive, or to transfer into Court a fund as security for the deposit to be received: see Form 6, *sup.* p. 290. From the expense of giving security it is not often required on the sale of small properties, or where the parties being all *sui juris* agree to waive it: see Dan. 1080.

Where a deposit has been received at the sale the certificate appoints a day for its payment into Court without further order; and the recipient making default in paying it in may be compelled, by an order to be obtained at Chambers on summons, to pay it in within a limited time: see Form 7, *sup.* p. 290.

Auctioneers were held justified in handing over deposit, less their charges, to the vendor's solr, he, and not they, being the proper person to pay it into Court: *Brown v. Farebrother*, 58 L. J. Ch. 3.

#### SALE OUT OF COURT.

By O. LI. 1a, "in all cases where a sale, mortgage, partition, or exchange is ordered, the Court or a Judge shall have power, in addition to the powers already existing, with a view to avoiding expense or delay, or for other good reason, to authorize the same to be carried out, either as at present (a) by laying proposals before the Judge in Chambers for his sanction; or (b) by proceedings altogether out of Court, any moneys produced thereby being paid into Court or to trustees, or otherwise dealt with as the Judge in Chambers may order. Provided that the Judge shall not authorize the said proceedings altogether out of Court, unless and until he is satisfied, by such evidence as he shall deem sufficient, that all persons interested in the estate to be sold, mortgaged, or exchanged, are before the Court, or are bound by the order for sale, mortgage, partition, or exchange, and every order authorizing the said proceedings altogether out of Court shall be prefaced by a declaration that the Judge is so satisfied as aforesaid, and a statement of the evidence upon which such declaration is made."

Kay, J., in directing a sale out of Court, required that the reserved bid and the auctioneer's remuneration be fixed by the chief clerk, and the purchase-money paid directly into Court: *Pitt v. White*, 57 L. T. N.S. 659; *Re Stedman*, 58 L. T. N.S. 709.

Where at an auction a stranger, having no intention to buy, made several biddings, and ran up the price, the vendors, having no knowledge of these dishonest biddings, were able to enforce the contract: *Union Bank of London v. Munster*, 37 Ch. D. 51; 36 W. R. 72.

#### SALE BY PRIVATE CONTRACT.

Under a judgment for sale, the sale is as a rule by public auction; but proposals may be carried in for sale by private contract: O. LI. 1a. An

advantageous offer will be at once accepted: *Dowle v. Lucy*, 4 Ha. 311; and without inquiry in Chambers, if the evidence is satisfactory: *Pimm v. Inshall*, 10 Ha. lxxiv.; Dart, V. & P. 1313.

Property, which the Plt was authorized to sell by auction, could not, after an attempt, which failed, to sell in that way, be sold by tender in Chambers, without an express order to that effect: *Berry v. Gibbons*, 15 Eq. 150; but where the sale by auction which failed was one of the terms of a compromise which had been sanctioned by the Court, and was not pursuant to any actual direction, a subsequent sale by private contract was not invalid: *Bousfield v. Hodges*, 33 Beav. 90.

As to the duty of a person in a fiduciary position purchasing property which is being sold under the direction of the Court to make fair disclosure of information in his possession, and that it does not follow that because information on some material point is offered or given on request by the purchaser, it must therefore be given on all others, as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated, see *Coaks v. Boswell*, 11 App. Cas. 232; rev. S. C., 27 Ch. Div. 424.

#### CERTIFYING RESULT.

The ordinary conditions of sale (see R. S. C. Appx. L. 15) fix a time at which the chief clerk will proceed to certify the result of the sale when the purchaser or his solrs may attend.

By O. LI. 6a (R. S. C., Dec. 1885), the particulars of sale are to be signed by, and the result of the sale certified under the hands of, the auctioneer and the solr of the party having the conduct of the sale, and it is not necessary to file any affidavit verifying the particulars or the result of the sale. Such certificate, with the particulars and bidding paper, which are to be referred to therein (see Form 16, R. S. C. Appx. L., as substituted by r. 6a), are to be left at Chambers at least a clear day before the day appointed for settling the certificate: O. LI. 6.

As to preparing and signing the certificate, see O. LV. 66a and 67, *sup.* Chap. XVIII., "CHAMBERS"; and it need not be signed by the Judge; and unless an order to discharge or vary the certificate is made, is to be deemed to be approved and adopted by the Judge: r. 65.

The certificate is transmitted by the chief clerk to the Central Office to be there filed, and thenceforth becomes binding on all parties to the proceedings, unless discharged or varied on application by summons, within eight clear days after the filing; subject to the power of the Court, on motion or summons, to open any such certificate at any time after the same has become binding: O. LV. 70, 71; and see *Bridger v. Penfold*, 1 K. & J. 28; *Barlow v. Osborne*, 6 H. L. C. 556.

Until the certificate becomes binding, the highest bidder has not become the purchaser with the rights or liabilities of an owner; and any loss to the property by fire or otherwise falls on the vendor: *Exp. Minor*, 11 Ves. 559; *Twigg v. Fifield*, 13 Ves. 518; and see *Palmer v. Goren*, 4 W. R. 688.

After the certificate becomes binding, any loss arising from accident, without fault of the vendor, falls on the purchaser, who is regarded in equity as the owner: *Robertson v. Skelton*, 12 Beav. 260; and the sale may be enforced against his reprieve, though not, as has been said, without suit for specific performance: see Sugd. V. & P. 109.

The purchaser of a mere life estate is in a different position, and must complete, though the life drops in the interval before the certificate becomes absolute: *Anson v. Tougood*, 1 J. & W. 637; *Vesey v. Elwood*, 3 Dr. & War. 74; and see *Millican v. Vanderplank*, 11 Ha. 136, 140.

Formerly, in the case of sales, under a decree or order of the Court, by public auction or by sealed tenders (though not by private contract, see *Millican v. Vanderplank*, 11 Ha. 136), one common ground of application before the expiration of the eight days was to have the biddings opened, i. e., that an intending purchaser might be allowed to offer an advance upon the price for which the estate was originally sold, and for this purpose, that the property might again be submitted to public competition: see *Waterhouse v. Wilkinson*, 1 H. & M. 636; *Barlow v. Osborne*, 6 H. L. C. 556; *Re Jones*,

1 Giff. 284; 8 W. R. 56; *Ewing v. Waite*, 1 Eq. 440. And for the practice in such cases, see Seton, 3rd ed., 1202-7; Dart, V. & P. 5th ed., 1201-5.

But by the Sale of Land by Auction Act, 1867 (30 & 31 V. c. 48), s. 7, the highest *bonâ fide* bidder at a sale by auction of land under an order of the Court, provided he has bid a sum equal to or higher than the reserved price (if any), will be declared and allowed the purchaser, unless the Court or Judge, on the ground of improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made before the chief clerk's certificate of the result of the sale has become binding) either opens the biddings, holding such purchaser bound by his bidding, or discharges him from being the purchaser, and orders the property to be resold upon such terms, as to costs or otherwise, as the Court or Judge shall think fit.

The principle of the Act, preventing the opening of biddings, applies as much to sales by private contract as by public auction: *Re Bartlett, Newman v. Hook*, 16 Ch. D. 561.

To open biddings since this Act there must have been unfair or grossly improper conduct, bordering on fraud, in the management of the sale, not merely error of judgment: *Delves v. D.*, 20 Eq. 77; *Brown v. Oakshott*, 38 L. J. Ch. 717; *Griffiths v. Jones*, 15 Eq. 279; *Re Bartlett, sup.*; *Re Oriental Bank Corporation*, 56 L. T. N.S. 868.

Mortgagees selling under the direction of the Court are not prejudiced by the acts of other parties in employing a person to make fictitious biddings: *Union Bank of London v. Munster*, 37 Ch. D. 51.

## SECTION II.—COMPLETION OF SALE.

### 1. Inquiry as to Title.

LET an inquiry be made whether a good title could be made to the hereditaments (comprised in Lot —) whereof A. has been allowed the purchaser by the chief clerk's certificate [or the order], dated &c., and being (part of) the estates directed to be sold by the judgment or order, dated &c.

For inquiries as to title in specific performance actions, see Chap. L., "SPECIFIC PERFORMANCE."

### 2. Order to Pay in Purchase-Money on Purchaser's Application— Deposit—Timber—Interest—Title accepted.

UPON the application of A., the person by the chief clerk's certificate, dated &c., certified to be [or by the order dated &c., allowed] the purchaser of (the hereditaments comprised in Lot —, part of) the estates sold under the judgment [or order] dated &c.; and upon hearing the solrs for the Applicant, and for the Plt [or Deft B., the party having the conduct of the sale], requesting the investment of the purchase-money; and upon reading the said judgment [or order] and certificate (and the conditions of sale and the certificate of the fund); and the Applicant by his solr declaring himself content with the title to the premises, Let the Applicant A., on or before

the — day of —, pay into Court, as directed in the Schedule hereto, £—, being the purchase-money for the premises [*If deposit made*, being the balance of the purchase-money for the premises, after deducting the sum of £—, paid as a deposit at the time of sale; *If timber*, and the sum of £—, the amount of the valuation of the timber on the premises; *If interest*, and the sum of £— for interest on the said sum of £— at the rate of £— p. c. per ann. from the — day of — to the said — day of — after deducting income tax]; And Let, upon such payment being made, the Applicant be let into possession of the premises, and into receipt of the rents and profits thereof, from the — day of —, and all proper parties are to join in and execute a proper conveyance of the premises to the Applicant, or as he shall direct, such conveyance to be settled by the Judge, in case the parties differ; And the said sum of £— is [*If so*, and the said sums of £— and £— are] not to be paid out [except for the purchase of such anns, and such anns are not to be sold, transferred, or otherwise disposed of] without notice to the Applicant. [Add Lodgment Schedule, Form No. 3.]

For orders to pay in balance of purchase-money, after paying off incumbrances, or where mortgage debts are to be kept on foot, see Chap. XLVII., "MORTGAGES."

For order to pay in purchase-money of a life policy, and thereupon the purchaser "to be entitled to the benefits of the said policy from the — day of —," with directions to assign and assure the same to him, see *Cobbold v. Fisk*, V.-C. W. at Chambers, 19 Jan. 1854, A. 337.

Where there are several purchasers, they may all be comprised in one Schedule.

### 3. *Paying in Purchase-Money by Instalments.*

UPON the application of B. &c. [Form 2, *sup.*], and the Applicants, by their solr, declaring themselves content with the title to &c., Let the said B. &c., on or before &c., pay the sum of £16,200 (being the balance of £21,600, the purchase-money for the hereditaments comprised in Lot 1, in the conditions of sale mentioned, after deducting £5,400, the first instalment already paid into Court, pursuant to the order dated &c.), and interest as after mentioned, into Court &c., by the instalments and within the respective times mentioned in the Schedule hereto, together with interest as therein mentioned. [Add Lodgment Schedule, Form No. 3.]

### 4. *Order to Enforce Payment into Court, on Vendor's Application—* *Title held to be accepted.*

UPON the application of the Plt, and upon reading an affidavit of &c. of service on A., the purchaser, "And it appearing to the satisfaction of the Judge that the said A., the purchaser of the said lots, has not taken any objection to the title to the hereditaments comprised in the said lots respectively, within the time limited by the conditions of sale, and that the only requisitions upon or with respect to the same, or the abstract thereof made by the said A. have been fully and satisfactorily

complied with, and the Judge being of opinion that the said A. is to be deemed to have approved of and accepted the title to the said lots."—Directions to pay in the purchase-money, with interest; and thereupon for possession, conveyance, and notice [*sup.* Form 2]; And Let the said A. pay to the Plt B. his costs of this application, to be taxed &c.—*Jones v. Gloster*, V.-C. K. at Chambers, 28 Nov. 1861, A. 2239.

#### 5. Order for Purchaser to leave Conveyance to be Settled.

LET D. (the purchaser), within four days after service of this order, leave at the Chambers of the Judge, situate &c., the draft of the conveyance of &c., to the intent that such draft may be settled by the Judge pursuant to the order dated &c.—*Leach v. Westall*, V.-C. M. at Chambers, 18 March, 1870, B. 732; *Goodwin v. Lancesman*, V.-C. M. at Chambers, 23 Nov. 1876, A. 1981.

#### 6. Compensation out of the Purchase-Money allowed to Purchaser kept out of Possession for more than a Year from the Time fixed for Completion.

UPON the application of J., the person by the certificate dated &c., certified to be the purchaser of the premises comprised in Lot 1, part of the estates sold under the judgment dated &c., and upon reading &c., Let the fund in Court be dealt with as directed in the Schedule hereto, the several sums of £—, £—, and £—, making together £—, thereby directed to be paid to the Applicant J., being for compensation in respect of the several matters mentioned in his affidavit, filed &c.; And Let the costs of the Applicant by the order dated &c. directed to be taxed and to be paid by the Plt J. when so taxed &c., be, notwithstanding such order, paid as directed in the said Schedule; And Let the Plt B. within (seven days) after service of this order deliver to the Applicant J. the conveyance of the said premises and the title deeds relating to the same; And Let the costs of the Applicant of this application and consequent thereon, be taxed &c.—Costs of the Plts and the Defts of this application, and consequent thereon, to be costs in this action. [Add Payment Schedule, Forms Nos. 44 and 32.]—See *Thomas v. Buxton*, M. R., 1 May, 1869, B. 1594; *S. C.*, 8 Eq. 120.

#### 7. Order to Pay off Mortgagee out of Purchase-Money in Court.

LET upon the execution by M. (*mortgagee*) of the respective conveyances to H. and L. of the hereditaments comprised in Lots 1 and 2 (whereof the said H. and L. have been certified to be the purchasers by the chief clerk's certificate, dated &c., and which are) now in mortgage to the said M., such execution to be certified, the fund in Court be dealt with as directed in the Schedule hereto.—Direction to tax mortgagee's costs; Plt to pay purchaser's costs of appearance and be allowed them, and Plt's and Deft's costs of application to be costs in



the action. [Add Payment Schedule, Form No. 44.]—See *Sutton v. Downham*, M. R., at Chambers, 3 Aug. 1860, B. 1974.

In the case of an equitable mortgage the order will be for delivery of the deeds in the possession of the mortgagee, on payment of his principal, interest and costs.

For waiver by first mortgagees, not parties, of their claim to the proceeds of a sale by the Court of part of the mortgaged property, they being otherwise secured, see *E. Macclesfield v. Owen*, M. R., 12 July, 1859, B. 2121.

8. *Mortgagee having purchased Mortgaged Copyholds under an Order for Sale, to hold free of the Equity of Redemption.*

USUAL directions for completion of purchase [Form 2, p. 298]: And it appearing that the lands comprised in the said contract are copyhold of inheritance of the manor of K., in the county of —, and that the legal estate of the said lands is already vested in the Plt F. as mortgagee of the estate of the said R., the intestate, the said F., having been on the — day of — duly admitted tenant of the said lands according to the custom of the said manor, as mortgagee thereof, pursuant to a conditional surrender thereof, dated &c., Declare that upon such payment being made the said lands comprised in the said contract (are to) be held by the said Plt F. as copyhold of inheritance of the said manor according to the custom thereof, for his own absolute use and benefit, freed from all equity of redemption of the said R., or any persons claiming under him, and free from the claims of all other the creditors of the said R.—*Foxton v. Jackson*, V.-C. H., 24 June, 1878, A. 2512.

9. *Heir-at-Law of Intestate becoming Purchaser under Court, Estate to be held by him Discharged from Claims of Creditors.*

USUAL directions for completion [Form 2, p. 298]: And it appearing that the legal estate of the lands is already vested in the Deft W. E., as the heir-at-law of the intestate, This Court doth declare that upon such payment as aforesaid being made, the said lands (are to) be held by the said Deft in fee simple for his own absolute use and benefit, free from the claims of the Plts and other the creditors of the intestate.—*Cutler v. Entwistle*, V.-C. K., 27 May, 1861, A. 1239, penned by V.-C.

10. *Mortgage, by Consent, kept on Foot, on Sale free from Incumbrances—Difference of Purchase-Money to be paid into Court.*

“And the said C. &c., the legal pers. represves of the said T., the mortgagee named in the said indenture of mortgage, dated &c. (being a mortgage of the premises comprised in the said lot), by their solr, waiving all claims and demands against the estate of the testator B., or his real or pers. represves, under or in consequence of the said indenture, in respect of the principal sum of £— now due to them on

the security thereof, and all interest and other moneys due or to become due under or by virtue thereof; Let at the said purchaser's request the said Lot — remain subject to the said mortgage debt of £— secured thereon by the said indenture, dated &c., and now due to the said C. &c.—Directions for payment into Court of balance of purchase-money."—Thereupon directions for possession and conveyance to purchaser, "subject, nevertheless, to the said sum of £— due on the security of the said hereditaments as aforesaid, and the interest thereon."—Notice of dealing &c. [Add Lodgment Schedule, Form No. 3.]—See *Re Goldring, G. v. G.*, M. R. at Chambers, 25 Jan. 1875, A. 107; and *Robinson v. Barnes*, M. R. at Chambers, 24 June, 1861, B. 1322.

For an order where part of the mortgage debt was to be paid by the purchaser to the mortgagee, and the balance to remain on the security, and the residue of the purchase-money to be paid into Court, see *Winnifrith v. Card*, V.-C. M. at Chambers, 22 Dec. 1876, B. 3615.

### 11. *Order to deliver Title Deeds to several Purchasers.*

LET all deeds and documents relating to the hereditaments comprised in each of the said lots, in the custody, possession, or power of any of the parties to this action be delivered to the respective purchasers of such lots.—*Whitford v. Steele*, M. R. at Chambers, 1 Nov. 1861, B. 1937.

### 12. *The Like—Deeds relating jointly to other Estates.*

LET such deeds and writings as relate solely to the estate comprised in the said Lot No. 6 (*the larger lot*), and also such as relate to the same jointly with other estates of less value, be delivered to B. (*purchaser*), or to whom he shall appoint, he submitting to produce such last-mentioned deeds and writings on necessary occasions, and to give an acknowledgment and undertaking for safe custody of the same as provided by the 9th section of the Conveyancing and Law of Property Act, 1881; But as to such of the deeds and writings as relate to the said estate purchased by him jointly with other estates of greater value, the persons entitled to such estates of greater value are to give to him a like acknowledgment and undertaking for safe custody of such deeds and writings; And in case any dispute shall arise between the parties touching the copies of any particular deeds or writings relating to the said estates, the same is to be settled by (the Judge).—See *L. Kinnaird v. Christie*, L. C., 22 March, 1809, B. 414.

### 13. *Substituted Purchaser.*

UPON the application of A. B., the purchaser &c., and of C. D., and upon hearing the solrs for the Applicants and for the Plt; And the said C. D. declaring himself content with the title &c., Let upon the said C. D. paying into Court as directed in the Schedule hereto £—,

the said C. D. be substituted for the said A. B. as the purchaser of &c. [Add Lodgment Schedule, Form No. 3.]—See *Moston v. Booth*, Chitty, J., 28 January, 1887, B. 130.

For order substituting a person in place of a purchaser who died after payment in of his purchase-money, but before conveyance, on producing probate of his will, showing he had not devised the premises, and by consent of his heir, and directing conveyance to such person, see *Matchett v. Palmer*, V.-C. K.-B., 7 Mar. 1850, B. 668; *Haire v. Lovitt*, M. R., 27 Apr. 1850, A. 919.

## NOTES.

## DELIVERY OF ABSTRACT—INVESTIGATION OF TITLE.

The general conditions of sale provide (R. S. O. Appx. L. 15) that the vendor within a specified time (usually eight days) after the certificate has become binding shall deliver to each purchaser or his solicitor an abstract of the title to the lot purchased, and also that each purchaser shall within four days after actual delivery of the abstract deliver his objections and requisitions, and upon the expiration of such last-mentioned time (and in this respect time is to be of the essence of the contract) the title shall be considered as approved of and accepted, subject only to such objections and requisitions, if any.

Delivery of the abstract by the vendor may be compelled by order on summons: see Dan. 1086.

If objections and requisitions are not delivered, or being delivered, are satisfactorily disposed of, a direction signed by the chief clerk for the payment of the purchase-money into Court may be obtained at Chambers, and such direction is a sufficient authority for the Paymaster to receive the money: O. LI. 3a; or an order for payment in of the purchase-money may, on the expiration of the time fixed for payment by the conditions, and without referring the title, be obtained at Chambers, at the cost of the purchaser, and such order may be enforced by sequestration: O. XLII. 4.

If the purchaser's objections or requisitions cannot be satisfactorily disposed of between him and the vendor, the proper course is to raise the objections to the title either on summons obtained by the purchaser for an inquiry into the title (the mode also provided by the V. & P. Act, 1874, s. 9, as to which, *v. inf.* Chap. L., "SPECIFIC PERFORMANCE"), or on summons obtained by the vendor for payment into Court of the purchase-money: see Dan. 1087. If the vendor cannot in Chambers remove the objections, the matter is adjourned for argument in Court: *Pegg v. Wisden*, 16 Jur. 1105. A reference upon the title may also be directed to the conveyancing counsel.

If after such inquiry the title is found good, the purchaser may be ordered to pay his purchase-money into Court, and in default process of execution, by sequestration or otherwise, under O. XLIII. 4, XLII. 6 (and see *Robinson v. Galland*, 37 W. R. 396; *Bell v. Denver*, 54 L. T. N.S. 729), may issue or a resale be ordered.

If the title is found bad, he may apply by summons to be discharged, and for his costs: see *inf.* Sect. III., p. 311.

In investigating the title, the purchaser should ascertain not only that the title is good, but that the Court, from all proper persons being parties to the action or bound by the judgment, had jurisdiction to direct a sale: *Lechmere v. Brasier*, 2 J. & W. 287; *Calvert v. Godfrey*, 6 Beav. 97; *Bennett v. Hamill*, 2 Sch. & Lef. 577; *Pigott v. P.*, 2 N. R. 14; and that the sale was in accordance with the judgment: *Coldclough v. Sterum*, 3 Bli. 181; *Talbot v. Minett*, 6 Ir. Ch. 83; and see *Waters v. W.*, 15 W. R. 191; *Beioley v. Carter*, 4 Ch. 230. The purchaser will be protected against parties to the action, and all persons coming in under the judgment: *Tomney v. White*, 3 H. L. C. 63; *Sugd. V. & P.* 111; but not against persons of whom the purchaser has actual notice that they ought to have been, but are not, parties: *Dart, V. & P.* 1350, 1352; and therefore he should see that he obtains a discharge from all judgment creditors, or that they are bound by the judgment, whether he obtains the legal or equitable estate; and is entitled to require their concurrence: *Grey Coat Sc. v. Westminster Improvement Commrs.*,

1 D. & J. 531; Sugd. V. & P. 111; Dart, V. & P. 1346; or a release of the estate from their charge, with costs occasioned by their refusal: *Mosecrop v. Sandeman*, 9 Jur. N.S. 1147.

By the V. & P. Act, 1874 (37 & 38 V. c. 78), s. 1, in the completion of any contract of sale of land after 31st Dec. 1874, subject to any stipulation to the contrary in the contract, forty years is substituted for sixty years as the root of title, but earlier title than forty years may be required in cases similar to those in which earlier title than sixty years might before the Act be required.

A purchaser under a judgment will be compelled to take an equitable title provided the legal estate can be got in, *e.g.* when outstanding in an infant: *Freeland v. Pearson*, 7 Eq. 247; Sugd. V. & P. 397; but will not be compelled to take a doubtful title: *Ib.* (s); and see *Palmer v. Locke*, 15 Ch. Div. 294; and *inf.* Chap. L., "SPECIFIC PERFORMANCE."

The purchaser is entitled to his costs of the inquiry when the title proves good on grounds not appearing on the abstract: *Fielder v. Higginson*, 3 V. & B. 142; and will not be ordered to pay the vendor's costs though the title proves good according to the abstract: *Flower v. Hartopp*, 8 Beav. 200; *Holland v. King*, 1 W. R. 80; Dart, V. & P. 1336; but see *Osborn v. O.*, 18 W. R. 421; unless the objections are frivolous and vexatious: *Thorpe v. Freer*, 4 Madd. 466; *Peers v. Sneyd*, 17 Beav. 151.

If the title prove bad, and the purchaser is discharged, he is entitled to a return of any deposit, and to his costs, charges, and expenses consequent upon his having become a purchaser: see Sect. III., *inf.* p. 312.

#### PAYING IN PURCHASE-MONEY—INTEREST—PROPERTY TAX.

It is provided by the ordinary conditions of sale (R. S. C. Appx. L. 15), that each purchaser is, under an order for that purpose to be obtained by him, or in case of his neglect, by the vendors, at his costs, upon application at Chambers, to pay the amount of his purchase-money (after deducting the amount paid as a deposit), together with the amount of any valuation of timber, into Court to the credit of the cause, on or before a day to be specified (which must be subsequent to the time fixed for delivering the abstract, see *Dav. Conv.* vol. i. p. 506); and if the same is not so paid, then the purchaser is to pay interest on his purchase-money, including the amount of the valuation, from the day specified to the day on which the same is actually paid (if so, deducting property tax). Upon payment of the purchase-money the purchaser is to be entitled to possession, or to the rents and profits, as from (usually the last rent day), down to which time all outgoings are to be paid by the vendor. The order to pay in purchase-money is now rarely made, the money being generally paid in on a direction under O. LI. 3a.

Two or more separate purchasers may join in one application, but their purchase-money must be paid in separately. Two or more purchasers of one lot must pay in an entire sum: *Darkin v. Marye*, 1 Anst. 22.

Where the lots are very small, it is not unusual for the conditions to provide that no abstract shall be delivered or title shown unless specially requested by the purchaser; and to provide that one order for payment in of the several purchase-moneys shall be obtained by the party having the conduct of the sale, at the expense of the estate: see *Huish v. Sweet*, V.-C. W. at Chambers, 12 Nov. 1872, A. 2637.

The purchaser should not ordinarily apply for leave to pay in his purchase-money until he has approved the title: Sugd. V. & P. 103.

Except under special circumstances, he will not be allowed to pay in without accepting the title: *De Visme v. De V.*, 1 Mac. & G. 336, 344; *Rutley v. Gill*, 3 D. & S. 640; *Denning v. Henderson*, 1 D. & S. 689; nor will he in any case be let into possession without accepting the title: *Hutton v. Mansell*, 2 Beav. 260; *Rutter v. Marriott*, 10 Beav. 33; *Dempsey v. D.*, 1 D. & S. 691.

On taking possession without authority from the Court he will be treated as having accepted the title, and be compelled at once to pay in: *Wilding v. Andrews*, 1 C. P. Coop. 380; but if he take possession after delivery of the abstract he will not be bound as to objections not disclosed thereby: *Bown v. Stenson*, 24 Beav. 631. See also *Miller v. Pridden*, 5 W. R. 171; 3 Jur.

N.S. 78, that payment in, and acceptance of a conveyance, with knowledge of an incumbrance, will have the effect of waiving any objection thereon.

A purchaser, after he has paid his money into Court and obtained a conveyance, is not bound to see to the application or apportionment of the fund: *Todd v. Studholme*, 3 K. & J. 324; *Cavendish v. C.*, 10 Ch. 319; and see *Morris v. Debenham*, 2 Ch. D. 540; *Cooper and Allen's Contract*, 4 Ch. D. 802, 807, 816.

The rate of interest as a general rule is 4 p. c. per ann.: *Dart, V. & P.* 708; *Day. vol. i. p. 507.*

As to the effect of the condition now in general use (see *Day. Conv.*, vol. i. p. 576; *Prid. Conv. vol. i. p. 15*), that the purchaser shall pay interest on his purchase-money if "from any cause whatever" the purchase shall not be completed by the day fixed for completion, see *Williams v. Glenton*, 1 Ch. 200; *Sherwin v. Shakspear*, 5 D. M. & G. 517; *Sugd. V. & P.* 633—637; *et sup.* p. 304.

The condition as to interest now usually adopted enables the purchaser to deduct the property tax on the interest payable; where it does not he must pay in in full without deduction: *Dawson v. D.*, 11 Jur. 984; *Humble v. H.*, 12 Beav. 43; *Flight v. Comac*, 2 W. R. 437; *Goslings and Sharpe v. Blake*, 23 Q. B. Div. 324, at p. 330; but may apply for its return when the money is dealt with by the Court: see *Bebb v. Bunney*, 1 K. & J. 216, 219; *Sugd. V. & P.* 99.

Where a vendor went abroad two days before the day for completion, he was held not entitled to interest on the purchase-money during the delay caused by his absence: *Re Young and Harston's Contract*, 31 Ch. Div. 168.

A purchaser cannot relieve himself from liability to pay interest by setting apart the unpaid purchase-money and giving notice thereof to the vendor: *Re Riley and Streetfield*, 34 Ch. D. 386.

Upon a purchase under the ordinary condition, the order for payment of purchase-money will not be made with a direction for deduction of rents received after the date for completion: *Re Smith, Day v. Bonaini*, 54 L. T. N.S. 627; but a receiver being in possession, a direction was inserted that he should pay such rents to the purchaser: *S. C.*, 55 L. T. N.S. 329.

#### INVESTMENT AND DEALING WITH PURCHASE-MONEY IN COURT.

The order for investment of the purchase-money when paid in should always state at whose instance such investment is directed: see Form 2, p. 298. If the investment is on the application of the purchaser, he must, if the purchase be rescinded, take the stock, whether the funds have fallen or risen since the investment; *secus*, if made on the vendor's application: *Sugd. V. & P.* 119, 640; *Tompsett v. Wickens*, 3 Sm. & G. 171; *Humphries v. Home*, 3 Ha. 376; and see *Dart, V. & P.* 1333.

To give the full effect of a stop order to the concluding direction in the order to pay in, that the purchase-money is not to be dealt with without notice to the purchaser (see Form 2, *sup.* p. 298), the order should be lodged at the Chancery Pay Office for the express purpose of being entered on the books as a stop order, and giving the purchaser a lien upon the purchase-money until completion.

By S. C. F. R. 1886, r. 5, it is provided that when an order has directed the sale of any property and the lodgment of the proceeds thereof in Court, the authority for such lodgment may be a lodgment schedule signed by the chief clerk; and such lodgment schedule shall operate in the same manner as a lodgment schedule annexed to an order.

Plt's solr was held personally responsible for loss caused by his omission to request investment of purchase-money: *Batten v. Wedgwood Coal and Iron Co.*, 31 Ch. D. 346.

On delivery of the conveyance to the purchaser, the vendor's solr should obtain from him a written acknowledgment thereof, and an authority to concur in his name to such distribution of the purchase-money as the Court may direct: see *Dan.* 1094; otherwise the purchaser must be served with notice of any application to deal with the money, whether the order be entered at the Pay Office or not.

If he does not appear, an affidavit of such service is required, and of delivery of his conveyance.

If he has not obtained his conveyance, he will be entitled to his costs of appearing, though merely for the purpose of consenting to the application: *Bamford v. Watts*, 2 Beav. 201; *Noble v. Stow*, 30 Beav. 272.

If he has obtained his conveyance, his costs of appearing will not be allowed: *Barton v. Latour*, 18 Beav. 526, except, perhaps, under special circumstances: *Rowley v. Adams*, 16 Beav. 312; and see *sup.* p. 284.

#### SUCCESSION DUTY.

By the Succession Duty Act, 16 & 17 V. c. 51, s. 42, the duty is made a first charge on the property; but where powers of sale, exchange, or partition are exercised, the duty will be shifted to the substituted property, or interim moneys or investments.

By s. 44, every person in whom the property chargeable shall be vested, by alienation or other derivative title, at the time of the succession becoming an interest in possession, is made personally accountable for the duty to the extent of the property.

By s. 52, every receipt and certificate, purporting to be in discharge of the whole duty payable for the time being in respect of any succession, is to exonerate therefrom a *bona fide* purchaser for value without notice, notwithstanding any suppression or misstatement in the account rendered for, or any insufficiency of the assessment; and no such purchaser, under a title not appearing to confer a succession, is to be subject to any duty chargeable by reason of extrinsic circumstances of which he has no notice at the time of his purchase.

As between himself and the purchaser of a fee simple, the vendor must pay all duties (including succession duty) which have or will become payable under any settlement or disposition of the property prior to the sale of the fee simple, but the purchaser of a reversion expectant on an intermediate life estate is liable to the duty on the reversion: *Cooper v. Trewby*, 28 Beav. 194; *Re Langham's Contract*, 39 W. R. 156; *secus*, on a purchase from trustees of an estate in settlement subject to a jointure, the duty in such case being chargeable upon the proceeds of the sale: *Dugdale v. Meadows*, 6 Ch. 501; and see *Cooper and Allen's Contract*, 4 Ch. D. 802. That the devisee from the purchaser in fee of an estate in settlement having paid succession duty on the death of his testator is not again liable for duty on the death of the vendor tenant for life, see *Hanson*, 332; *Dart, V. & P.* 667, 668, 958; *Dav. Conv.* vol. ii., 253, 313.

#### INCUMBRANCERS.

A mortgagee concurring in the sale of the mortgaged estate does not in general postpone his rights over the purchase-money, and is entitled to be paid his principal, interest, and costs thereout in priority to the Plt's costs of suit: *Hepworth v. Heslop*, 3 Ha. 485; *Wood v. Mackinlay*, 2 D. J. & S. 358.

This priority extends to the costs of the sale, and where the proceeds were sufficient to pay the first mortgagee in full, but not the second mortgagee (the Plt), a third mortgagee who had joined in the conveyances to purchasers under the decree was held not entitled to any costs in respect of his concurrence: *Wonham v. Machin*, 10 Eq. 447; *et v. inf.* Chap. XLIV., "ADMINISTRATION."

Under the usual direction for sale in such a case an account is taken in Chambers of what is due to the incumbrancers, and if incumbrances appear by the certificate, or *semble*, though not so appearing, if they are known to exist, the purchaser may on summons obtain an order to pay the amount out of the purchase-money on the incumbrancers executing the conveyance to him, and to pay the balance into Court: see *Dan. Ch. Forms*, 1347; or the application may be delayed until the purchase-money has been paid: see *Form 7, sup.* p. 300; or by consent the mortgage may be kept on foot as against the estate and the purchaser only: see *Form 10, sup.* p. 301.

## CONVEYANCE.

The order for payment in of the purchase-money ordinarily provides for the execution of a conveyance by all proper parties; but *semble*, a direction that the vendor shall convey includes in effect all necessary conveying parties: *Minton v. Kirwood*, 3 Ch. 614, *et v. inf.* Chap. L., "SPECIFIC PERFORMANCE."

If infants or persons under disability were necessary conveying parties, or interested in the property sold, the conveyance was formerly directed to be settled by the Judge, and the words "in case the parties differ" were not inserted in the order.

In practice, however, except in orders for sale under the Settled Estates Act, these words are now always used, and accordingly the conveyance, even where infants, &c. are interested as conveying parties, is not necessarily settled by the Judge.

In sales under the Settled Estates Act, the practice of requiring the conveyance to be settled by the Judge, whether the parties differ or not, has been adhered to: see *Re Eyre*, 4 K. & J. 268; and has not been changed by the Settled Estates Act, 1877, or the Orders under that Act.

Under the usual qualification "in case the parties differ," a purchaser will have to pay the costs of applying at Chambers respecting his conveyance, unless a special case is made: *Hodgson v. Shaw*, 11 Jur. 95.

The order of a Judge settling the form of a conveyance is subject to appeal: *Pollock v. Rabbits*, 21 Ch. D. 466.

As to the procedure on settling a deed in case the parties differ, see O. LV. 34.

As to vesting lands or contingent rights of infants, or parties under disability, on sales by the Court, see *inf.* Chap. XLI., "TRUSTEES."

All persons having a legal title to or remedy against the property, whether parties to the action or not, should concur in the conveyance, but persons having only equitable interests, who are parties to the action, are bound by the order for sale, and the purchaser cannot, even at his own expense, insist upon their concurrence: *Re Williams*, 5 D. & S. 515; *Dart, V. & P.* 1346; *Dav. Conv.* vol. ii. p. 271 (a); nor is he entitled to covenants for title from them: *Cottrell v. C.*, 2 Eq. 330.

Where delay in completion occurs owing to defect of conveyance, the vendor is entitled to have a reasonable time within which to remove the defect: *Hatten v. Russell*, 38 Ch. D. 334.

When the conveyance has been settled, the necessary parties may be compelled to execute it by summons served upon them, and the order, upon service and non-compliance, may be enforced by writ of attachment or by committal: O. XLII. 7; but the better course is to obtain an order on summons at Chambers under the Trustee Acts and O. LV. 2 (8), appointing a person to convey to the purchaser, or vesting the estate at once in him, or an order under sect. 14 of the Jud. Act, 1884, appointing a person to execute.

Execution of the conveyance by a party may be ordered, although it has not been settled in Chambers: *Dougherty v. Teay*, 21 L. R. Ir. 379.

## POSSESSION.

Under O. LI. 1, any party to the action (in which a sale has been directed) in possession of the estate, or in receipt of the rents and profits of the estate directed to be sold, may be ordered to deliver up such possession or receipt to the purchaser or such other person as the Court shall direct.

To enforce possession the purchaser should apply by summons or motion on notice for an order for delivery of possession within a limited time. If possession be withheld after due service of the order the purchaser may proceed to enforce delivery of possession by writ of possession: O. XLII. 3, 5, XLVIII.; which, since the Jud. Acts, has, so far as relates to land, been substituted for the writ of assistance, whether between the parties to the action or as against strangers: see *Hall v. H.*, 47 L. J. Ch. 680; but as to the writ of assistance being still available in special cases, see *Wyman v. Knight*, 39 Ch. D. 165.

The purchaser will be entitled, out of the purchase-money, to his costs of

obtaining possession, occupation rent during the time he has been kept out of possession, compensation for deterioration, and arrears of charges (e. g., tithe) which he may have been compelled to pay, the amount, if not agreed upon, to be ascertained by inquiry : see *Thomas v. Buxton*, 8 Eq. 120.

#### COMPENSATION.

The ordinary conditions provide that any error or misstatement in the particulars shall not annul the sale nor entitle the purchaser to be discharged from his purchase, but that a compensation is to be made to or by the purchaser, the amount of which is to be settled by the Judge at Chambers.

Notwithstanding this condition, misrepresentation in the particulars may be so material as to entitle the purchaser to be discharged : see *Dimmock v. Hallett*, 2 Ch. 21; *Elze v. E.*, 13 Eq. 196; and for instances of the right to compensation, or *e. cont.* to a discharge from the purchase, *v. inf.* Chap. L., "SPECIFIC PERFORMANCE."

A purchaser has been allowed compensation under this condition for misdescription or misstatement of rent in the particulars, discovered after conveyance : *Cann v. C.*, 3 Sim. 447; *Bos v. Helsham*, L. R. 2 Ex. 72; *Re Turner and Skelton*, 13 Ch. D. 130; *Palmer v. Johnson*, 13 Q. B. Div. 351; not following *Manson v. Thacker*, 7 Ch. D. 620; *Besley v. B.*, 9 Ch. D. 103; and *Allen v. Richardson*, 13 Ch. D. 524; and commenting on *Jolliffe v. Baker*, 11 Q. B. D. 255; and see *Dart, V. & P.* 904; *Dav. Con.* vol. i. p. 467; but not in the absence of such a condition for a defect of title which might have been discovered : *Clayton v. Leech*, 41 Ch. Div. 103; and see *Soper v. Arnold*, 14 App. Cas. 429; nor for innocent misrepresentation made by the auctioneer : *Brett v. Clowser*, 5 O. P. D. 376; and as to the right to specific performance with compensation or abatement, *v. inf.* Chap. L., "SPECIFIC PERFORMANCE."

#### TITLE-DEEDS.

The conditions of sale usually contain provisions for the delivery to the purchaser of such of the title-deeds in the vendor's possession as relate exclusively to the lots purchased, and for the giving of an acknowledgment or undertaking as the case may require, under sect. 9 of the Conveyancing Act, 1881, in reference to title-deeds which do not relate exclusively to the lots purchased, and which are either not delivered to the purchaser, or delivered to him subject to the right of other persons to production of them.

When the vendor retains any part of an estate to which any documents of title relate, he is entitled to retain such documents : see *V. & P. Act*, 1874, s. 2, sub-s. 8; *Dart, V. & P.* 162, 163, 762.

In the absence of any stipulation, the purchaser of the lot largest in value is entitled to the custody of the title-deeds, and must enter into a covenant for their production to the other purchasers, who will be entitled to attested copies at the expense of the vendor : see *Peterson v. Elwes*, 6 W. R. 611; *Griffiths v. Hatchard*, 1 K. & J. 17; *Sugd. V. & P.* 34, 451; *Dart, V. & P.* 763, 1349; and see *Conveyancing Act*, s. 9.

A condition that the purchaser of "the largest lot" shall have the deeds has been differently construed. In *Scott v. Jackman*, 21 Beav. 110 (citing and following *L. Kinnaird v. Christie*, Form 12, *sup.* p. 302), the purchaser of the lot largest in price was held entitled to the deeds, as against the purchaser of several lesser lots though of greater aggregate amount.

In *Griffiths v. Hatchard, sup.*, the words "largest lot" were held to mean largest in superficial extent; but see on this case *Sugd. V. & P.* 34.

Where on a sale in lots the conditions provided that the largest purchaser should have the deeds and covenant to produce them to the others, it was held that each purchaser requiring a covenant must bear his own costs of it : *Strong v. S.*, 4 Jur. N.S. 942; and see the *V. & P. Act*, 1874, s. 2 (4).

If the deeds are in Court they may be ordered to be delivered out to the vendor for the purpose of completion : *Lee v. Flood*, V.-C. S., at Chambers, 7 Jan. 1853; or the purchaser may apply by summons at Chambers for delivery to him of such as he is entitled to; or, with consent of all parties, by petition of course : see *Dan.* 1098.



## SUBSTITUTING PURCHASER.

Either before or after the certificate has become binding, the Court will discharge the purchaser and substitute another, upon the latter first bringing in the purchase-money: *Miller v. Smith*, 6 Ha. 609. If the sub-sale was at a profit and before certificate, the advanced and not the original price must formerly have been brought in: *Hodder v. Ruffin*, Tam. 341. If the sub-sale was after certificate, any increased price belonged to the original purchaser, who from that period has been regarded in Equity as the owner: *Dewell v. Tuffnell*, 1 K. & J. 324; Sugd. V. & P. 100.

The order to substitute is made on application by summons. The original and sub-purchaser must either join as applicants, or appear and consent; and before the certificate has become binding, the order will not be made when neither the vendor nor the original purchaser consent. The application, without such consent, of a sub-purchaser before the certificate became binding was refused, and a resale directed, upon an undertaking by the original purchaser to bid at the resale the advanced price: *Re Goodwin's Estate*, 1 N. R. 46; 8 Jur. N.S. 1173.

If the subsale took place before the certificate had become binding, the application must formerly have been supported by an affidavit of no collusion or under-bargain: *Rigby v. M'Namara*, *Vale v. Davenport*, 6 Ves. 515, 615; and see *Holroyd v. Wyatt*, 2 Coll. 327; 9 Jur. 1072; or disclosing the terms of the under-bargain, if any. Such affidavit is not, however, since the Sales by Auction Act, 1867, in practice required at Chambers, even when the application to substitute is made before the certificate has been signed and approved: and see Dart, V. & P. 1334. But whether the present practice so affects the purchaser's position between the contract and certificate as to give him all the rights and liabilities of equitable owner seems doubtful; and it is submitted that, having regard to the preamble of sect. 7 of the Act, that section was directed to protecting the bidder from the risk of losing his bargain between contract and certificate, and does not so change his position as to give him complete ownership for all purposes from the date of the contract.

The order to substitute has been made when the original purchaser, after agreeing to sell the lots of which his purchase had been confirmed, died, his heir being abroad: *Pearce v. P.*, 7 Sim. 138.

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SECTION III.—DISCHARGE OF PURCHASER—RESALE.

1. *Purchaser discharged on his Application—Repayment of Deposit—Costs.*

UPON the application of A., the person by the chief clerk's certificate dated &c. certified to be [or by the order dated &c. allowed] the purchaser of (the hereditaments comprised in Lot —, part of) the estates directed to be sold by the order dated &c., and upon hearing &c., and upon reading &c., Let the said A. be discharged from being such purchaser; And it being agreed between the parties that the deposit paid by the said A. is now represented by £— New Consols, part of the £— New Consols in Court &c., and that the dividend that accrued thereon in Oct. last is now represented by £— New Consols, further part of the said £— New Consols, Let the fund in Court be dealt with as directed in the schedule hereto; And Let the costs, charges,

and expenses of the said A., occasioned by his bidding for [*or entering into the conditional contract in the said order dated &c. mentioned*], and being allowed the purchaser of the said estates (hereditaments), and of and incident to this application, be taxed &c. [*Add Payment Schedule directing transfer of part of stock to A. with interest at 4 p. c. on deposit, and for payment of costs, "without prejudice to the question out of what fund the said costs shall be ultimately borne."*] See *Powell v. P.*, V.-C. B., 20 Feb. 1875, B. 532, 19 Eq. 422; 10 Ch. 130.

*2. Order on Purchaser to complete—In default Resale—Purchaser to make good Deficiency, with Costs.*

LET the costs of the Plt of (the application for the order dated &c., *former order to pay in, if any, and of*) this application, be taxed &c. and be paid by B., the person by the chief clerk's certificate dated &c. certified to be [*or by the order dated &c. allowed*] the purchaser of the (hereditaments comprised in Lot —, part of the) estate sold under the judgment [*or order*] dated &c., to the Plt A.—Direction to pay in purchase-money, with consequent directions [Form 2, p. 298]; But in default of the said B. paying the said sum of £— and interest into Court by the time aforesaid, Let the said estate (hereditaments) be resold, with the approbation of the Judge; And in case no purchaser shall be found for the same at such resale, or in case the same shall be sold for less than the sum of £—, Let the said B., within (eight days) after service of the chief clerk's certificate of the result of such resale, pay the said sum of £—, in case the said estate (hereditaments) shall not be resold, or the difference between the said £— and the amount for which the said estate (hereditaments) shall be so resold, in case the same shall be resold for less than £— (the amount to be paid in to be certified), into Court &c.; And Let the said B. pay to the Plt A. his costs and expenses occasioned by such default as aforesaid, to be taxed &c.—[*Add Lodgment Schedule, Form No. 3.*]—See *Parramore v. Greenslade*, V.-C. W., 1 June, 1848, B. 1196; *Alchin v. Rogers*, V.-C. S., 27 March, 1871, A. 875.

For order to resell at not less than former bidding, and, if the estate shall not be resold, for the original purchaser to pay in his purchase-money, see *Walond v. W.*, M. R., 14 Nov. 1844, B. 224.

For order for payment in of purchase-money, and in default a resale, without prejudice to the liability of the purchaser to make good any deficiency in the price and all costs and expenses occasioned by his default, see *Hanne v. Watts*, V.-C. M. at Chambers, 22 Nov. 1877, A. 3426.

*3. Purchaser having accepted Title—Resale in Default of Payment of Purchase-money.*

UPON the application of the Plt, and upon hearing the solrs for the Applicant and A. B. the purchaser; And the said A. B. declaring himself content with the title, &c. Usual directions for payment in of purchase-money and for conveyance; And Let, in default of A. B.

paying the said £— into Court by the time aforesaid, the said hereditaments be resold with the approbation of the Judge, And in case no purchaser shall be found for the same at such resale, or in case the same shall be sold for less than the said £—, Let the said A. B. within eight days after service of the chief clerk's certificate of the result of such resale lodge in Court &c., the said £— in case the said hereditaments shall not be resold or the difference between the said £— and the amount for which the said hereditaments shall be so resold in case the same shall be resold for less than the said £—, the amount to be lodged to be certified. And Let A. B. pay to the Plt his costs and expenses occasioned by such default as aforesaid to be taxed &c. [Add Lodgment Schedule, Form No. 3.]—See *Johnson v. Mosley*, V.-C. H., 15 Jan. 1879, A. 391.

4. *Order, on Vendor's Application, rescinding Contract and forfeiting Deposit.*

"UPON the application of the Deft F. N. &c. (*vendor*); Let the contract dated &c. entered into by the Deft F. N., and A., B., and C., the purchasers (*on behalf of a company afterwards in liquidation*) for the sale of the leasehold colliery &c., fixed and loose plant, machinery, and other effects, be rescinded; And Let the deposit paid by the said purchasers be forfeited, but this order is to be without prejudice to the directions contained in the order dated &c. as to the costs thereby directed to be taxed and paid by the said purchasers."—Costs of the Plts and the Defts, and the official liquidators, of this application to be costs in the action. "And the summons, so far as it seeks that the said leasehold colliery, fixed and loose plant &c. might be resold, or dealt with as the Judge might direct, stands over."—*Nowell v. N.*, V.-C. H., at Chambers, 13 March, 1877, B. 1492.

5. *Bankrupt Purchaser—Resale—Forfeiture of Deposit.*

"AND the said E. as (the trustee) of C. (*the purchaser*) declining to elect to complete the purchase of the estate and premises comprised in Lots &c., of which the said C. has been allowed the purchaser, Let the sum of £—, being the amount paid by the said C. as a deposit on his bidding, or the New Consols now representing the same, be forfeited, and disallow the said C. as the purchaser thereof; And Let the premises comprised in the said lots be resold with the approbation of the Judge."—*Depree v. Bedborough*, V.-C. S., 4 Dec. 1863, A. 2370; 4 Giff. 479.

NOTES.

DISCHARGE OF PURCHASER.

A purchaser under a judgment, if upon inquiry the title is certified to be bad, may apply by summons, served upon the parties to the action, to be discharged from being such purchaser, and that his costs, charges and expenses occasioned by his bidding for, and being allowed the purchaser, and of the application, may be taxed and paid: see *Dan. Ch. Forms*, 1355; and

unless precluded by the conditions he will be entitled, on being discharged, to his costs, charges and expenses (including those of investigating the title: see *Barton v. Downes*, 1 Flan. & K. 633; *Re Hargreaves and Thompson*, 32 Ch. Div. 454; *Re Ebsworth and Tidy*, 42 Ch. Div. 23; *Re Bryant and Barningham*, 44 Ch. Div. 218; Sugd. V. & P. 107) out of the fund in Court, if any: *Reynolds v. Blake*, 2 S. & S. 117; *Calvert v. Godfrey*, 6 Beav. 97; *Perkins v. Ede*, 16 Beav. 268; and if no fund in Court, from the Plt, without prejudice as to how they are to be ultimately borne: *Smith v. Nelson*, 2 S. & S. 557; *Bury v. Johnson*, 2 Y. & C. 564; but not in the first instance from a Deft having the conduct of the sale: *Mullins v. Hussey*, 1 Eq. 488.

He is also entitled to a return of any deposit, with interest at 4l. p. c.: *Re Hargreaves and Thompson*, *sup.*; *Re Ebsworth and Tidy*, *sup.*; *Re Bryant and Barningham*, *sup.*; and, if the deposit has been invested, to receive the stock in which it has been invested and the dividends that have accrued thereon, or the actual sum deposited, and all dividends that have arisen from the investment: see *Powell v. P.*, 19 Eq. 422; and as to return of deposit in cases of specific performance, and under the V. & P. Act, 1870, *v. inf.* Chap. L., "SPECIFIC PERFORMANCE."

Independently of the title being found bad on inquiry, a purchaser has been discharged where the contract is inequitable, on submitting to forfeit his deposit: *Savile v. S.*, 1 P. W. 745; *Gregg v. Glover*, 1 Ir. Ch. 211; and also, in one instance, where by mistake he had given an unreasonable price: *Morshead v. Frederick*, Sugd. V. & P. 120.

A purchaser has been also discharged and his deposit returned when the vendors, knowing that the occupation was adverse, represented it as the occupation of their own tenant: *Lachlan v. Reynolds*, Kay, 52.

So also where, after acceptance of title and payment into Court, the purchaser discovered, from a will having been incorrectly abstracted, or from an undisclosed deed, that the title was bad: *McCulloch v. Gregory*, 1 K. & J. 286; *Ward v. Trathen*, 14 Sim. 82; and also when the title has been rendered bad by the vendor's omission, after the day fixed for completion, to keep the property (leasehold) insured: *Palmer v. Goren*, 4 W. R. 688.

Inaccurate recitals, misleading conditions, or substantial misrepresentations as to the value or rental of the property will also entitle a purchaser to be discharged: *Dimmock v. Hallett*, 2 Ch. 21; *Else v. E.*, 13 Eq. 196; and see *Torrance v. Bolton*, 8 Ch. 118; *Bromage v. Davies*, 4 Jur. N.S. 683; *et inf.* Chap. L., "SPECIFIC PERFORMANCE."

A purchaser insane at the time of his bidding has also been discharged, and a resale directed on the vendor's application: *Blackbeard v. Lindigren*, 1 Cox, 205.

The purchaser may also be discharged and the sale set aside when the judgment has been obtained fraudulently, or the purchase fraudulently effected: *L. Bandon v. Becher*, 9 Bli. N.S. 532; 3 Cl. & F. 479; *Thornhill v. Glover*, 3 D. & W. 195; *Bowen v. Evans*, 2 H. L. C. 257; 1 Jo. & Lat. 178.

A purchaser under a judgment who participates in, or is cognisant of, the fraud cannot avail himself of his purchase, which is a nullity, nor, *semble*, though innocent of the fraud, where it appears on the proceedings, or might have been ascertained on inquiry: see *Gore v. Stacpoole*, 1 Dow, 18, 30; *Colclough v. Bolger*, 4 Dow, 54; and see Sugd. V. & P. 110; Sugd. H. L. 679—721.

In the absence of fraud, and provided the Court had jurisdiction (from all parties interested being before the Court), mere irregularity in the proceedings did not operate to set aside the sale, nor affect the purchaser's title: see *Lutwyche v. Winford*, 2 Bro. C. C. 248; *Bennett v. Hamill*, 2 Sch. & Lef. 577; *Colclough v. Sterum*, 3 Bli. 181; *Curtis v. Price*, 12 Ves. 105; *Lloyd v. Johnes*, 9 Ves. 65; *secus* where, as under the Partition Acts, the jurisdiction to sell depended upon the result of the inquiries directed, and the sale had been before certificate: *Powell v. P.*, 19 Eq. 422; 10 Ch. 131; or where error in the judgment under which the purchase was directed had been shown: *Lechmere v. Brasier*, 2 J. & W. 287.

Now by the Conveyancing Act, 1881, s. 70, "an order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not." The section applies to leases, sales, &c., under the

Settled Estates Act, 1877 (as to which, *v. inf.* Chap. XLV., "SETTLEMENT"), notwithstanding the exception in sect. 40, or under the former Acts repealed by the Act of 1877, and to all orders made before or after the commencement of the Act, except any previously set aside or determined to be invalid, or as to which proceedings impeaching it were then pending. This protection extends to any impropriety, even though apparent on the face of the order: *Re Hall Dare's Contract*, 21 Ch. Div. 41.

And see *Sherwood v. Beveridge*, 3 D. & S. 425; *Whitfield v. Lequentre*, *lb.* 464, that the conduct of the purchaser, or the nature of the irregularity, may be such as to entitle him not to be at once discharged, but to a reference as to title.

#### RESALE.

It is provided by the general conditions (R. S. C. Appx. L. 15) that if the purchaser does not pay in his purchase-money in due course, and otherwise perform the conditions, an order may be made at Chambers for a resale, and for payment by him of any deficiency in the price thereat, and of all costs and expenses occasioned by such default.

Upon the purchaser making default in paying his purchase-money, the vendor may either obtain upon summons a simple order for payment into Court, which may be enforced by writ of sequestration: O. XLII. 4; or he may obtain an order for payment in, and in default a resale, and that the purchaser make good the deficiency, and the costs and expenses occasioned by such default.

In order, it seems, to preserve the remedy against a purchaser who does not complete, of making him liable for any deficiency of price, the order for resale does not direct the purchaser to be discharged: *Harding v. H.*, 4 My. & C. 514; and until the resale takes place he may complete his contract upon payment of all costs occasioned by his default: *Robertson v. Skelton*, 13 Beav. 91; but where the purchaser is bankrupt, and unable on that ground to complete, an order may be obtained by the vendor rescinding the contract, and forfeiting the deposit: see *Nowell v. N.*, *Depree v. Bedborough*, Forms 4, 5, *sup.* p. 311.

A purchaser under a judgment being, from subsequent bankruptcy, unable, and his assignees declining, to complete the purchase, the deposit was forfeited on a resale, but without any order against the bankrupt's estate to indemnify the vendors as to any deficiency: *Depree v. Bedborough*, 4 Giff. 479.

## CHAPTER XX.

## FURTHER CONSIDERATION.



1. *Order on Further Consideration (and Motion, or Adjourned Summons, to vary Certificate).*

THIS action coming on [the — day of — and] this day for [*If so*, subsequent] further consideration before this Court, in the presence of counsel for the Plt and the Defts [*if some Defts do not appear*, for the Plt and the Deft A., no one appearing for the Defts B. and C., although they were duly served with notice of this action having been set down to be heard for [subsequent] further consideration, as by the affidavit of &c., filed &c., appears]; *if so*, and for D., who has been served with the judgment [*or order*] and has entered an appearance pursuant to O. xvi. 41, of the R. S. C.; *and if so*, and for E., the purchaser of the real estates of G., the testator &c., sold pursuant to the judgment, *or order*, dated the — day of —; *and if so*, and for F., upon whose application the funds are restrained by the order dated the — day of —, *and if so*, and upon the motion of the Deft A., to vary the chief clerk's certificate dated the — day of —, [*or if on adjourned summons*, and upon the application of the Deft A. to vary &c., which upon hearing the solrs for the Applicant, and for &c., in Chambers, was adjourned to be heard in Court,] and upon hearing the said judgment, [*or order*] dated the — day of —, the chief clerk's certificate dated the — day of — [*enter any evidence*], and what was alleged by the counsel on both sides [*or for all parties, or for the Plt and the Deft A., and if so*, and for the said D., *or E., or F.*], This Court doth &c.

2. *Order on Summons for Further Consideration (and Summons to vary Certificate) heard in Chambers.*

Mr. Justice —, in Chambers.

UPON the application of the Plt for the further consideration of this action, adjourned by the order dated &c. [*If so*, and upon the application of the Deft A. to vary the chief clerk's certificate dated the — day of —], and upon hearing the solrs for the Plt and for the Defts [and for &c., last Form], and upon reading the said order dated the — day

of —, the chief clerk's certificate, dated the — day of — [*Enter any evidence*], It is ordered that &c.

3. *Order on Summons for Further Consideration (and Summons to vary Certificate) adjourned into Court.*

THE application of the Plt for the further consideration of this action [*If so*, and the application of the Deft A. to vary the chief clerk's certificate dated the — day of —], which upon hearing the solrs for the Plt and for the Defts [*If other persons appear*, and for &c., Form 1, *sup.*], in Chambers, on the — day of —, was [*or were*] adjourned to be heard in Court, coming on (the — day of — and) this day to be heard accordingly; and upon hearing counsel for the Plt and the Defts [*If so*, and for the said &c.], and upon reading the order dated the — day of —, the chief clerk's certificate dated the — day of — [*enter any evidence*], this Court doth &c.

And as to applications by motion or summons to vary the certificate and adjourning the applications by summons to be heard in Court, see Chap. XVIII., "CHAMBERS."

NOTES.

SETTING DOWN ACTION OR CAUSE FOR FURTHER CONSIDERATION.

When any cause or matter in the Chancery Division has been adjourned for further consideration, it may, after eight days and within fourteen days from the filing of the certificate, be set down for further consideration, on the written request of the solr for the Plt or party having the conduct of the proceedings, and after the expiration of such fourteen days it may be set down on the written request of the solr for the Plt, or for any other party, and in either case on production of the judgment or order adjourning further consideration, or an office copy thereof, and an office copy of the chief clerk's certificate, or a memorandum of the date when it was filed, endorsed on the request above referred to by the proper officer. The cause, when set down, is not to be put into the paper for ten days, and to be so marked. Notice of setting down is to be given to the other parties at least six days before the day for which the cause is marked: O. xxxvi. 21. And for the forms of the request and notice, see R. S. C. Appx. L., 26, 27.

By O. XL. 10, upon a motion for judgment, or upon an application for a new trial, the Court may, if of opinion that it has not sufficient material before it, direct the motion to stand over for further consideration, and direct issues or questions to be tried or determined, and accounts and inquiries to be taken.

Where on further consideration further accounts and inquiries were directed, but no question of law remained for decision, the Court refused to adjourn further consideration in Court, but gave liberty to apply in Chambers after certificate: *Gilbert v. Russell*, W. N. (75) 225.

By O. xxxvi. 39, the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment.

The action may be marked short as on the original hearing or trial, but not, except by consent, so as to be in the paper until after ten days from the date of setting down. And as to short causes, *v. sup.* p. 157.

On a question reserved by the chief clerk for the Court's opinion counsel for the affirmative proposition have the right to begin: *Lyle v. Ellwood*, 23 W. R. 157.

## SERVICE—APPEARANCE BY PERSONS NOT PARTIES.

All parties to the action, including any persons who may have entered appearances pursuant to O. XVI. 41, must be served with notice that the action has been set down for further consideration.

As to affidavit of service, see *sup.* p. 20.

If it is intended to deal with the proceeds of any estates sold in the action, the purchaser must be served, and if he does not appear, an affidavit not only of service, but that his conveyance has been delivered to him, must be produced and entered as read. If the purchaser has obtained his conveyance, he should not appear; and doing so was refused his costs: *Barton v. Latour*, 18 Beav. 526. If it appears on the proceedings that he has obtained his conveyance, he need not be served: *Noble v. Stow* (No. 2), 30 Beav. 272. If any stop order affects the funds to be dealt with, the person who obtained it must be served with notice, and if he does not appear, an affidavit of service must be produced. If such purchaser or incumbrancer appear, his appearance must be noticed in the order.

Persons against whom a personal order for payment of money is required should be served, though they have not obtained an order to attend proceedings: *Re Rees, R. v. George*, 15 Ch. D. 490.

By O. LXVII. 8, "where a person who is not a party appears in any proceeding, either before the Court or in Chambers, service on the London solr, by whom such person appears, whether acting as principal or agent, is good service except in matters requiring personal service."

As to the right of a person not served with the judgment to obtain leave to appear to contest a point on further consideration, see *Samuel v. S.*, 12 Ch. D. 152, 161; *Dan.* 1006; *D. C. F.* p. 465, Form 1167.

## EVIDENCE.

An affidavit as to matters directly in issue, filed after the certificate, could not formerly have been read, but the Court, on counsel's statement of the facts, has sent an inquiry: *Fleming v. East*, Kay, lii.; and see *Howard v. Chaffers*, 11 W. R. 585; but now, under O. XXXVII. 1, further evidence by affidavit may be received by leave of the Court: *May v. Newton*, 34 Ch. D. 347; and see *Re Chifferiel, C. v. Watson*, 57 L. J. Ch. 137; 58 L. T. N.S. 877; 36 W. R. 806; *Re Rouse, R. v. Tribble*, W. N. (88) 231; *Re Michael, Dessau v. Lewin*, 52 L. T. N.S. 609; *Beaney v. Elliott*, W. N. (80) 99. Further evidence as to the conduct of the Deft between judgment and further consideration was received on the question of costs, but not as to his conduct before action: *Re Revill, Leigh v. Rumney*, 55 L. T. N.S. 542.

Notice ought to be given of reading evidence entered in the certificate: per M. R. (Sir G. Jessel), in *Re Chennell, Jones v. C.*, 8 Ch. Div. 504. In *Re Brier, B. v. Evison*, 26 Ch. Div. 242, the question was raised whether the evidence could be read where there was no summons to vary, but was not decided.

## PRINCIPLE OF JUDGMENT NOT TO BE VARIED.

The Court will not, on the further consideration of the action, entertain questions raised on the pleadings, but with respect to which no direction or reservation is contained in the original judgment: *Legrand v. Whitehead*, 1 Rus. 309; and see *Morgan v. M.*, 13 Beav. 441; and as to raising on further consideration questions not raised in the pleading, see *Hughes v. Jones*, 3 D. F. & J. 307.

Interest may, on further consideration, be directed to be computed on balances certified to be due, if grounds for it appear by the certificate: see Chap. XLVII., "MORTGAGES," and Chap. XLI., "TRUSTEES."

But though grounds for it may appear, the Court will not, on further consideration, direct a party to be charged with wilful default: see Chap. XLI., "TRUSTEES;" and where a decree was framed so as to give the Plts compensation for the value of minerals wrongfully taken, the Court declined, on further consideration, to entertain a claim for interest thereon: *Phillips v. Homfray*, 44 Ch. D. 694, 701.



The principle on which costs have by the original judgment been directed to be taxed will not be varied: *Wilson v. Metcalfe*, 1 Rus. 530; *Quarrell v. Beckford*, 1 Mad. 286; but where by a decretal order directing an inquiry what damage Plt had sustained, with liberty to apply, no further consideration was adjourned, but costs of suit were ordered to be paid by Deft, the Plt, though entitled to the costs of all matters properly within the inquiry, notwithstanding he failed to prove any damage, was ordered to pay the costs of questions improperly raised by him in prosecuting such inquiry: *Krehl v. Park*, 10 Ch. 434.

Where a receiver has been appointed generally, it is unnecessary, on further consideration, to insert a direction to continue him: *Re Underwood, U. v. U.*, 60 L. T. N.S. 384; 37 W. R. 428.

Although an order on further consideration directing payment of costs in a particular way did not reserve subsequent further consideration, nor the question how the costs should ultimately be borne, the Court treated the directions as to costs as being made for the purpose of convenience, and on petition for payment out of the fund, readjusted the incidence of the costs: *In re Roper, Taylor v. Bland*, 45 Ch. Div. 126; and that it is right in such a case to reserve the question how the costs are ultimately to be borne, *v. Ib.* p. 136.

#### FURTHER CONSIDERATION IN CHAMBERS.

By O. LV. 2 (16), applications for orders on the further consideration of any cause or matter, where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders, may be disposed of in Chambers.

Where questions of difficulty arose in the distribution of an insolvent estate the Plt was allowed costs of further consideration in Court: *Re Barber, Burgess v. Vinnicome*, 31 Ch. D. 665, 670.

As to the admon of insolvent estates, *v. inf.* Chap. XLIV., "ADMINISTRATIONS."

In *Gilbert v. Smith*, 2 Ch. Div. 686, on an order on admissions in pleadings for the usual inquiries in a partition action, the Court reserved further consideration, and gave liberty to any of the parties to apply that the hearing on further consideration should be in Chambers.

#### ON ORIGINATING SUMMONS UNDER O. LV. 72.

By O. LV. 72, where any matter originating in Chambers shall have been adjourned for further consideration in Chambers, such matter may, after eight and within fourteen days from the filing of the chief clerk's certificate, be brought on for further consideration by a summons, to be taken out by the party having the conduct of the matter, and after the fourteen days, by a summons to be taken out by any other party. The summons is to be in the form prescribed by the rule, and is to be served six clear days before the return.

The order will in simple cases be made in Chambers, but if both sides desire the case to be argued by counsel, or if it appears to the Judge that the questions arising are such as to require the assistance of counsel, the case is adjourned to Court. For the course taken on such adjournment, see Chap. XVIII., "CHAMBERS," p. 278.

## CHAPTER XXI.

## SPECIAL CASE.

1. *Form of Order on Special Case which decides the whole Action.*

THIS special case, stated for the opinion of this Court, and filed on the &c., coming on this day to be heard before this Court in the presence of counsel for the Plt and for the Deft, and upon hearing the said special case read, and what was alleged by counsel on both [all] sides, This Court is of opinion that &c., and that &c., and that &c. And that the costs of this special case and of this action ought to be borne out of &c. And counsel for the [Plt or Deft] moving for judgment in accordance with the foregoing opinion, This Court doth order and adjudge accordingly; And it is ordered that it be referred to the taxing master to tax the said costs [in case the parties differ]. Liberty to apply.

This form was settled after the hearing of *Harrison v. The Cornwall Minerals Co.*, V.-C. H., 16 Ch. D. 66.

Where the decision on a special case will decide all questions in the action, it is not necessary that the action should be separately set down on motion for judgment: *In re Cane, Ruff v. Sivers*, 60 L. J. Ch. 36; 63 L. T. N.S. 746, where the Court made a declaration in terms of its answer to the case, and ordered further proceedings in the action to be stayed.

2. *If the Special Case stands for Judgment.*

THIS Court did order that this special case should stand for judgment, and the same standing for judgment this day in the paper in the presence of counsel for &c., this Court doth declare &c.

3. *The like—Court Declining to answer the Question.*

THIS special case coming on &c. [Form 1, *supra*], and this Court being of opinion that the question submitted for the opinion of the Court cannot properly be decided during the life of the Deft B., doth decline to decide the same.—See *Moore v. M.*, V.-C. W., 8 Dec. 1856, B. 320; followed by V.-C. M., in *Bright v. Tyndall*, 4 Ch. D. 189, 199.

4. *Order to set down Special Case—O. xxxiv. 4.*

UPON the application of the Plt, who alleged that the parties have concurred in stating the questions of law arising in this action in the

form of a special case ; that the Deft A. is a married woman [or an infant, or a lunatic]; and upon hearing the solrs for the Applicant, and for [if a lunatic, add, and for C. his committee]; and upon reading an affidavit of &c., filed &c. [*Enter evidence*], It is ordered that the Plt be at liberty to set down the said special case for hearing.

On application to set down a special case under O. XXXIV. 4, notice to a married woman (not being a party thereto in respect of her separate property, or of any separate right of action by or against her), infant, or *non compos*, who may be interested in the case, is not required, though such a notice is necessary on an application to set down a special case under 13 & 14 V. c. 35 : see *Re Smith, Lambert v. Lange*, M. R., 6 Dec. 1878, B. 2077.

For order to amend special case by stating the question differently, and thereon declaring rights, see *Bell v. Cade*, 2 J. & H. 125.

For order stating facts assumed from but not stated in the case, and declaring the Court's opinion, see *Lane v. Debenham*, 11 Ha. 195.

5. *Order directing Question of Law to be set down for Argument without stating Special Case.*—O. XXXIV. 2.

UPON the application of the Plts, and upon hearing &c., It is ordered that the following question of law be set down to be argued before the Court, viz., Whether &c.

6. *Order on Questions of Law set down under O. XXXIV. 2.*

THE questions of law directed to be set down to be argued before this Court by the order, dated &c., coming on this day to be argued before this Court in the presence of counsel for the Plt and for the Deft, and upon hearing counsel on both sides, This Court doth declare &c.

7. *Order directing Point of Law raised by Pleadings to be set down under O. XXV. 2.*

UPON the application of the Plt, and upon hearing &c., It is ordered that the point of law raised by the statement of defence be set down to be argued before this Court.

8. *Order on Point of Law.*

THE point of law raised by the statement of defence, and by the order, dated &c., directed to be set down to be argued before this Court, coming on &c.—See Form 7.

NOTES.

The procedure by special case is now regulated by O. XXXIV., which provides, by r. 1, that the parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court, stating concisely such facts and documents as may be necessary to enable the Court to decide the questions thereby raised. Upon the argument of such case the Court and the parties may refer to the whole contents of such documents, and the Court may, from the facts and

documents stated, draw any inference, whether of fact or law, which might have been drawn from them if proved at a trial.

The rules as to parties (as to which, *v. sup.* Chap. IX.) apply to a special case.

As to amendment of special case, the old practice, under Sir G. Turner's Act (13 & 14 V. c. 35), would seem to be applicable: see Dan. 1968; Dan. Ch. Forms, 1983, 1984.

Under that Act, the case might be amended by adding parties after it was set down: *Thistlethwaite v. Garnier*, 5 D. & S. 73; or at the hearing, the case being set down again: *Barnaby v. Tassell*, 11 Eq. 363; *Savage v. Snell*, 11 Eq. 264; *Attey v. Etough*, 13 Eq. 462; but in *Johnston v. Brown*, 8 Eq. 584, where a female Deft had married after the setting down, it was held that the case need not be set down again. Where a material fact was omitted, but admitted by all parties at the hearing, prefacing the order with a recital to that effect was sufficient: *Lane v. Debenham*, 11 Ha. 188; 17 Jur. 1005.

A special case cannot be amended under O. XXVIII. 6; but when a decision has been given under a mistake of fact, the Court is not thereby bound, but, unless the decision has been carried into effect by any subsequent order, may direct the action to go on to trial, and then direct inquiries to ascertain the real facts: *Re Taylor's Estate*; *Tomlin v. Underhay*, 22 Ch. D. 495.

Upon special case under these rules, the Court has decided questions as to title in an action for recovery of possession of land: *General Finance, &c. Co. v. Liberator Building Society*, 10 Ch. D. 15; as to whether estates, subject of an action for specific performance, were comprised in a devise of trust estates: *Lysaght v. Edwards*, 2 Ch. D. 499; as to construction of a power of appointment: *Marshall v. Aislewood*, W. N. (81) 3; and as to validity in law of objections to letters patent: *Rolls v. Isaacs*, 19 Ch. D. 268.

As to special case stated by arbitrator or referee, *v. inf.* Chap. XXVII., "ARBITRATORS"; and in interpleader proceedings, Chap. XXIX., "INTERPLEADER."

By r. 2, if it appear to the Court or a Judge that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or reference made to a referee or an arbitrator, the Court or Judge may make an order accordingly, and may direct such question to be raised by special case or in such other manner as may be deemed expedient, and may stay all proceedings in the meantime.

The rule is applicable only to such questions of law as must necessarily arise in the action: *Republic of Bolivia v. National Bolivian Navigation Co.*, 24 W. R. 361; and as to the Court declining to entertain fictitious questions, see *Bright v. Tyndall*, 4 Ch. D. 189, 197; *Pryse v. P.*, 15 Eq. 86; *Key v. K.*, 4 D. M. & G. 73; or questions submitted in such a form that the real rights of the parties cannot be determined: *Bulkeley v. Hope*, 4 W. R. 280; or to make declaration of future rights: *Lady Langdale v. Briggs*, 8 D. M. & G. 426; 26 L. J. Ch. 45; *Dawson v. D.*, 4 Eq. 508; *Gosling v. G.*, John. 265; *Moore v. M.*, *sup.* Form 3; and as to the Court declining to answer, see *Ewart v. E.*, 11 Ha. 276; *Pryse v. P.*, *sup.*; and that the Court would not act on inferences drawn by the parties, but required that necessary facts should be verified by affidavit, *Domville v. Lamb*, 9 Ha. 1v.

As to the time when application should be made under the rule, see *Met. Bd. of Works v. New River Co.*, 1 Q. B. D. 727; 2 Q. B. Div. 67; *Tattersall v. National Steamship Co.*, W. N. (84) 32; and for form of motion or summons, D. C. F. 1979, 1980.

By r. 3, every special case is to be printed and signed by the several parties, or their counsel or solrs, and filed.

By r. 4, a special case in a cause or matter to which a married woman (not being a party thereto in respect of her separate property, or of any separate right of action by or against her), infant, or person of unsound mind not so found by inquisition is a party, is not to be set down for argument without leave of the Court or a Judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

The application under this rule is now usually by summons in Chambers: see O. LV. 2 (17), *sup.* p. 275; and Dan. 1969.

By r. 5, either party may enter a special case for argument by delivering to the proper officer a memorandum of entry (see Form, R. S. C. Appx. G., No. 25), and also producing a copy of any order made under r. 4.

#### SETTING DOWN THE SPECIAL CASE.

A special case cannot now be set down before the Court of Appeal in the first instance; it will not be placed in the paper for one month after being set down unless by consent; and it must not be marked short: see *Anon.*, M. R., 1 W. R. 10.

By O. xxxiv. r. 6, the parties to a special case may enter into an agreement (not liable to stamp duty) that upon the judgment of the Court a sum of money shall be paid by one party to the other, and that execution shall issue forthwith, unless otherwise agreed, and unless stayed on appeal.

By r. 8, a special case may be stated for the same purposes and in the same manner as was provided by the 13 & 14 V. c. 35, and the same shall be deemed to be a special case stated in a matter within the meaning of O. xxxiv.

The effect of this rule is to keep alive the provisions of Sir G. Turner's Act (repealed by 46 & 47 V. c. 49), under which, by sect. 1, persons interested in any question as to the construction of any Act of Parliament, will, deed, &c., or as to the title, &c., to any real or personal estate contracted to be sold, or as to any other matter falling within the jurisdiction of Equity, might concur in stating a special case for the opinion of the Court; and exors, admors, and trustees might concur therein. By sect. 2, the committee of a lunatic's estate might concur, with the sanction of the L. C., or of the Lords Justices.

By sect. 14, the Court, upon the hearing, might determine the questions raised, or any of them, and by decree declare its opinion, without proceeding to administer any relief consequent thereon, or might decline to decide. By s. 15, the declaration was to indemnify trustees, and this protection still subsists: *Re Benzon, Forster v. Schlesinger*, 54 L. T. N.S. 51; W. N. (86) 19. By s. 17, the special case was to be a *lis pendens*, and might be registered as such. On a special case under a will, the costs were payable out of the general residue: *Armitage v. Coates*, 35 Beav. 1; *Cowley v. Wellesley*, *Ib.* 635; or, if none, from the specific property: *Cookson v. Bingham*, 17 Beav. 262. The estate having been administered, except 100*l.*, the trustees took their costs thereout in priority, and the residue went to the other parties rateably: *Hindle v. Taylor*, 5 D. M. & G. 577. As to costs under the old practice, see *Morg. & Wurtzburg*, 92; *Dan.* 5th ed. 1710.

These orders are subject to appeal: see sect. 33.

The Court could decide disputed rights, on a special case: s. 14; *Schroeder v. S.*, Kay, 578; *affr.* 24 L. J. Ch. 510; but see *Bailey v. Collett*, 23 L. J. Ch. 230.

All persons interested beneficially were required to be parties: *Entwistle v. Cannon*, 4 W. R. 450; but where one of the parties was out of the jurisdiction, and there were others before the Court having identical interests, his presence was dispensed with: *Re Brown*, 29 Beav. 401; and the trustees were necessary parties to a case for construing the trust deed: *Vorley v. Richardson*, 8 D. M. & G. 126.

It must, however, be borne in mind that the procedure under the Act is in most cases superseded or rendered unnecessary by the new procedure by way of originating summons (*v. sup.* Chap. XVIII., "CHAMBERS"), which should, it is conceived, be always resorted to where practicable.

## CHAPTER XXII.

## ISSUES.

## SECTION I.—DIRECTING TRIAL OF ISSUES AND QUESTIONS OF FACT.

1. *Trial by Jury*—O. XXXVI. 3.

UPON the application of the Plts, and upon hearing the solrs for the Applicants and for the Deft, and upon reading &c., Let this action be tried before a Judge with a jury.—*Melville v. Barker*, V.-C. B. at Chambers, 23 January, 1885, B. 232.

2. *Order for Trial of Issues or Questions of Fact, or Fact and Law, before the Court without a Jury, and with or without Assessors*—O. XXXVI. 8.

LET the following issues [or questions of fact, or partly of fact and partly of law] be tried before this Court, [or, if so, with &c. as assessors], that is to say, whether &c. [*State the issues or questions to be tried; and if a day be then appointed, Add, And Let the day for such trial be the — day of —. Add, if so: Adjourn &c.*].—Liberty to apply.

For order directing interpleader issue as to ownership of goods seized by sheriff, see Chap. XXIX., Sect. II., Form 1, "INTERPLEADER."

3. *Order for Trial of Issues or Questions of Fact by Jury before another Division or at Assizes*—O. XXXVI. 44.

AND this Court being of opinion that, by reason of &c. (*State the reason*), it is expedient that the following issues [or questions of fact] arising in this action should be tried by a common [or special] jury before a Judge at the sittings in London [or Middlesex] of the Q. B. Division [or at the next assizes to be holden for the county of &c.], that is to say, whether &c. [*State the issues or questions*] doth order that such issues [or questions] be accordingly so tried [*add, if so: Adjourn &c.*].—Liberty to apply.

4. *Further Issue added by Consent.*

UPON the application of the Plt, and upon hearing &c., for the Deft, Let the following additional issue agreed upon by the parties be tried

with and at the same time as those ordered to be tried under the order dated &c., that is to say &c.—*Williams v. Allen*, Stirling, J., 3 Nov. 1887, B. 1320.

#### 5. *Order postponing Trial.*

UPON the application of the Plts, and upon hearing counsel for the Applicants and for the Defts, and upon reading &c., Let the trial of the issues arising in this action directed to be tried by the order dated &c. be postponed until the next assizes to be holden at L— in the county of —; And Let the Plts J. and F. pay to the Defts C. and W. £— for the agreed costs of this application.—*Whitaker v. Feather*, M. R. at Chambers, 20 July, 1876, B. 1714.

#### 6. *Form of Certificate of Officer after Trial by Jury.*

30th Nov. 1876.

In the High Court of Justice.

— Division.

Between A., Plt, and B., Deft.

I CERTIFY that this action was tried before &c. and a special jury of the county of — on the — and — days of Nov. 1876. The jury found [*State findings*]. The judge directed that judgment should be entered for the Plt for £—, with costs of summons [*or as the case may be*]. C. D. [*Title of Officer*].—See R. S. C. 1883, Appx. B., Form 17.

By O. xxxvi. 41, 42, (*v. inf.* p. 327), the certificate of the associate or officer is substituted for the *postea* formerly indorsed on the record, and in future there will not be any such record or *postea*.

The Court sometimes directed that if the substance of the issue were found, but with some special circumstances, which might be material in measuring the extent of relief to be given, that matter should be endorsed on the *postea*: *White v. Lisle*, 3 Swa. 345; *Crawley v. Roberts*, *Parker v. Morrell*, V.-C. K. B., 2 May, 1846, B. 1020; *Bowser v. Colby*, 1 Ha. 145.

#### NOTES.

##### DIRECTING ISSUES—RIGHT TO TRIAL BY JURY—DISCRETION OF COURT.

The right of suitors to a jury was in general unaffected by the Judicature Acts; but by the Rules of 1883 has been greatly modified, especially in the Chancery Division.

By Jud. Act, 1873, s. 29, “any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law,” may, with the leave of the Judge or Judges of the Court or Division, have the question or issue tried at the assizes or at the sittings in London or Middlesex, as provided for by sect. 30.

By Jud. Act, 1875, s. 21, the methods of procedure previously existing in the different Courts are preserved in similar cases when not inconsistent with the Acts and Rules. And see O. LXII. 2.

Applications under r. 6 for trial of one issue in an action (*e.g.* an issue raised by counter-claim) before another will only be granted on very special grounds: *Piercy v. Young*, 15 Ch. D. 475; and see *Emma Mining Co. v. Grant*, 11 Ch. D. 918.

By O. xxxvi. 3, “causes or matters assigned by the principal Act to the Chancery Division shall be tried by a Judge without a jury, unless the Court or a Judge shall otherwise order.”

By r. 4, "the Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury."

By r. 5, "the Court or a Judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury": see *Shafto v. Bolckow, Vaughan & Co.*, 35 W. R. 686.

By r. 6, "in any other cause or matter, upon the application, within ten days after notice of trial has been given, of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury."

As to the meaning of the words "in any other cause or matter," see *The Temple Bar*, 11 P. Div. 6; *Cooté v. Ingram*, 35 Ch. D. 117; *Jenkins v. Bushby*, (1891) 1 Ch. (C. A.) 484.

By r. 7, "(a) in every cause or matter, unless under the provisions of r. 6 of this order a trial with a jury is ordered, or under r. 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a Judge without a jury; provided that in any such case the Court or a Judge may at any time order any cause, matter, or issue to be tried by a Judge with a jury, or by a Judge sitting with assessors, or by an official referee or special referee, with or without assessors:

"(b) The Plt, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, upon giving notice in writing to that effect to the Dft at the time when he gives notice of trial:

"(c) The Dft, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given:

"(d) Provided that a Judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just."

By r. 8, "subject to the provisions of the preceding rules of this order, the Court or a Judge may, in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others."

Before the Jud. Act, all questions of fact arising in suits properly instituted in Chancery could, without any consent of parties, be tried without a jury. If the Court thought fit, a jury could be had either by summoning a jury in Chancery (21 & 22 V. c. 27, s. 2), or by directing issues at law; but neither party could claim a jury as a matter of right: *Bovill v. Hitchcock*, 3 Ch. 417; *Patent Marine Inventions Co. v. Chadburn*, 16 Eq. 447. But at law questions of fact were tried by jury as a matter of course, except such questions as, under the C. L. P. Act, 1854, ss. 3, 6, could without consent be referred to arbitration. The Jud. Act, 1873, s. 57, continued this exception under the new practice, and somewhat extended the class of cases which might be referred without consent; and it is now provided by the Arbitration Act, 1889 (52 & 53 V. c. 49), s. 13, that, "subject to rules of Court, and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry and report to any official or special referee."

The effect of the above rules is to make trial without jury the normal mode of trial, except where trial by jury is ordered under rr. 3, 6, or 7 (a): *Timson v. Wilson*, 38 Ch. Div. 72, at p. 76; *The Temple Bar*, 11 P. Div. 6; *Jenkins v. Bushby*, *sup.*; and for the discretion formerly given to the Court by r. 26 of O. xxxvi. of 1875, to direct a trial without a jury, is now substituted the converse discretion to direct trial with a jury.

Under the new rules the Court has declined to direct a trial by jury in an action for injunction and damages for infringement of copyright: *Cooté v. Ingram*, 35 Ch. D. 117; in an action for specific performance and injunction against infringement of ancient lights: *Sheppard v. Gilmore*, 34 W. R. 179;



53 L. T. N.S. 625; in an action claiming declaration that Deft was trustee for Plt, an account and damages for detention of chattels: *Gardner v. Jay*, 29 Ch. Div. 50; in an action claiming a declaration that Plt's bonds were deposited with the Defts in fraud of the Plt, and that they took them with notice: *Thornton v. Union Discount Co. of London*, 7 Times Rep. 322.

And in general an action will not be sent for trial by jury, unless it involves a simple issue of fact, determination of which will decide the case: *Cardinall v. C.*, 25 Ch. D. 772; and see *Gardner v. Jay*, 29 Ch. Div. 50, 56; and one Deft cannot insist upon having one issue relating to a matter not assigned to the Chancery Division tried by a jury: *Sheppard v. Gilmore*, *sup.*; nor a Plt in a redemption action, merely because Deft counter-claims for damages for fraudulent misrepresentation: *Lynch v. Macdonald*, 37 Ch. Div. 227; and the mere fact that the action will be more quickly tried at the assizes is not a ground for sending it there: *Cardinall v. C.*, *sup.* But where a view of the *locus in quo* is all-important, a trial by jury will be directed: *Jenkins v. Bushby*, (1891) 1 Ch. (C. A.) 484.

Under the previous rules, a trial by jury has been refused where there were mixed questions of law and fact: *Singer Manufacturing Co. v. Loog*, 11 Ch. D. 656; *Garling v. Royds*, 25 W. R. 125; and see *Cardinall v. C.*, *sup.*; in an action for infringement of trade mark, where only one issue of small importance was appropriate for a jury: *Spratt's Patent v. Ward*, 11 Ch. D. 241; in an action to restrain publication of a trade libel: *Thomas v. Williams*, 14 Ch. D. 864; where the question was mainly one of title, and depended on construction of documents: *Wedderburn v. Pickering*, 13 Ch. D. 769; and see *A. G. v. Arkcoll*, W. N. (82) 182; *Garling v. Royds*, 25 W. R. 123; or, under the Lands Clauses Act, whether lands had become superfluous: *Smith v. N. Staffordshire Rail. Co.*, 44 L. T. N.S. 85; in actions for specific performance: *Usil v. Whelpton*, 50 L. J. Ch. 511; *Sykes v. Firth*, 46 L. J. Ch. 627; *Pilley v. Baylis*, 5 Ch. D. 241; *Swindell v. Birmingham Syndicate*, 3 Ch. Div. 127; on the application of a Plt who had delayed giving notice of trial, or in taking other steps: *Lloyd v. Jones*, 7 Ch. D. 390.

In cases which, before the new procedure, would not have been essentially Chancery cases (see *Swindell v. Birm. Synd.*, 3 Ch. Div. 127), the fact that the Deft desired a trial by jury at the assizes was held a sufficient reason to be stated on the order: *West v. White*, 4 Ch. D. 631; but see *contra*, *Wood, &c. v. Hamblet*, 6 Ch. D. 113, that the mere desire of the parties is not sufficient, and that the reasons should be stated on the order; and see *Powell v. Williams*, 12 Ch. D. 234, 239.

The refusal of one Deft did not prevent an action from being tried by jury, but it imposed on the Deft who desired it the duty of showing that it was more convenient: *Mirehouse v. Barnett*, 47 L. J. Ch. 689; 26 W. R. 690; *Moss v. Bradburn*, 32 W. R. 368; and see *Bach v. Hay*, 5 Ch. D. 235.

Where the parties had by agreement taken the evidence by affidavit, the Court refused to direct a trial by jury, even in a case peculiarly adapted for such trial: *Brook v. Wigg*, 8 Ch. Div. 510.

And an application by the Plt has been the less readily entertained, because by bringing his action in the Chancery Division he has selected his forum: *Bach v. Hay*, 5 Ch. D. 235; *Pilley v. Davis*, *ib.* 241; *Sykes v. Firth*, *sup.*; *Ruston v. Tobin*, 10 Ch. Div. 558; and see *Spratt's Patent v. Ward*, 11 Ch. D. 241; *Wedderburn v. Pickering*, *sup.*; *Powell v. Williams*, 12 Ch. D. 234.

But a Plt will not be permitted to deprive a Deft of his right to a jury by bringing a common law action in the Chancery Division, and claiming an injunction: *Coles v. Civil Service Supply Assoc.*, 26 Ch. D. 629; 32 W. R. 407.

Issues of fact at the instance of the Deft have been directed to be tried by jury in cases of injunction to restrain nuisance: *Clarke v. Skipper*, 21 Ch. D. 134; *Powell v. Williams*, 12 Ch. D. 234; obstruction of lights: *Bordier v. Burrell*, 5 Ch. D. 512; interference with watercourse: *Petar v. Lailey*, W. N. (81) 22; in creditors' actions for admon where the Plt's debt was disputed: *Clarke v. Cookson*, 2 Ch. D. 746; *Re Martin, Hunt v. Chambers*, 20 Ch. Div. 365; in an action for infringement of patent: *Sugg v. Silber*, 1 Q. B. D. 362; and for dissolution of partnership on the ground of breaches in the articles: *Clements v. Norris*, 26 W. R. 94.

In *Re Moordaff, Burgoine v. M.*, 8 P. D. 205, after two abortive trials with a jury, a trial without jury was directed,

Where all the issues are appropriate for trial by jury, and there is no necessity that the matter should come back to the Chancery Division, the most convenient course is to transfer the whole action to the Queen's Bench Division: *Re Martin, Hunt v. Chambers, sup.*; *Fennessy v. Rabbits*, 56 L. T. N.S. 138.

A Deft did not lose his right to have his case tried before a jury by entering into an arrangement for a motion for injunction to stand to the trial: *Clarke v. Skipper*, 21 Ch. D. 134.

As the jurisdiction to direct a trial with or without a jury is discretionary, the Court of Appeal has been reluctant to interfere, unless the discretion has been exercised in a manner clearly erroneous: *Ruston v. Tobin*, 10 Ch. Div. 558, 565; *Re Martin, Hunt v. Chambers*, 20 Ch. Div. 365; *Ormerod v. Todmorden Mill Co.*, 8 Q. B. Div. 664, 679, 684; *A. G. v. Vynier*, 38 W. R. 194; *Mangun v. Metropolitan Electric Supply Co.*, (1891) 2 Ch. 551.

#### INTERLOCUTORY ORDERS.

By O. xxxvi. 44, the Court or Judge may, "at any time, or from time to time," order the determination of an issue, and, under the former practice, an issue might be sent before the hearing: *Kent v. Burgess*, 11 Sim. 361; *Townley v. Deare*, 3 Beav. 213.

As to the duty of the parties to put their legal right in a course of trial at an early stage of their proceedings, and not wait till the hearing, see *Bacon v. Jones*, 4 M. & C. 433; and as to the effect of delay in applying for a trial by jury, see *Thomas v. Williams*, 14 Ch. D. 864, 871; *Brooke v. Wigg*, 8 Ch. D. 510.

After the disclosure of the Plt's evidence, the Court did not willingly direct issues on the Deft's motion: *Roskell v. Whitworth*, 5 Ch. 459.

After the jury had found against the validity of a deed, the order being submitted to, the parties claiming under the deed could not at the hearing insist on the Statute of Limitations: *Lewis v. Thomas*, 3 Ha. 26.

In *Powell v. Williams*, 12 Ch. D. 234, it was held that notice by Deft of desire to have issues tried by a jury should be given out of Court, and should be in general terms, and not specify particular issues.

An advance from a fund in Court to enable parties to try an issue was refused in *Johnston v. Todd*, 3 Beav. 218; and in *Nye v. Maule*, 4 M. & C. 342; but in *Coombs v. Brooks*, 3 D. & S. 452, was allowed.

Leave to bring an action was given, instead of sending inquiries: *Watson v. Parker*, 2 Ph. 5; and see *Lockhart v. Hardy*, 5 Beav. 305.

Issues as to matters not suggested on the pleadings were not directed: *Morgan v. Fuller* (1), 2 Eq. 296; but an issue as to fraud was not defective because it threw on the Deft the onus of showing *bona fides*: *Browne v. McClintock*, L. R. 6 H. L. 456.

By O. LIV. 12, the settlement of issues, except by consent, is excluded from the jurisdiction of the Masters of the Queen's Bench Division, and from that of the Registrar of the Probate, &c. Division. There may be a reference to Chambers to settle issues: *Powell v. Williams*, 12 Ch. D. 234.

#### TRIAL OF SOME ISSUES BEFORE OTHERS.

An application to have one issue in action tried before others can only be granted on very special grounds; as, for instance, where there is reason to believe that the trial of such issue will put an end to the action: per Jessel, M. R., *Piercy v. Young*, 15 Ch. D. 475, 480; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918, 926; and see *Dent v. Sovereign Life Ass.*, 27 W. R. 378; *Tasmanian Main Line Co. v. Clark*, 27 W. R. 677.

Where liability and amount of damages are both disputed, and the question of damages is such that it will probably be referred to some tribunal other than a jury, the question of liability may be directed to be tried first: *Smith v. Hargrove, &c. Co.*, 16 Q. B. D. 183.

#### PLACE AND MODE OF TRIAL BY JURY UNDER THE JUD. ACTS.

By Jud. Act, 1875, s. 21, and by the rules (see O. LXXII. 2), the existing procedure is preserved, except where otherwise provided by the Acts and rules.

By Jud. Act, 1873, s. 29, the Queen may issue commissions of assize for the trial of "any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law"; and any party to a cause or matter may, with the leave of the Judge or Judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried before a commr. And by consent a cause or matter not involving any question or issue of fact may be tried in like manner.

Sect. 30 (as amended by 46 & 47 V. c. 39), provides that, "subject to rules of Court, sittings for the trial by jury of causes and questions or issues of fact, shall be held in Middlesex or London" continuously; and, by sect. 37, trials by jury, whether in London or Middlesex, or under commissions of assize, &c., shall, subject to the arrangements of the Judges, be held by or before Judges of the Queen's Bench Division; but there is a proviso for including other persons in any such commissions.

In *Redmayne v. Vaughan*, 24 W. R. 983, an issue from the Chancery Division was tried at Liverpool.

By O. xxxvi. 9, "every trial of any question or issue of fact by a jury shall be by a single Judge, unless such trial be specially ordered to be by two or more Judges." And see Jud. Act, 1873, s. 40, which is now modified by the Appellate Jurisdiction Act, 1876 (39 & 40 V. c. 59), s. 17, by which all actions and proceedings are to be before a single Judge, subject to rules of Court.

By r. 13, the notice of trial is to state whether it is for the trial of the action or of issues therein, and the place and day for which it is to be entered for trial (for Form, see R. S. C. Appx. B., No. 16); and, by r. 17, is to be deemed to be, as to trials in London and Middlesex, not for any particular sittings, but for any day after the expiration of the notice on which the action may come on for trial in its order; and by r. 18, as to trials elsewhere, is to be deemed to be for the first day of the then next assizes.

Jud. Act, 1875, s. 20, provides that, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, the mode of giving evidence by the oral examination of witnesses in trials by jury shall not be affected, nor the rules of evidence, nor the law relating to juriesmen or juries.

Sect. 22, after reciting the 46th section of the principal Act (enabling any Judge to direct any case or point in a case to be argued before a Divisional Court), enacts that nothing in that Act, nor in any rule or order, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues, and that such right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record.

By O. xxxvi. 39, "the Judge may, at or after a trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment"; and no judgment is to be entered after a trial without an order.

By the Jud. Act, 1890 (53 & 54 V. c. 44), s. 2, "every motion for judgment in any cause or matter in which there has been a trial of any issue therein with a jury," shall be heard and determined before the Judge before whom such trial with a jury took place, and not by a Divisional Court, unless it be impossible or inconvenient that such Judge should act, in which case such motion shall be heard and determined by some other Judge to be nominated by the President of the Division to which the cause or matter belongs.

By r. 41, upon every trial at the assizes, or at the London and Middlesex sittings of the Q. B. Division, "where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate or master shall enter all such findings of fact as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, in a book to be kept for the purpose."

By r. 42, "if the Judge shall direct that any judgment be entered for any party absolutely, the certificate of the associate or master to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly."

The certificate may be in the Form No. 17 in Appx. (B.) to R. S. C.; and see Form 6, *sup.* p. 323.

If such trials are those of actions in the Chancery Division, the registrar will be the proper officer.

As to irregularities in impannelling the jury, see *Irwin v. Grey*, L. R. 2 H. L. 20; *Mulcahy v. The Queen*, L. R. 3 H. L. 306.

As to qualifications, summoning, attendance, and remuneration of jurors, see 33 & 34 V. c. 77.

#### POSTPONING TRIAL.

Notice of trial cannot now be countermanded except by consent or by leave, on such terms as to costs or otherwise as may be just: O. xxxvi. 19; *Clarke v. Cookson*, 24 W. R. 535.

By r. 34, the Judge may postpone or adjourn the trial on such terms, if any, as he shall think fit.

Under special circumstances leave was given to postpone: *Bearblock v. Tyler*, 1 J. & W. 226; *Kebel v. Philpot*, 9 Sim. 614; the application being made to the Court which directed the issue: S. C.; it was refused in *Hargrave v. H.*, 9 Beav. 153, and *Wright v. M'Guffie*, 4 C. B. N.S. 441; and motion by Plt for stay of trial, till Deft had cleared his contempt in non-payment of costs, was refused: *Bickford v. Skeues*, 10 Sim. 193; S. C., 4 M. & C. 498; and see *Reeve v. Hodson*, 10 Ha. xxiv.

That the House of Lords might be influenced on an appeal case by the result of a trial was no ground for postponing it: *Boyes v. Colclough*, 1 K. & J. 140.

#### DEFAULT AT TRIAL.

Where the Plt or party having the conduct of the issue fails to bring it on, the other side may now do so: O. xxxvi. 12.

By O. xxxvi. 31, "if, when a trial is called on, the Plt appears, and the Deft does not appear, then the Plt may prove his claim so far as the burden of proof lies upon him."

By r. 32, "if, when a trial is called on, the Deft appears, and the Plt does not appear, the Deft, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him."

By r. 33, "any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex."

Where judgment goes by default, the jury need not be sworn: *Lane v. Eve*, W. N. (76) 86.

As to default of either side in appearing at the trial, *v. sup.* p. 133.

#### COSTS OF ISSUE.

By O. LXV. 1, costs are to be in the discretion of the Court, but the costs of any action or issue tried by a jury are to follow the event, unless upon application made at the trial for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.

As to the operation of this rule generally, *v. sup.* p. 219.

Formerly, costs of an issue were discretionary, but generally followed the event as at law: see *Corp. Rochester v. Lee*, 2 D. M. & G. 427; *Duncan v. Varty*, 2 Ph. 696. But see *Wright v. W.*, 5 Sim. 449.

Success on the material issue carried all the costs at law, notwithstanding failure on another issue: *Blackburn v. Gregson*, 1 B. C. C. 425.

The costs of an issue directed on an interlocutory application could be disposed of after the issue was decided, without waiting for the hearing of the cause: *Duncan v. Varty*, 2 Ph. 696; overruling *Malins v. Price*, 2 Col. 190; but where, on appeal, an order directing an issue was reversed, and a new issue directed, the costs of the appeal were reserved: *Parker v. Morrell*, 2 Ph. 453.

And as to costs of issue, and actions, and appeal, where an action was

allowed, on appeal from an order refusing a new trial of an issue found for Deft, and from an order dismissing the bill, and Plt succeeded in the action, and in a second action allowed at law, see *Corp. Rochester v. Lee*, 2 D. M. & G. 427; and see *Martin v. Pycraft*, *Ib.* 806.

Where Defts obtained an order for a new trial on their paying costs of the former one, and they did not go to trial, they were not bound to pay the costs: *Lambert v. Fisher*, 7 Sim. 525.

As to costs of an issue under the Inclosure Act, 8 & 9 V. c. 118, s. 56, see *Hardy v. Fetherstonhaugh*, L. R. 4 Q. B. 725.

## SECTION II.—SPECIAL DIRECTIONS AS TO TRIAL OF ISSUES AND QUESTIONS OF FACT.

### 1. *Directions for Special Jury.*—O. xxxvi. 7 (d).

AND Let such trial be, at the request of either party, before a special jury.

For similar order reserving the costs of the application until after the trial of the issue, see *Butlin v. Allibone*, 13 L. J. Ch. 216.

### 2. *Order for View by Special Jury.*—O. L. 5.

UPON the application of the Deft, and upon hearing the solrs for the Applicant and for the Plt, Let the sheriff of M. cause the premises known as &c. in the county of M., to be shown to six or more of the first twelve special jurors to be summoned and impanelled to try the question between the said parties, or as many more of them as he shall think fit, to take a view of the place in question, at a time to be fixed by the said sheriff. But that no evidence be then and there given to the said jurors. And that the sheriff of M. do return the names of such jurors as shall view the said place to the Associate of the Queen's Bench Division [of the X. circuit], for the purpose of their being called as special jurymen upon the trial of the said question.—*Newman v. Worley*, V.-C. B., at Chambers, 12 Feb. 1883, B. 194.

The order to try by a special jury may be included in this Form. For similar order in which the time to view is fixed, see *March v. Bailey*, Pearson, J., at Chambers, 20 July, 1885, B. 938.

## NOTES.

### PARTICULAR VENUE.

For order fixing particular venue, see *Chapman v. Smith*, 2 Ves. 516; and with directions as to special jury, *Layburn v. Crisp*, 1 Dec. 1837; *S. C.*, in *Exch.*, 4 M. & W. 320.

By O. xxxvi. 1, "there shall be no local venue for the trial of any action, except where otherwise provided by statute. Every action in every division shall, unless the Court or a Judge otherwise orders, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a notice in writing to be served on the Deft, or his solr, within six days after appearance. Where no place of trial is

named, the place of trial shall, unless the Court or a Judge shall otherwise order, be the county of Middlesex."

These provisions apply to every action, notwithstanding that it may have been assigned to any Judge: r. 1a.

O. xxxvi. 1, is precise, and a Plt is entitled under it to place the venue of his action at county assizes, although it is assigned to the Chancery Division by s. 34 of the Jud. Act, 1873, and although it has been commenced in that Division: *Philips v. Beall*, 26 Ch. Div. 621.

#### CHANGE OF VENUE.

A Plt who wishes to name some place other than in Middlesex must do so in the original statement of claim, if not the venue is in Middlesex, and once fixed must there remain unless there is an order to the contrary: *Locke v. White*, 33 Ch. Div. 308; and see *Ridge v. R.*, 35 L. T. N.S. 428.

An application for change of venue made before notice of trial or issue joined was held not premature, the pleadings having disclosed the issues to be tried: *Powell v. Cobb*, 29 Ch. Div. 486; but an order for change of venue ought not to be made until the Judge can see what the issues are: *Ibid.* p. 494.

Change of venue from Cardigan was ordered, on application of Deft, in action to set aside deeds for fraud: *Powell v. Cobb*, *sup.*; and for other cases in which the venue has been changed from country to London on the ground of convenience, see *Green v. Bennett*, 54 L. J. Ch. 85; 32 W. R. 848; *Old Mill Co. v. Dukinfield Local Board*, 54 L. J. Ch. 160; 51 L. T. N.S. 414; and that the Deft, applying for a change must show serious injury to his case if the venue is not changed, see *Schroeder & Co. v. Myers*, 34 W. R. 261.

The influence which the reputation of a material witness may have upon jurors' minds, in affecting the relative credit to be given to him and other witnesses, is no ground for changing the venue: *McGregor v. Topham*, 3 Ha. 488; nor that a party whose conduct is impeached is lord lieutenant of the county: *Hopwood v. E. Derby*, 1 K. & J. 255.

### SECTION III.—VARIOUS ISSUES.

#### 1. Issues (alternative) as to Heirship.

1. WHETHER E. is the heir-at-law of the testatrix; in which E. is to be Plt, and the Defts L. and W. are to be Defts; 2ndly, Whether the said L. and W., or one and which of them, are or is the heirs or heir-at-law of the testatrix; in which the Deft L. is to be Plt, and the Deft W. is to be Deft; But in case on the trial of the first issue the said E. shall be found to be the heir-at-law of the testatrix, then the second issue is not to be tried.—*Hartopp v. Boothby*, L. C., 17 Nov. 1775, A. 124.

#### 2. Issues as to Heir-at-Law *ex parte paternâ* and *ex parte maternâ*, and Customary Heir.

1. WHETHER Plt was or was not at the time of the death of Ann F. in &c. the heir-at-law *ex parte paternâ* of the said Ann F.; 2. Whether Plt is or is not now the heir-at-law *ex parte paternâ* of the said Ann F.;

3 and 4, similar issues whether the Plt was the heir of Ann F., *ex parte maternd* at her death, and is now. 5. Whether the Plt was or was not the customary heir of the said Ann F. according to the custom of any manor whereof the said Ann F. had copyholds of inheritance. 6. Whether the Plt is or is not now the customary heir of the said Ann F. as last mentioned. 7. Whether the Plt was or was not at the time of the death of Ann F. the heir-at-law of any and what ancestor *ex parte paternd* of Sarah F. in the (bill) named, which ancestor was the last purchaser of any and what hereditaments which the said Ann F. died seised of by descent, or in any manner entitled to by descent from the said Sarah F., or of any and what hereditaments whatsoever which the said Ann F. died seised of or entitled to. 8. Whether the plaintiff is or is not now such heir of &c. (*as above*). 9. Whether the Plt is not lineally descended from the great grandfather of the said Ann F.—*Kettlewell v. Barstow*, V.-C. J., 30 June, 1870, A. 2440; S. C., 7 Ch. 686.

As to evidence admissible in pedigree case, see *Haines v. Guthrie*, 13 Q. B. Div. 818; *Murray v. Milner*, 12 Ch. D. 845.

### 3. Issue as to Eldest or only Son.

WHETHER J., in the pleadings named, is the eldest or only son of M., the wife of P., by the said P. lawfully begotten.—*Cooke v. Lloyd*, M. R., 7 March, 1803, B. 522.

As to the evidence sufficient to rebut the presumption of legitimacy of a child born in wedlock, see *Hawes v. Draeger*, 23 Ch. D. 173 (evidence of non-access); *Re Walker and Jackson*, 53 L. T. N.S. 660; *Burnaby v. Baillie*, 42 Ch. D. 282 (verbal statements by paramour); *Bosville v. A. G.*, 12 P. D. 177 (clear and conclusive evidence required); *Re Aylesford Peerage*, 11 App. Cas. 1 (statements by mother bastardizing child admitted as evidence of conduct); *Re Perton, Pearson v. A. G.*, 53 L. T. N.S. 707.

The proper law for determining "kindred" under the Statute of Distributions is the international law adopted by the comity of states: *In re Goodman's Trusts*, 17 Ch. Div. 266 (where "ante nati" were admitted); and see *Re Ullee*, 53 L. T. N.S. 710; *Re Bell, B. v. Kendall*, W. N. (88) 48.

### 4. Issue as to Daughter.

WHETHER H., deceased, the late mother of the Plt, was a daughter of M., named in the will of O., the testatrix.—*Wright v. Dryden*, M. R., 17 Feb. 1827, B. 2089.

For issue whether a woman was ever during coverture delivered of a living child, see *Gardiner v. Slater*, M. R., 10 June, 1856, A. 1255.

### 5. As to Validity of Bond—Fraud.

1st, WHETHER the bond and warrant of attorney, &c., was obtained from the Plt by any fraudulent (or unfair) representation by the obligees, or any of them; 2ndly. Whether the same was obtained by any untrue representation; 3rdly. Whether the same was obtained by any fraudulent (or unfair) concealment, or suppression by the obligees, or either of them; 4thly. Whether the bond &c. was given to secure

any debt or liability, other than the whole or part of the balance due from P. to the firm in the pleadings mentioned.—*Parker v. Morrell*, V.-C. K. B., 2 May, 1846, B. 1020; 2 Ph. 457; the word “unfair” was objected to by the L. C.

### 6. *As to Sanity, and Validity of Deed—Fraud.*

1st, WHETHER M., in &c. named, at the time of the execution of the indentures dated &c. in &c. mentioned, was of sound mind, understanding, and capacity to execute the said deeds; 2ndly. Whether the said deeds were obtained from the said M. by fraud or imposition.—*Smith v. Moody*, M. R., 27 July, 1802, B. 1059.

For form of issue, whether a deed was ever executed by A. T.; and if so, whether she was then of sound mind &c., see *Lewis v. Thomas*, 3 Ha. 29. Whether Deft was on the — day of — in such a state of mind as to be able to conduct the business in partnership with the Plt according to the articles of partnership, and “whether he has since been, and now is, in such a state of mind,” see *Sayer v. Bennet*, 1 Cox, 111.

### 7. *As to Sanity, Validity of Deed, and Authority to buy Stock.*

“1. WHETHER G. at the time he executed the four leases or underleases, dated &c., in the pleadings mentioned, was of sound mind, so as to be sufficient for the government of himself and management of his property; 2. Whether the said G., when he was of sound mind, so as &c., authorized or approved of the purchase in the names of &c. of the five sums of stock in the pleadings mentioned, or any or either of them.”—*Hayward v. Pursey*, V.-C. K. B., 23 Ap. 1849, A. 1213.

For issue to try validity of deeds, executed by a party found lunatic, from a time prior to the execution, see *Frank v. Mainwaring*, 4 Beav. 37; 2 Beav. 115; *Snook v. Watts*, 11 Beav. 105.

And for orders for issues, see, as to deeds being fraudulent within the 13 Eliz. c. 5, and consideration being paid before sequestration issued, *Empringham v. Short*, 3 Ha. 471; whether power was struck out of settlement with wife's knowledge, *Harbidge v. Wogan*, 5 Ha. 271; as to alleged trust, *Freeman v. Tatham*, 5 Ha. 329, 342; whether creditor, party to creditors' deed, had taken any proceedings contrary to its provisions, *Duncombe v. Levy*, 5 Ha. 236; to try question of notice between judgment creditor and subsequent incumbrancer first registered, see *Robinson v. Woodward*, 4 D. & S. 562, 566 n., 567.

For issues as to purchase of shares alleged to have been induced by fraudulent representations in directors' reports, see *W. Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 148.

### 8. *Issues as to Right of Way.*

“1st, WHETHER there is any right of way through a place called ‘George Yard’; 2ndly, if there be any such right, whether it extends over the whole; 3rdly, if not, what is the extent, length, breadth, and direction of it; 4thly, whether any such right has been obstructed or disturbed by the Defts, or any of them, and if so in what manner and to what extent; 5thly, whether there is any public right (other than a right of way) over the whole; 6thly, whether such right, if any, has



been obstructed or disturbed by the Defts &c."—*A. G. v. Faa*, V.-C. W., 13 Nov. 1856, A. 260.

For issue to try right to fell timber, and whether ornamental, and the directions and declarations that should guard it, see *Wombwell v. Bellasye*, 6 Ves. 110 a, n.

For issue as to limits of royal forest and rights of sporting, *Blanchard v. Cawthorne*, 6 Sim. 159.

For issue to ascertain boundaries, and jury to view, with particular directions as to jury to be returned, see *Lethieullier v. L. Castlemain*, 1 Dick. 46, 27 Oct. 1726, B. 196.

And for forms of issues, where the Crown claimed land as reclaimed from the sea by encroachment, Deft disputing the Crown's title to the soil between the present low and high-water mark, *A. G. v. Chamberlaine*, 4 K. & J. 292, 293, 298; and *A. G. v. Chambers*, 4 D. & J. 55, 72, where there was a further issue as to working a mine below the present or former line of high water at ordinary tides.

As to mode of pleading right of way by showing termini and general course, see *Harris v. Jenkins*, 22 Ch. D. 481.

### 9. Issues as to Damages.

Issues as to damage caused by injunction under the usual undertaking, action being dismissed—"1. Whether the Defts have sustained any damage by reason of the said order dated &c. (having been made); 2. And in case it shall be found that the Defts have sustained any such damage, what is the amount of such damage."—Reserve payment of the amount assessed, if any, and the costs until after the trial.—Liberty to apply.—*Christie v. C.*, V.-C. H., Feb. 19, 1875.

Issues as to damages in a suit for specific performance of a contract to sell a vessel. 1. What (if any) damage has been sustained by the Plts by the non-delivery of the vessel, pursuant to the contract, on the day named in the agreement; 2. What &c. by any injury to the vessel between the date of the agreement and the date of the delivery.—*Cory v. Thames, &c. Co.*, 11 W. R. 589; and see the result at law, *L. R.* 3 Q. B. 181.

"Whether the Plts, to the damage or injury of the Deft, prevented the Deft from completing his contract."—Plts to admit that they did so prevent, and employed their own workmen to complete.—*E. Lanc. Rail. Co. v. Hattersley*, 8 Ha. 95.

As to co. infringing on Plt's right to bridge tolls under Act by their steam ferry, they keeping ferry account meantime, and furnishing Plt with it before trial, verified by their secretary's affidavit, though the Act gave no right of action, but only to recover penalties, see *Cory v. Yarmouth Rail. Co.*, 3 Ha. 593, 608.

As to deterioration of estate after reference, *Ferguson v. Tadman*, 1 Sim. 530; as to mines being drowned out in breach of covenant by lessee's default, and so continuing, *Walker v. Jeffreys*, 1 Ha. 356.

For order for issues, 1. Whether the widening and deepening of a canal basin, as widened and deepened before a stated time, did or will, to the damage or injury of the Plt, diminish the surplus water in the Plt's works; 2. Whether the further widening and deepening of it, as intended, before injunction granted, would or might do so, see *Blakemore v. Glamorgan Canal*, 1 M. & K. 169, 1824, A. 1891.

For order for issues in the case of an alleged nuisance of smoke and vapours from cement works, see *West v. White*, 7 Feb. 1877, B. 174, 4 Ch. D. 631, 636.

For issues, settled by the L. JJ., and set out in schedule to the order, whether Plts, as owners of the estate in the bill mentioned, were entitled to any right of pasture over sand banks lying between the estate and the sea, and whether the sand banks had been wrongfully removed or disturbed by the Defts or under their direction, authority, or licence, to the damage and injury of the Plts as such owners, by subjecting the estate, or any part thereof, to encroachments or incursions from the sea, or to the drifting of sand, beyond what the same would have been subject to; or by obstructing or impeding any right of way of the Plts, as owners, to the estate; or by preventing the growth of grass or herbage on the estate or the sand banks; and whether the further removal or disturbance of the sand banks would or might damage and injure the Plts by such means as above: see *Davies v. Smith*, L. JJ., 6 Dec. 1861, A. 2417.

An appeal as to the *quantum* of damages will not be entertained: *Ball v. Ray*, 22 W. R. 283.

### 10. *As to Covenants and Agreements.*

For issues as to breaches of covenant in lease and waiver, with special directions, subject to certain payments into Court, in default action to be dismissed, see *Bowser v. Colby*, 1 Ha. 145.

As to agreement for partnership, *Webster v. Bray*, 7 Ha. 180; *Trentbeck v. Crew*, 2 Turn. Pr. 180; if certain persons were partners of the firm, *Travis v. Milne*, 9 Ha. 167; and "whether Plt had any interest, and to what amount or share, in the profits of the partnership in question, and during what time," *Peacock v. P.*, L. C., 17 Nov. 1808, B. 31; 16 Ves. 49, 52; whether solrs acted as partners in certain business, and, if so, whether in equal shares, *M'Gregor v. Bainbrigge*, 7 Ha. 165, n.; and as to agreement for joint speculations in buying and selling land, and as to term in agreement, Plt to be affirmant in the first, Deft in the second, with leave to Plt to examine Deft on notice, with admissions, *Dale v. Hamilton*, 5 Ha. 396; *S. C.*, 2 Ph. 266; 10 Ha. vii.; as to agency, *Milner v. Singleton*, 6 Ha. 622, n.; as to act of bankruptcy, *Barker v. Chapman*, L. C., 29 Jan. 1810, A. 288; *Ryall v. Stevens*, L. C., 7 June, 1743, B. 309; *Cust v. Ward*, L. C., 3 July, 1781, A. 374.

Issues were directed—As to the existence of any agreement, *Penny v. Watts*, 1 Mac. & G. 150, 169; 2 D. & S. 501; 17 Sim. 45; to try validity of promissory notes, *Woodgate v. Field*, 2 Ha. 211; in creditor's suit, whether testator's bond was voluntary or not, *Hepworth v. Heslop*, 6 Ha. 561, 622; in foreclosure, whether an old mortgage was a subsisting security at three specified dates, *Wynne v. Styan*, 2 Ph. 303; to try the validity of an appointment, *Gee v. Gurney*, 2 Col. 486; heirship according to the custom of a manor, facts being admitted, *Locke v. Colman*, 1 M. & C. 423; as to whether a purchase by U. was made by him for the benefit of B., the solr in the cause, *Browne v. McClintock*, L. R. 6 H. L. 462; whether grant of a lease by a testator was valid, *Jenkins v. Morris*, 14 Ch. Div. 674.

Issues are not to be directed on mere suggestion or suspicion: *Browne v. McClintock*, L. R. 6 H. L. 465.

As to the nature and amount of evidence on which an issue will be directed in pedigree cases, see *Monkton v. A. G.*, 2 R. & M. 147; *Shields v. Boucher*, *Lancashire v. L.*, 1 D. & S. 40, 288.

An issue was directed (in preference to inquiry) as to notice being given by a certain day: *Earle v. Pickin*, 1 R. & M. 547; and was refused in redemption suit: *Lloyd v. Wait*, 1 Ph. 61.

Tenants in common were all necessary parties to an issue: *A. G. v. Flint*, 4 Ha. 147.

### 11. *As to Act of Bankruptcy.*

WHETHER A. did, on or before the — day of —, commit any act of bankruptcy, within the intent and meaning of the several statutes relating to bankruptcy, or any of them; and if the jury shall find that

he did not commit any act of bankruptcy before that day, whether he committed an act of bankruptcy at any (and what) time afterwards.—*Gordon v. Baron d'Avernas*, M. R., 21 Feb. 1765.

And as to whether a payment made by a bankrupt was a fraudulent preference, see *Exp. Bolland*, 7 Ch. 24.

### 12. *As to a Custom.*

For issues as to the custom of the country as to consuming on a farm all hay, and thrashing out all grain crops grown thereon, and using the straw and all manure arising thereon; and as to the landlord at the expiration of the tenancy taking the hay, straw, and manure at a valuation; and whether Deft (Plt's sub-lessee) was aware that the Plt's lease contained a covenant restricting him from removing any produce, unless he should bring on to the farm a full equivalent in manure, see *Milnes v. Roome*, V.-C. K., 26 Feb. 1861, B. 381.

And for orders for issues, see—as to a custom, and the custom found to be endorsed on the postea, *Gwynn v. Thomas*, L. C., Nov. 1708, A. 98, 161; as to right of piscary, *Mayor of York v. Pilkington*, L. C., 23 Nov. 1742, B. 104; 1 Atk. 282; West, 293; 2 Atk. 302; and as to the right of the oyster meters of the City of London to unload the oyster boats within the port, and the amount of compensation, *Layburn v. Crisp*, in Exch., 1 Dec. 1837; order on the equity reserved, 5 July, 1838; S. C., 4 Mee. & W. 320; and as to their rights and compensation, *Thompson v. Daniel*, 10 Ha. 296.

For issue as to *donatio mortis causa*, see *Hanbrooke v. Simmons*, M. R., 20 Nov. 1827, A. 118; 4 Russ. 25.

### 13. *As to Intestate's Marriage.*

Issues directed to be tried by a Judge and jury in the C. P. Division —“Whether at the time of the celebration of the Deft's marriage with the intestate the Deft had any other husband living, the Deft undertaking to be bound by the result.”—*Re Beard*, B. v. B., V.-C. H., in Chambers, 24 July, 1876, A. 1394.

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## SECTION IV.—JUDGMENTS AND ORDERS AFTER TRIAL OF ISSUES OR QUESTIONS OF FACT.

### 1. *Judgment after Trial of Issues or Questions of Fact, or Fact and Law, without a Jury, where Judgment pronounced at the Trial.*

THE parties having on the — day of — (and this day) proceeded to a trial of the issues [or questions of fact &c.] directed by the order dated &c. to be tried before this Court without a jury, This Court doth decide in favour of the Plt [or Deft], and doth find &c. [*State the findings*], and doth &c.

2. *Judgment on Motion for Judgment after Trial, by a Jury, of Issues or Questions of Fact, directed by Court.*—O. XL. 7, 8.

THE parties having on the — day of — proceeded to a trial of the issues [or questions of fact] directed to be tried by the order dated &c. before &c. by a common [or special] jury, when the jury found &c. [State the findings, and if so, Add: Now upon motion for judgment this day made unto this Court by counsel for the Plt [or Deft], and upon hearing counsel for the Deft [or Plt],] This Court doth &c.

3. *After Issue, as to Right of Way.*

THIS action coming on for trial the — and — before this Court in the presence of counsel for the Plt and for the Deft, and upon hearing &c. This Court did find that the Plt was and is entitled to such right of way and other rights over W. court as claimed in this action by the Plt, and that the same had been obstructed by the Deft and the building erected by him, and did direct that a verdict be entered for the Plt accordingly; And upon motion this day made unto this Court by counsel for the Plt for judgment in accordance with such finding and verdict, and upon hearing counsel for the Deft, Let the Deft, his servants, workmen, and agents, be perpetually restrained by injunction from erecting, or causing to be erected, or continuing any building or erection so as to interfere with or obstruct the Plt's right of way and passage over and along W. court, &c. as the same existed before the commencement of the Deft's building, so as to hinder or prevent the Plt, his servants &c., coming or going to or from the messuages and premises No. 37, Coleman Street, aforesaid, and from exercising, using, or enjoying the free access to the rear of the Plt's messuage, No. 37, Coleman Street, over and along the said W. court, and from permitting to remain after &c., any building &c., so as to obstruct &c. This Court &c.—*Krehl v. Burrell*, M. R., 28 Jan. 1878, A. 226.

NOTES.

PROCEEDINGS AFTER THE TRIAL OF ISSUES, ETC.

By O. XL. 7, "where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the Plt may set down a motion for judgment as soon as such issues or questions have been determined. If he does not set down such a motion, and give notice thereof to the other parties within ten days after his right so to do has arisen, any Deft may set down a motion for judgment, and give notice thereof to the other parties."

By r. 8, "where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down a motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear

just, and may give any directions which may appear desirable as to postponing the trial of the other issues of fact."

By the Jud. Act, 1890 (53 & 54 V. c. 44), s. 2, every motion for judgment in any cause or matter in which there has been a trial thereof, or of an issue therein with a jury, is to be heard and determined by the Judge before whom such trial with a jury took place, and not by a Divisional Court, unless it be impossible or inconvenient that such Judge should act, in which case such motion shall be heard and determined by some other Judge to be nominated by the President of the Division to which the cause or matter belongs.

The cause could be set down immediately after the trial of an action allowed under the old practice: *Rodgers v. Nowill*, 6 Ha. 338. Where the issues were tried without a jury, and the bill dismissed at once, the order was not to be drawn up until the time for moving for a new trial had expired: *Macdougall v. Gen. Sewage, &c. Co.*, 23 W. R. 435.

At the hearing after the trial of issues, the Court was bound by the findings, and to give effect to them, or order a new trial: *Browne v. McClintock*, L. R. 6 H. L. 434; although they left the question undecided: *Exp. Freeman of Sunderland*, 1 Drew. 184; or were against the weight of evidence: *Exp. Morgan*, 2 Ch. Div. 72; or founded on evidence which ought not to have been admitted: *Evans v. Prothero*, 1 D. M. & G. 572; or on questions wrongly put: *Exp. Morgan, sup.*; and see *Fulton v. Andrew*, L. R. 7 H. L. 448. As to whether this rule applied to issues directed on interlocutory motion, see *Kent v. Burgess*, 11 Sim. 361, 372. It did apply where the facts had by consent been found by the Judge himself acting as a jury: *Ferne v. Young*, L. R. 1 H. L. 63; *Simpson v. Holliday*, L. R. 1 H. L. 315; but see *Curtis v. Platt*, L. R. 1 H. L. 337; *Exp. Gillebrand*, 10 Ch. 52.

But if there was no evidence to go to the jury (*S. C.*, *Exp. Morgan*, 2 Ch. Div. 72); or on appeal the view taken of the law was such as to make the findings immaterial (*Simpson v. Holliday*, L. R. 1 H. L. 315; *Exp. Bolland*, 7 Ch. 24; *Morrison v. Barrow*, 1 D. F. & J. 633); or they became so because of facts happening since (*Armstrong v. A.*, 3 My. & K. 45; 1 D. F. & J. 640, n.; and see 2 Ch. Div. 81, 82); or the jury had evidently been misled by the wording of one of the issues (*Exp. Bolland*, 7 Ch. 24), the verdict might be disregarded or set aside without a new trial and an order made in favour of the side against whom the verdict was given: *Exp. Morgan*, 2 Ch. Div. 72, 98.

The Court was not bound by the decision of another Court as a jury on similar facts in another case: *Dent v. Auction Mart Co.*, 2 Eq. 238, 254.

Before the trial of an issue, Plt might dismiss his bill, with costs, on motion; but Deft, after trial and verdict for him, was entitled to have the cause set down for further consideration, in order that the dismissal might be pleadable: *Carrington v. Holly*, 1 Dick. 280; cited 2 Dick. 612.

After the issues had been tried, and a new trial refused, an appeal might be brought against the order directing the issues: *Butlin v. Masters*, 2 Ph. 290; *Browne v. McClintock*, L. R. 6 H. L. 463; *Malone v. M.*, 8 Cl. & F. 179. As to the costs in such a case, see *Rochester v. Lee*, 2 D. M. & G. 427.

## CHAPTER XXIII.

## PETITION.

1. *Order on Petition.*

UPON the petition of &c., on the — day of —, preferred unto this Court, and upon hearing counsel for the Petr [and for &c., *Name the respondents, if any*], and upon reading the said petition, [an affidavit of A. filed &c., of service of the petition on &c., *Name any persons served and not appearing, and enter any evidence,*] This Court doth order &c.

2. *Order on Petition as to part adjourned.*

UPON the further hearing of the petition of &c., on the — day of —, preferred unto &c. [Form 1], and upon hearing counsel for the Petr and for &c., and upon reading the said petition, the order made on the original hearing thereof, dated &c., This Court doth order &c.

3. *Order on Petition adjourned to Chambers.*

UPON the petition of &c., preferred &c. [Form 1], which upon hearing counsel for the Petr and for &c., on the — day of —, was adjourned for consideration in Chambers, and upon hearing the solrs for the Petr and for &c., in Chambers, and upon reading &c., It is ordered &c.

4. *Order on Petition dismissed.*

UPON the petition of &c., preferred &c. [Form 1, *And recite prayer of petition*], and upon hearing counsel for the Petr and for &c., and upon reading the said petition [*enter evidence*], This Court doth order that this petition do stand dismissed out of this Court [*if with costs, see Chap. XVII., "Costs," p. 212*].

For forms of orders for substituted service of petition, and for service out of the jurisdiction, *v. sup.* Chap. II., "SERVICE OF WRIT AND PROCEEDINGS," p. 13.

## NOTES.

## PROCEDURE BY PETITION.

By O. i. 1, 2, all suits hitherto commenced by bill or information are to be by action, and all other proceedings in and applications to the High Court may, subject to the rules, be taken and made in the same manner and in the same

Court in which any proceeding or application of the like kind could have been taken or made if the Jud. Acts had not been passed.

By O. v. 9 (a), where a matter is commenced by petition, such petition is to be brought to the office of the Registrars of the Chancery Division, and marked by the officer charged by the registrars with that duty, with the name of one of the Judges of that division to whom for the time being Chambers are attached (to be ascertained in the manner used in the distribution of business amongst the conveyancing counsel of the Court): see O. LI. 9; and *sup.* Chap. XIX., "SALES BY THE COURT," p. 293.

Every subsequent petition relating to or connected with the same matter is to be marked with the name of the same Judge: O. v. 9 (e).

Petitions are transferred in the same manner as actions, as to which, *v. inf.* Chap. XXXIV.

As to the power of one Judge to sit for another without any transfer in case of urgency during absence or vacancy, see Jud. Act, 1881, s. 12; and upon request, see Jud. Act, 1884, s. 6; O. XLIX. 4a; and by direction of the L. C., see O. XLIX. 4.

Petitions are either special or of course; orders on the latter being drawn up, passed and entered by the registrars of the Chancery Division (O. LXII. 18) without any direct application to the Judge.

By O. LXI. 19, petitions in causes are to be distinguished by year, letter, and number; and by O. XIX. 9, petitions are excepted from the rule as to printing pleadings. The former practice has not been altered as to service of petitions, whether in actions, or in matters, notwithstanding r. 10; and by Jud. Act, 1873, s. 100, "pleading" includes "petition."

The Court of Appeal has no jurisdiction to hear petitions, except on appeal: see *Re Dunraven Coal, &c. Co.*, 24 W. R. 37; Jud. Act, 1873, s. 18; O. LVIII. 4, 17.

The petition should be addressed to the High Court of Justice, and should contain, as concisely as possible, a statement of the material facts, but not the evidence by which they are to be proved, and is to be divided into paragraphs, numbered consecutively, and each paragraph containing as nearly as may be a separate allegation. Dates, sums, and numbers are to be expressed in figures, and not in words. Signature of counsel is not necessary: see O. XIX. 4.

The effect of documents ought to be stated without setting them out at length (r. 21), except where the precise words are material, as for instance in the case of wills or settlements on applications for payment out of Court. In such cases the gift ought to be set out *verbatim*; and as to the form of alleging certain facts, see rr. 22—25.

As to the effect of these rules, see *Hammer v. Flight*, 24 W. R. 346; *Herring v. Bischoffsheim*, W. N. (76) 77.

As to striking out pleadings calculated to embarrass from prolixity and statement of immaterial facts, *v. sup.* Chap. V., "PLEADINGS," p. 33.

The petitioner, if not a party to the cause, must give his name, residence, and description: *Glazbrook v. Gillatt*, 9 Beav. 492; and if abroad may be required to give security for costs: *Atkins v. Cooke*, 3 Drew. 694; 5 W. R. 384; and so on petition under the statutory jurisdiction, and though respondent had filed affidavits: *Anon.*, 12 Sim. 262; *Exp. Seidler*, 12 Sim. 106; *Re Dolman*, 11 Jur. 1095. As to giving security for costs generally, *v. sup.* Chap. IV., pp. 26 *et seq.* The order for security to be given was refused as to a petitioner residing abroad, who was a Deft in the suit in which the petition was presented: *Cochrane v. Fearon*, 18 Jur. 568. *Secus*, where he came in under the decree: *Partington v. Reynolds*, 6 W. R. 307; *et v. sup.* Chap. XVII., "COSTS."

Infants must petition by a next friend; and the Court will require a guardian to be appointed to an infant respondent in a matter: *Re Barrington*, 27 Beav. 272; *Re Ward*, 6 Jur. N.S. 441. As to the mode of appointing a guardian for an infant respondent to a petition, see O. XVI. 19. In *Re Mitchell*, 23 Jan. 1866, V.-C. K. allowed an infant respondent to appear by her testamentary guardian, but under the circumstances required an affidavit that the guardian had no adverse interest; and *v. inf.* Chap. XXXVIII., "INFANTS."

By O. LXI. 15, no order on petition is to be passed till the petition is filed in the Central Office. By r. 17, proper indexes of the petitions are to be

kept there. The original petition having been lost, leave was given to file the copy left with the Judge: *Sanderson v. Walker*, 1 M. & C. 359; *Smith v. Harwood*, 1 S. & G. 137. And where a petition was dismissed, and the petitioner's solr would not produce it to be filed, the copy served on the respondent was ordered to be filed instead: *Re Devonshire*, 32 Beav. 241; *Re Anglo-Greek, &c. Co.* (No. 2), 35 Beav. 419, where the petitioners were ordered to pay the costs of the applications.

A petition under sect. 39 of the Conveyancing and Law of Property Act, seeking to bind the interest of a married woman restrained from anticipation, need not be entitled in the matter of the Act: *Re Landfield, L. v. L.*, Fry, J., 30 W. R. 377.

Petitions are answered in the name of the senior registrar: O. LXII. 18, and the list thereof prepared in the Cause Book Room. As to the practice in reference to answering winding-up petitions, see *Re Building Societies Trust*, 44 Ch. D. 140, at p. 142.

#### SERVICE.

By O. LII. 16, at the foot of every petition and copy thereof, a statement is to be made of the persons, if any, intended to be served, or, if so, that no person is to be served. The respondents ought to be named, and not merely described as Plts or Defts: per M. R. in *W. N.* (76) 219.

By r. 17, unless by special leave, the time for service is two clear days; and as to the computation of a limited time of less than six days, see O. LXIV. 2, 3.

As to service of petition out of the jurisdiction, *v. sup.* Chap. II., p. 20.

Substituted service of a petition in a suit was ordered on the ground that the bill could have been so served: *Shurmer v. Hodge*, *W. N.* (66) 304; but see *Anon.*, *W. N.* (76) 105, per Denman, J.

As to service of the writ of summons on infants (and the service of petitions in actions may probably follow the same rules), see O. IX. 4; O. XIII. 1; and generally O. IX.; and by O. LII. 8, the plaintiff may, without any special leave, serve any petition upon any Deft, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

By O. XIX. 10, every "pleading (which by Jud. Act, 1873, s. 100, includes petitions) or other document required to be delivered to a party or between parties," shall be delivered to a party for whom no appearance has been entered by being filed.

This seems to apply to petitions in actions, but in many cases, having regard to the subject-matter of such petitions, the Court would require service: see *Re Battersby's Trusts*, 10 Ch. D. 228.

If a respondent does not appear, the order may be made as against him, on affidavit of service; if the petitioner does not appear when the petition is called on in regular order as an opposed petition, the respondent may have the petition dismissed with costs on producing an affidavit of having been served, or the copy of the petition served upon him. For order to dismiss petition, see Form 4, *sup.*

As to affidavits of service, *v. sup.* pp. 20, 150.

#### AMENDMENT.

Leave to amend the petition is almost of course; and an amendment is often required by the Court before granting the order: and see *Matson v. Swift*, 8 Beav. 378, 379; 9 Jur. 521; *Re Humphrys*, 1 Jur. N.S. 921.

Petitions have been amended after the hearing and the passing and entry of the order: *Hilop v. Wykeham*, 3 W. R. 286; *Re Bunnett*, 1 Jur. N.S. 921; *Re Havelock*, 14 W. R. 26, 174; *Re Savage*, 15 Ch. D. 557, *sup.* Chap. VI., "AMENDMENT," p. 38 (but see *Re Marrow*, C. & P. 142); and after service and advertisement under the Settled Estates Acts: *Re Wilkinson*, 9 Eq. 71.

The petition will be amended in the Cause Book Room on a note from the registrar.

Facts occurring after leave to attend was given may be stated in the amendments: *Re Westbrook*, 11 Eq. 252.



An amended petition does not in general require re-answering: *Re Medow*, 12 W. R. 595; 10 Jur. N.S. 536; *Robinson v. Harrison*, 1 Drew. 307.

A petition on which an order had been made, which had not been worked out, was revived on the application of the exor of the petitioner: *Re Youl*, 16 Eq. 107.

By O. XXVIII. 6, application for leave to amend any pleading (which includes petitions, Jud. Act, 1873, s. 100) may be made by either party to the Court or a Judge; and may be given on such terms as to costs or otherwise as may be just; in practice, however, petitions are amended upon the direction of the Court upon a fiat signed by the registrar, as before stated, without the imposition of any terms.

By O. LII. 6, if on the hearing of a motion or other application the Court or Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose.

And by r. 7, the hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit.

#### EVIDENCE.

By O. XXXVIII. 1, the evidence upon any motion, petition, or summons may be by affidavit, but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit; and the Court has power to direct the depositions of witnesses to be taken before an examiner: see O. XXXVII. 5.

The Court has a discretion to refuse to order a witness to attend for cross-examination: *La Trinidad v. Browne*, 36 W. R. 138.

As to the form, contents, and mode of swearing affidavits, and as to evidence generally, *v. sup.* Chap. VIII., "EVIDENCE."

The petitioner intending to use affidavits previously filed in the action, should give notice thereof to the respondents. When the title of a petition is amended, affidavits need not be resworn, but may be made exhibits to a short affidavit: *Re Varley Chapel*, 10 Ha. xxxvii. The petition must be entitled in the cause or matter to which the fund is standing, but a slight variation between the title of the petition and that of the account to which the fund was standing, was immaterial: *Re Harris*, 8 Jur. N.S. 166; and see *Re Varley*, 14 W. R. 98; in which case, and in *Re Gombault*, W. N. (68) 243, the affidavits were sworn before the petition was presented; and as to an affidavit wrongly intitled in an action, see *Fisher v. Coffey*, 1 Jur. N.S. 956.

#### ORDER ON PETITION.

In *Sharshaw v. Gibbs*, 18 Jur. 330, it was said that the Court makes no declaration on petition, but, if necessary, prefaces its order with the statement of its opinion; but this rule is not adhered to: see *Re Walker*, 16 Jur. 1154; and by O. XXV. 5, no action or proceeding is to be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not: and see *Re St. Nazaire Co., sup.* Chap. XII., "TRIAL AND JUDGMENT," p. 144.

#### COSTS.

A respondent who appears unnecessarily after service and tender of a sufficient sum to enable him to get legal advice, will not have his costs: *Re Duggan*, 6 Eq. 697; *Boucher v. Wood*, 6 Ch. 77, and cases there cited: *Carey v. Whittingham*, T. & R. 405; *Re Gore Langton's Estate*, 10 Ch. 328.

And by O. LXV. 27 (19), where any petition in a cause or matter assigned to the Chancery Division is served, with notice to the party served that if he appear his costs will be objected to, the tender of costs for perusing the same is to be £1 10s., which is to be allowed to the party making the payment if the service was proper, but not otherwise. This is without prejudice to the rights of either party to costs or to object to costs where no such tender is

made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case in which a solr of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding £1 10s. : see *Re Sutton*, 21 Ch. D. 855.

And by r. 23, any party appearing on any application or proceeding in which he is not interested, or which he ought not to attend, will not be allowed costs unless expressly directed. Where no tender for costs was made to respondents who had no interest, they were allowed £2 2s. (the amount specified in the corresponding Rules of 1875): *Somes v. Martin*, W. N. (82) 113.

#### PETITIONS ADJOURNED TO CHAMBERS.

By O. LV. 29, when any matter is adjourned to Chambers, or any directions are given to be acted upon at Chambers, without an order being drawn up, a note signed by the registrar, stating the purpose of the adjournment or directions, is to be left at Chambers.

In the case of petitions for leave for an infant to marry, the more usual course now is to adjourn the consideration of the whole matter to Chambers; a summons is then taken out to proceed on the petition in Chambers, where, if right, the order may be made; and in that case a minute of the order, and of the evidence adduced, written on the fold of the original petition to be filed therewith, is sent to the registrar to enable him to draw it up. The same course is sometimes adopted on petitions for payment of funds out of Court, where the evidence is complicated, or the persons representing a class or family are numerous, and much time would be occupied in investigating their title in Court. By this course, the expense of a certificate and of a further order and attendance in Court is saved. If a petition is adjourned to Chambers, that the matter may be looked into there, and is then to be brought on again to be disposed of in Court, without a formal certificate being made, a minute of the result is annexed to the Judge's copy of the petition and sent to the Judge in Court, and a note of the evidence used will be made by the chief clerk for the registrar, on the fold of the original petition : see *Dan*. 1112.

A petition for payment out of Court under the Trustee Relief Act may be adjourned into Chambers : *Re Moate's Trusts*, 22 Ch. D. 635.

Where matters adjourned to Chambers may be prosecuted without drawing up the order, see *Kelson v. K.*, 9 Ha. lxxxvi. ; but *semble*, it is discretionary.

## CHAPTER XXIV.

### MOTION.

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#### 1. *Order on Motion.*

UPON motion this day made unto this Court by counsel for &c., and upon hearing counsel for &c. [*If so*, and upon reading an affidavit of &c. filed &c., of service of notice of this motion on &c., *Enter any evidence*], This Court doth order &c.

#### 2. *The Like—and on Cross Motion.*

UPON motion &c., by counsel for &c. that [*Recite Plt's notice*], and upon motion &c., by counsel for &c., that &c. [*Recite the cross notice*], and upon reading &c. [*Enter any evidence*], and upon hearing what was alleged by the counsel on both sides, This Court doth order &c.

#### 3. *Order on Motion refused.*

UPON motion &c., by counsel for &c. [*Recite notice*], and upon hearing counsel for &c. [*Enter evidence*], This Court doth not think fit to make any order upon this motion [*if with costs*, but doth order that the Plt A. do pay to the Deft B. his costs of this motion, to be taxed by the taxing master, *if so*, in case the parties differ].

#### 4. *Order on Abandoned Motion.*

WHEREAS the Plt A. did, on the — day of &c., give notice that this Court would be moved, on Thursday, the — day of &c., or so soon after as counsel could be heard, by counsel for the Plt A. that [*Recite notice*]; Now upon motion this day made unto this Court by counsel for the Deft B., who alleged that the Plt A. had not moved this Court pursuant to the said notice, This Court doth order that the Plt A. do pay to the Deft B. his costs occasioned by the said notice of motion, such costs to be taxed by the taxing master.

#### 5. *Order on Motion under O. xxxii. 6.*

UPON motion &c., by counsel for the Plt for such order as upon the admissions of fact in the statement of defence the Plt is entitled to, and

upon hearing counsel for the Deft. and upon reading the Plt's statement of claim and the Deft's statement of defence &c. as the case may be. This Court hath order &c. [If further consideration adjourned. v. sup. Chap. XX. - FURTHER CONSIDERATION.] p. 314.]

*C. Order granting or refusing to grant an application to proceed*

*Andc.*

Upon motion &c. by the Plt A. B. in person or behalf of himself and the Plt in the first-mentioned action to arrest the minutes of judgment in the second-mentioned action on the following grounds:— 1. that an alleged fraud had been committed on the Court and on the infant Plt and Defs by &c.; 2. that an alleged fraudulent conspiracy was entered into between &c.; 3. that the Court would direct the official referee to inquire into the nature of this case on the grounds of alleged fraud &c. and upon hearing counsel for &c. Dismiss application with costs. And Let the applicants or any of them be not allowed to make any further applications in these actions or either of them to this Court or to the Court below, without the leave of this Court being first obtained. And if notice of any such application shall be given without such leave being obtained, the respondents shall not be required to appear upon such application, and it shall be dismissed without being heard.—*Grepe v. Loam*, 4th Nov. 1887, A. 1622.

NOTES.

By O. LII. 1, applications in an action to a Divisional Court or to a Judge in Court, shall be made by motion. By O. LVIII. 1 and 118, all applications to the Appeal Court shall be by motion, and by O. LIV. 28, in the Q. B. D. appeals to the Court from any decision at Chambers shall be by motion.

A motion in any cause or matter must be made before the Judge to whose Court the cause or matter is attached: Jud. Act, 1873, s. 42; and the notice should state the Judge before whom it is intended to be made. That an order made by a wrong Judge is not a nullity, see Dan. 1544, and cases there cited. As to form of notice of motion, see R. S. C. Appx. B., Form 18.

By O. I. 1, 2, motions 'subject to the rules of Court' are to be made in the same manner as if the Judicature Acts had not been passed. Motions not in actions must follow the old practice: *Re Phillips and Gill*, 24 W. R. 158; 1 Q. B. D. 78.

A notice of motion stating that the Court will be moved at the Royal Courts of Justice is sufficient: *Petty v. Daniel*, 34 Ch. D. 172. A notice for a day not in the sittings is good: *Re Coulton, Hamling v. Elliott*, 34 Ch. Div. 22, overruling *Daubney v. Shuttleworth*, 1 Ex. D. 53; and in *Williams v. De Boinville*, 17 Q. B. D. 180, amendment of such a notice was allowed.

A Deft may, at any time after he has appeared, move for an injunction and receiver on notice to the Plt: O. L. 6. He may do so although Plt has served notice of motion for the like purpose. One order will be made on the two motions, and the Plt will in general have the carriage of the order: *Sargant v. Read*, 1 Ch. D. 600.

By O. LII. 2, no rule or order *nisi* to show cause is to be granted in any action, or to set aside, remit, or enforce an award, or for attachment, or to answer the matters in any affidavit, or to strike off the rolls, or against the sheriff to pay money.

The corresponding rule of 1875 only applied to actions: see *Phillips and Gill*, 1 Q. B. D. 78.

By O. LII. 3, no motion is to be made without notice, except where by the previous practice any order or rule has theretofore been made *ex parte*

absolute in the first instance, and except where, notwithstanding r. 2, an application may be made for an order to show cause only. But the Court or Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte*, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside.

A notice of motion may be served on a party who has failed to appear by being filed with the proper officer: O. XIX. 10; *Dymond v. Croft*, 3 Ch. D. 513.

An application to discharge an *ex parte* order must be made to the Judge with whose name the order is marked, or in vacation to a vacation Judge, and not to the Court of Appeal, the application not involving a rehearing: *Boyle v. Sacker*, 39 Ch. Div. 249.

Under Jud. Act, 1873, s. 25 (8), mandamus, injunction, or receiver may be granted *ex parte*, but orders for preservation or sale of property under O. L. 2, 3, must be made on notice: r. 6.

The indorsement of the writ was amended on *ex parte* application: *Colebourne v. C.*, 24 W. R. 235.

As to motions for receivers and injunctions, see Chap. XXXII., "RECEIVERS," and Chap. XXXI., "INJUNCTIONS."

Orders for attachment must now be obtained on notice: O. XLIV. 2.

By O. LII. 6, the Court or a Judge, if of opinion on the hearing of a motion or other application that any other person ought to have notice, may either dismiss it or adjourn it in order that such notice may be given, upon such terms as may be thought fit; and by r. 7 may adjourn the hearing generally.

A technical defect in the notice may be amended in Court, and the notice re-served then and there: *Heywood v. Wait*, 18 W. R. 205; and see *Williams v. De Boinville*, 17 Q. B. D. 180; and an irregularity in service, by which the party had not been injured, was disregarded, and the motion heard on the merits: *Dawson v. Beeson*, 22 Ch. Div. 504.

An agreement for stay of proceedings or dismissal of the bill may be enforced by motion in the suit, even if involving equities distinct from those on the record: *Eden v. Naish*, 7 Ch. D. 781; *Scully v. Ld. Dundonald*, 8 Ch. D. 658; *Re Gaudet Co.*, 12 Ch. D. 882; and see *per James, L. J.*, in *Pryer v. Gribble*, 10 Ch. 534.

But an agreement for compromise cannot be set aside on motion or summons in the original action: *Emeris v. Woodward*, 43 Ch. D. 185.

An immediate admon decree was made by consent on motion in a creditor's suit, another creditor having taken out an admon summons returnable before the first day on which the cause could be heard as short: *Furze v. Hennes*, 2 D. & J. 125; *Scaffold v. Hampton*, 22 W. R. 182.

As to moving for orders on admissions of fact in the pleadings under O. XXXII. 6, *v. sup.* Chap. XIII., "MOTION FOR JUDGMENT." Inquiries and accounts may also be directed at any stage of the proceedings: O. XXXIII. 2.

But where the priorities of mortgagees depend on questions of fraud, the inquiries cannot be sent to Chambers before the questions of fraud have been tried: *Garnham v. Skipper*, 29 Ch. Div. 566.

No new evidence could be filed on a motion ordered to stand over on certain terms until the hearing: *Singer v. Audsley*, 13 Eq. 401.

As to what is sufficient notice of intention to use affidavits on appeal, see *Bloxam v. Metropolitan Rail. Co.*, 16 W. R. 492, n.

As to saving motions, see *Banwen Iron Co.*, 17 Jur. 127; *Wedderburne v. Llewellyn*, 13 W. R. 939; *Dan*. 1553.

#### SERVICE.

By O. LII. 5, unless the Court or Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion; but on applications to answer matters in an affidavit, or to strike off the rolls, there must be ten days' notice. As to days not to be reckoned, see O. LXIV. 2.

If special leave be given to move on short notice, or on a day not appointed for motions, the notice must so state: *Hill v. Rimill*, 8 Sim. 632; *Harris v.*

*Lewis*, 8 Jur. 1063; *Chambers v. Toynbee*, 12 W. R. 1100; *Dawson v. Beeson*, 22 Ch. Div. 504; and leave to move before appearance does not authorize short notice: *Newton v. Charlton*, 10 Ha. xxxi.; *Hart v. Tulk*, 6 Ha. 611. Counsel on applying should state that he asks to serve on short notice: *Dawson v. Beeson*, *sup.*; but in case of omission it is not merely of course to give costs: see *Newton v. Charlton*, *sup.* Where notice was given for the wrong Court, such Court gave costs, but only two guineas: *Yearsley v. Y.*, 19 Beav. 1.

Leave to serve short notice of motion cannot be given by the chief clerk even during the long vacation: *Conacher v. C.*, 29 W. R. 230.

Motions for assignment of guardians under O. XIII. 1, must be on at least six days' notice.

Notice by a pauper must be signed by his solr, except for discharge of his solr: O. XVI. 29.

By O. LII. 8, a Plt may, without leave, serve notice of motion upon a Deft who, having been duly served with a writ of summons, has not appeared in due time.

By Cons. Ord. 3, r. 8, which was similar, service might be effected personally, or at the dwelling-house or office of any Deft, who having been served with the bill had not appeared within the time limited. Substituted service was ordered in fit cases under the old practice: *Maclaren v. Stainton*, 16 Beav. 279; or service abroad: *Green v. Pledger*, 3 Ha. 165. And by O. IX. 2, substituted or other service may be ordered of the writ of summons whenever "the Plt is from any cause unable to effect prompt personal service," the grounds of the application being set forth in an affidavit: O. x.

By O. LII. 9, the Plt may, by leave to be obtained *ex parte*, serve notice of motion with the writ of summons, or after service of it and before the time for appearance.

As to service on the solrs of the parties, see O. IV. 1, and O. XII. 10.

And on parties suing or defending in person, O. IV. 2, and O. XII. 11.

By O. LXVII. 8, where a person who is not a party appears on any proceeding before the Court or in Chambers, service on his solr or agent in London is good; except in matters requiring personal service.

As to affidavits of service, see *sup.* pp. 20, 150.

By O. LII. 4, "every notice of motion to remit or enforce an award, or for attachment, or to strike off the roll, shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." Under this rule the affidavits must be served with the notice, and cannot be served on the country solr when the notice is served in London: *Petty v. Daniel*, 34 Ch. D. 172.

#### COSTS.

The Court may give costs of a special motion, though not asked by the notice: *Clark v. Jaques*, 11 Beav. 623; but not unless the respondent appears: *Pratt v. Walker*, 19 Beav. 261.

Where a motion was adjourned to the trial, and by mistake no provision as to the costs was made in the subsequent judgment, the Court ordered payment on motion after the judgment was entered: *Fritz v. Hobson*, 14 Ch. D. 542; following *Viney v. Chaplin*, 3 D. & J. 282.

The rules as to costs of motions as costs in the cause, where the order is silent respecting costs, are as follows:—(1) The party making a successful motion is entitled to his costs as costs in the cause, but the party opposing is not. (2) The party making a motion which fails is not entitled to his costs as costs in the cause, but the party opposing is. (3) When a motion is made by one party and not opposed by the other the costs of both parties are costs in the cause: per Leach, V.-C., 1 S. & S. 357.

But the Deft was held entitled to the costs of resisting the Plt's successful motion for an injunction, the bill being ultimately dismissed: *Stevens v. Keating*, 14 Jur. 157.

As to whether costs of correspondence before motion are to be regarded as costs of motion, or of action, see *Norton v. Fenwick*, 54 L. J. Ch. 632.

If a motion for an interim injunction stands over till the trial, it is not

only unnecessary but improper to reserve the costs: *Bournemouth Commissioners v. Holden*, W. N. (88) 205.

An order made on notice continuing an injunction with costs, carries the costs of an interim injunction obtained *ex parte*: *Blakey v. Hall*, 56 L. J. Ch. 568.

As to party not interested not being entitled to appear merely to ask for costs, see *Campbell v. Holyland*, 7 Ch. D. 166; O. LXV. 27 (23).

Where a party is ordered to pay the costs up to a certain day, the usual rules do not apply, and the costs of motions made during that time may be included in costs of action: *Webster v. Manby*, 4 Ch. 372.

The costs of a motion for an injunction ordered to stand over until the hearing, although not mentioned in the decree, were allowed to the Plt as being the costs of a substantially successful motion: *Mounsey v. E. of Lonsdale*, 6 Ch. 141; and so, where the bill was eventually dismissed, the Deft had the costs of a motion which stood over to the hearing: *Corcoran v. Witt*, 13 Eq. 53; and where a motion stood to the trial, and no mention was made as to the costs then or at the trial, judgment dismissing the action with costs carried the costs of the motion: *Gosnell v. Bishop*, 38 Ch. D. 385.

In *Hodges v. H.*, 22 Nov. 1876, Jessel, M. R., directed the registrars to include in the general costs of suit the costs of all applications reserved to be disposed of at the trial, and all costs reserved to be disposed of at the trial.

If nothing is said to the contrary, the successful party gets his costs in any event: per Jessel, M. R., in *Jackson v. Wood*, 12 Mar. 1880.

If the motion is to obtain an indulgence, the party applying must pay the costs: *A. G. v. Corp. of Hulifax*, 18 W. R. 37; and see Dan. 1171; and as to costs of motions for injunctions, see Kerr, 30; and see *inf.* Chap. XXXI., "INJUNCTIONS."

The costs of an abandoned motion may be applied for on the day for which the notice is given, so soon as the motions are concluded, but the usual course is not to apply for them until next motion day, and a later application will not in general be entertained: *Woodstock v. Oxford Rail. Co.*, 17 Jur. 33; Dan. 1559. The notice of motion must be produced to the registrar before he draws up the order: *Withey v. Haigh*, 3 Mad. 437; and see *Berry v. The Exchange Trading Co.*, 1 Q. B. D. 77. Where the notice of motion was invalid, it was held that the Defts need not have appeared, and were not entitled to their costs of doing so, the Plts not appearing: *Daubney v. Shuttleworth*, 1 Ex. D. 53. For form of order, *v. sup.* Form 4.

In taxing the costs of an abandoned motion the costs of all work down to the time of any notice which stops the work are allowed if reasonable, and the same rule applies to discontinuance of action and dismissal: *Harrison v. Leutner*, 16 Ch. D. 559.

The costs of a motion were disallowed where a summons in Chambers would have sufficed: *Allen v. Oakley*, 62 L. T. N.S. 724.

As to the practice generally, see Dan. 1546 *et seq.* As to appeals from orders made on motion, *v. inf.* Chap. XXXVI., "APPEALS."

## CHAPTER XXV.

## PETITION OF RIGHT.

1. *Order on Petition of Right—Costs to be paid by the Crown.*

THE petition of right of J. and M. &c., by Messrs. P. & G. of &c., copartners, their solrs, coming on this day to be argued before this Court upon her Majesty's command that right be done, in the presence of counsel for the suppliants and for her Majesty's A. G., and upon reading [*enter evidence*] and (upon hearing) what was alleged by counsel for the suppliant and for her Majesty's A. G., This Court doth declare that &c. was entitled to &c. Tax the costs of the suppliants of the said petition, And Let the same, when taxed, be paid to the suppliants J. and M., in the manner directed by the Act of Parliament of the 23 & 24 V. c. 34.—See *James v. The Queen*, V.-C. M., 14 June, 1876, A. 1188; and see *S. C.*, V.-C. M., 11 Feb. 1874, A. 338; 17 Eq. 502, where the demurrer of the A. G. was overruled with costs.

Where relief was refused and costs given to the Crown, see *Re Brain*, V.-C. M., 1 July, 1874, A. 1770; 18 Eq. 389.

2. *Two Demurrers to Petition of Right, one allowed, one overruled.*

THE demurrer put in by her Majesty's A. G. on behalf of her Majesty, and the demurrer put in by the Secretary of State for India in Council (served with the petition), to the petition of right of K. of &c., on behalf of himself and all other the persons who under the Royal grant of the 10 June, 1864, are entitled to share in the booty of Banda and Kirwee, coming on this day to be argued before this Court in the presence of the said K. in person, and of counsel for her Majesty, and the Secretary of State for India in Council, Upon opening and debate of the matter, and upon hearing what was alleged by the said K. and by counsel for her Majesty and for the Secretary of State for India in Council. This Court held the demurrer of her Majesty's A. G. on behalf of her Majesty to be good and sufficient, and that the suppliant is not entitled to any portion of the relief sought by his petition; And, therefore, Let the said demurrer stand and be allowed; And Let the said K. pay to her Majesty's A. G. his costs of his said demurrer, to



be taxed by the taxing master; And this Court held the demurrer of the Secretary of State for India in Council to be insufficient as being out of time; And, therefore, Let the same be overruled; And Let the Secretary of State for India in Council pay to the said K. his costs of the said demurrer to be taxed by the taxing master, costs to be set off. —*Kinlock v. The Queen*, Kay, J., 27 November, 1882, A. 2257.

For order allowing demurrer, and for suppliant to pay costs of demurrer and petition, see *Re Tufnell*, 15 June, 1876, B. 1093.

## NOTES.

As to petitions of right, before and independently of the Petition of Right Act, 1860, see Dan. 1538; 3 Steph. Com. 11th ed. 680; Clode on Petition of Right; *Clayton v. A. G.*, 1 C. P. D. 97; *Taylor v. A. G.*, 8 Sim. 413; *Monckton v. A. G.*, 2 Mac. & G. 402; *Re Von Frantzius*, 2 D. & J. 126; *Re Rolt*, 4 D. & J. 44; and see the practice explained by Wickens, V.-C., in *Kirk v. The Queen*, 14 Eq. 563.

That Act (23 & 24 V. c. 34) provides that a petition of right may be instituted in any of the Superior Courts of Law or Equity, and by the following sections the *fiat* of her Majesty that right be done being obtained through the Home Secretary (see s. 2), the proceedings are assimilated to those in an ordinary suit or action between subjects (see Gen. Ord. 1 Feb. 1862; Dan. 1540; Clode, 192); and are to be prosecuted in the Court in which the petition is entitled, or such other Court as the L. C. may direct.

By ss. 11, 12, costs may be given to (*Re Brain*, 18 Eq. 389) and against (*James v. The Queen*, *sup.* Form 1, and *S. C.* on demurrer, 17 Eq. 502) the Crown and other parties.

By s. 18, suppliants may still proceed as if the Act had not passed.

The Crown may, notwithstanding the Act, plead and demur without leave: *Tobin v. The Queen*, 14 C. B. N.S. 505; 11 W. R. 701; and see *S. C.*, *Ib.* 915.

It seems doubtful whether any person can be joined with the Crown as respondent to the petition. If not, another suit may be commenced against the Sovereign and others after the *fiat* has been given: *Kirk v. The Queen*, 14 Eq. 558; and as to joining a Secretary of State, see *S. C.*

A petition of right will lie:—For unliquidated damages for breach of contract: *Thomas v. The Queen*, L. R. 10 Q. B. 31; *Windsor and Annapolis Rail. Co. v. Reg.*, 11 App. Ca. 607, P. C.; or otherwise in respect of matters of contract: *Macheath v. Haldimand*, 1 T. R. 178; *Oldham v. The Lords of the Treasury*, cited 6 Sim. 220; or to enforce an agreement for a lease: *James v. The Queen*, 17 Eq. 502; *Davis v. Adams*, W. N. (76) 202; and, *semble*, the Crown's advisers cannot capriciously refuse to allow investigation: *Ryves v. D. of Wellington*, 9 Beav. 579; Clode, 164. But not for unliquidated damages for a trespass: *Tobin v. Reg.*, 16 C. B. N.S. 310; 12 W. R. 838; *Canterbury v. A. G.*, 1 Ph. 306. Nor for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty: *Tobin v. Reg.*, *sup.* Nor as to lands in a colony: *Holmes v. The Queen*, 10 W. R. 39. And a suppliant, or intending suppliant, is not entitled to discovery, nor to production of documents as against the Crown: *Thomas v. The Queen*, L. R. 10 Q. B. 44; *Reiner v. M. of Salisbury*, 2 Ch. D. 378, 386; though the Crown, by the combined effect of 23 & 24 V. c. 34, and O. xxxi. 12, is entitled to discovery from the suppliant: *Tomline v. The Queen*, 4 Ex. Div. 225.

The Crown cannot be made to account for money paid by a foreign government as compensation to English subjects: *Rustomjee v. The Queen*, 2 Q. B. Div. 69.

Relief against a forfeiture of a Crown lease or gale for nonpayment of rent was refused after six months in *Re Brain*, 18 Eq. 389.

Demurrer was allowed to a petition of right by an army doctor, who, having been forced to retire, claimed that the office was tenable for life: *Re Tufnell*, 3 Ch. D. 164; also to a petition of right for an increase of a super-

annuation allowance, such an allowance being, under 4 & 5 Will. 4, c. 24, s. 30, and the Superannuation Act, 1859, ss. 2, 18, a mere bounty: *Cooper v. The Queen*, V.-C. M., 28 W. R. 611; and as to contracts by the Crown being conditional on the funds being voted by Parliament, see *Re Tufnell, sup.*, and *Churchward v. The Queen*, L. R. 1 Q. B. 173.

The Statutes of Limitation have no application as between the Crown and a subject, and should not be pleaded by the Crown, but the *stat* may be refused: *Customjee v. The Queen*, 2 Q. B. Div. 69.

And the Crown not being named in the Prescription Act, 1832, s. 3, is not bound by that section: *Perry v. Eames*, (1891) 1 Ch. 658.

No mention of petitions of right is made in the Judicature Acts or Rules, but the Gen. Ord. of 1st Feb. 1862, is not annulled, and the prerogative of the Crown to intervene in actions affecting its rights is not affected by Jud. Act, 1873, s. 24(5): *A. G. v. Constable*, 4 Ex. D. 172; and, notwithstanding those Acts and O. XXV. 1, a demurrer may be put in by the A. G.: *Northam Bridge Co. v. The Queen*, 23 November, 1886, B. 1373; Clode, 178.

And for Forms, and as to the practice generally, see Clode, *passim*.

## CHAPTER XXVI.

## ARBITRATIONS AND REFERENCES.



## SECTION I.—ARBITRATIONS.

1. *Usual Reference to one Arbitrator.*

By consent,—Let all matters in difference in this action between the parties be referred to the arbitrament, final end, and determination of A. of &c., who is to make his award in writing on or before the — day of —, or such further day as the said A. shall appoint; And by the like consent, Let all deeds, books, and papers in the custody or power of either of the parties relating to the matters in question be produced before the said arbitrator as he shall direct, to be ascertained by the oaths of the respective parties producing the same; And the parties and their witnesses, being first sworn, are to be examined as the said arbitrator shall direct; And by the like consent the costs of this cause [or action], and of this application and of this reference, are to be in the discretion of the said arbitrator; And by the like consent, no action is to be brought by either of the parties against the said A. for any matter or thing he shall do in, about, or touching any of the matters hereby referred to him; And by the like consent, the said arbitrator is to have power from time to time to enlarge the time for making his award as he shall think fit.

2. *Same—to two Arbitrators, or their Umpire.*

Let all matters in difference in these actions, between the Plt X., as exor of A., deceased, and the Deft, be referred to the arbitrament &c. of B., of &c., a person for this purpose nominated by the Plt, and of C., of &c., a person for this purpose nominated by the Deft, or, in case of their not agreeing to an award, then to the arbitrament &c. of such umpire as shall be appointed by them, the said B. and C., in the manner hereinafter mentioned; And such arbitrators are to make their award in writing on or before the — day of —, or on or before such further day as they, the said arbitrators, shall from time to time by any writing under their hands appoint; And in case of the said arbitrators not agreeing in an award, the said umpire is to make his award in writing within the period hereinafter mentioned, that is to

say, within three months after the time during which it is within the power of the arbitrators to make an award shall have ceased; or within such extended time, after the expiration of the said period of three months, as the said umpire shall from time to time by any writing under his hand appoint; And Let all deeds &c. [Form 1]; And the costs of these actions and of this application are to be in the discretion of the said arbitrators and umpire, or of such of them as shall award upon the matters in difference; And no action &c. [Form 1]; And before such arbitrators shall enter upon the matters referred to them they are, by writing under their hands, to appoint some person approved of by them to be such umpire as aforesaid: and such umpire shall, by writing under his hand, signify his acceptance of such appointment.—*Liberty to apply.*—*Edwards v. E.*, V.-C. S., 28 July, 1856, A. 1589.

For like order to refer all matters in question in the suit (including the question whether the alleged partnership was or was not constituted, and also including all questions between the parties relating to the Plt's annuity, and to the distress levied by him, and to the Deft's proceedings in replevin, and also who is to have possession of the farm in the pleadings mentioned, and upon what terms as to payment of moneys or otherwise), see *Oslar v. O.*, V.-C. B., 11 Nov. 1875, B. 3194.

### 3. *To enlarge Time to make Award*—52 & 53 V. c. 49, s. 9.

WHEREAS by an order dated &c. [*Recite order of reference concisely, but particularly as to time when arbitrator is to make his award*], Now upon motion &c., by counsel for —, and upon hearing counsel for —, and upon reading &c., This Court doth order that the time for the said arbitrators to make their award be enlarged until the — day of —.

This order may also be obtained at Chambers.

### 4. *To appoint new Arbitrator and Umpire in place of one who refuses to act or is incapable of acting*—s. 5.

WHEREAS by an order dated &c. [*Recite order of reference, and death of arbitrator and umpire*], It is, by consent, ordered that P. be appointed in the place of B., deceased, to act as arbitrator with L., the surviving arbitrator under the said order, together with such third person as the said P. and L. shall nominate in writing previously to their entering upon the said reference, with such powers and directions as are contained in and given by the said order dated &c.: And it is ordered, that the award of the said arbitrators be made on or before the — day of —, or such further time as they may appoint.—See *Gouthwaite v. G.*, V.-C., 23 Mar. 1842, A. 683.

#### NOTES.

All arbitrations, whether by consent out of Court or by reference under order of Court, are now governed by the provisions of the Arbitration Act, 1889 (52 & 53 V. c. 49), which repeals the Acts 9 Will. 3, c. 15; 3 & 4 Will. 4,

c. 42, ss. 39—41; the C. L. P. Act, 1854, ss. 3—17; the Jud. Act, 1873, s. 56 (except the portion relating to assessors), and ss. 57—59; and the Jud. Act, 1884, ss. 9—11.

Sects. 1—12 of the new Act relate more particularly to references by consent out of Court; ss. 13—17 to references under order of Court; and the remaining sections are of general application.

#### SUBMISSION TO ARBITRATION.

By the interpretation clause, s. 27, “‘submission’ means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.” As to the ambiguous use of the expression “submission” previously to the Act, see *Re Smith and Service and Nelson*, 25 Q. B. Div. 545.

In order to constitute an “arbitration” there must be some dispute which requires a judicial determination: *Re Dawdy*, 15 Q. B. Div. 426, 430; and a mere agreement for a sale at a price to be fixed by a valuer is not an arbitration, but a valuation: *Collins v. C.*, 26 Beav. 306; and see *Bos v. Helsham*, L. R. 2 Ex. 72; *Re Dawdy*, *sup.*; and so where a purchaser agrees to take timber at a valuation, such valuation is not in the nature of an award: *Re Carus-Wilson and Greene*, 18 Q. B. Div. 7; and the assessment under contract of compensation to tenant giving up land to a purchaser is a valuation: *Re Hammond and Waterton*, 62 L. T. N.S. 808; but if it is necessary to hold a judicial inquiry, and to decide a point of law or right arising out of the facts (*Vickers v. V.*, 4 Eq. 536; *Re Hopper*, 8 B. & S. 100), or settle a dispute (*In re Evans, Davies and Caddick*, 18 W. R. 723), there is an arbitration.

As to when the architect, &c. is made an arbitrator by a building contract, see *Kimberley v. Dick*, 13 Eq. 1; *Wadsworth v. Smith*, L. R. 6 Q. B. 332; *Jones v. St. John's Coll.*, L. R. 6 Q. B. 116; *Sharpe v. San Paulo Ry.*, 8 Ch. 597; *Walker v. L. & N. W. Ry.*, 1 O. P. D. 518.

Where it is intended that the parties should be deprived of any legal right, the submission should so state: see *Re Green and Balfour*, 63 L. T. N.S. 97.

As to the meaning of the expression “differences,” see *Randegger v. Holmes*, 1 O. P. 679; *Re Carlisle*, *Clegg v. C.*, 44 Ch. D. 200.

By s. 1, “a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of the Court.”

Formerly, unless the submission was made or agreed to be made a rule of Court, the appointment of the arbitrator was revocable until an award had actually been made: *Randell v. Thompson*, 1 Q. B. Div. 748; *Thomson v. Anderson*, 9 Eq. 523; *Re Rouse and Meier*, L. R. 6 O. P. 212; *Mills v. Bayley*, 2 H. & C. 36; *Fraser v. Ehrensperger*, 12 Q. B. Div. 310; *Deutsche, &c. Gesellschaft v. Brisac*, 20 Q. B. D. 177; but the general agreement to refer could not be revoked, and an action lay for breach of it: *Re Smith and Service and Nelson*, 25 Q. B. Div. 545, 550, 553; *Piercy v. Young*, 14 Ch. Div. 200; *Christie v. Noble*, 14 Ch. D. 203, n.

A stipulation in a contract, that the provisions of the C. L. P. Act, 1854 with regard to arbitration should apply, was held to be equivalent to an agreement that the submission should be made a rule of Court, and thus to render it irrevocable under the provision to that effect in 3 & 4 Will. 4, c. 42, s. 39; *Re Mitchell and Izard*, 21 Q. B. Div. 408.

Leave to revoke a submission on the ground that an arbitrator is making a mistake of law in a matter within his jurisdiction will only be granted under exceptional circumstances: *James v. J.*, 23 Q. B. Div. 12; *S. C.*, 22 Q. B. D. 673; *ex. gr.*, where the arbitrator was receiving evidence which was objected to as tending to vary the contract: *E. & W. India Docks Co. v. Kirk and Randall*, 12 App. Cas. 738.

The meaning of the last clause of the section is that the submission, whether it be a general agreement to refer or not, is to have the same effect as would have been given to it before the statute by an act of the parties making it a rule of Court: *Re Smith and Service and Nelson*, 25 Q. B. Div. 545, 554. The clause in effect supersedes the provisions of 9 & 10 Will. 3, c. 15, s. 1, whereby any agreement for reference might be made a rule of Court, and

could then be enforced accordingly, and of 3 & 4 Will. 4, c. 42, s. 39, whereby any submission made a rule of Court was irrevocable.

As to enforcing awards, *v. inf.*, Chap. L., "SPECIFIC PERFORMANCE," Russ. Arb. 562; and as to pleading an award as a defence to a suit, *Ib.* 544.

By s. 2, "a submission, unless the contrary is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act, so far as they are applicable to the reference under the submission." The provisions which are thus to be implied are as follows:—

"a. If no other mode of reference is provided, the reference shall be to a single arbitrator.

b. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

c. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

d. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

e. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

f. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

g. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

h. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

i. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

By s. 3, when a submission provides that a reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a Judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

The Act applies to an arbitration commenced after, on a submission made before, the commencement of the Act: *Re Williams and Stepney*, W. N. (91) 111.

#### STAYING PROCEEDINGS WHERE THERE IS A SUBMISSION.

By s. 4, "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Under s. 11 of the C. L. P. Act, 1854, for which this section has been substituted, two methods of compelling the prosecution of the agreed reference

were commonly adopted:—first, where a time had been fixed for making the award, by staying proceedings until further order, with liberty to apply if no award should be made within the time fixed: *Kitchen v. Turnbull*, 20 W. R. 253; or enlarging time to name an arbitrator where that had not been done: Form 3, *sup.* p. 352; secondly, by staying proceedings and appointing arbitrators, and giving the necessary directions: Form 2, p. 351.

An application for particulars is a "step in the proceedings" within sect. 4; *secus* a mere consent, as to extension of time: *Chappell v. North*, 60 L. J. Q. B. 554.

Where there is a *bonâ fide* suggestion of fraud, the Court has declined to interfere to stay proceedings, where it could not be supposed that the parties contemplated a reference of a case of fraud: *Wallis v. Hirsch*, 1 C. B. N.S. 316; *Cook v. Catchpole*, 34 L. J. Ch. 60; 13 W. R. 42; *Hoch v. Boor*, 49 L. J. C. P. 665; but see *Horton v. Sayer*, 4 H. & N. 643; but where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *primâ facie* case of fraud is proved: *Russell v. R.*, 14 Ch. D. 471.

The fraud alleged must be such as to affect the questions referred: *Hirsch v. Im Thurm*, 6 W. R. 605; *Birm. &c. Gas Co. v. Ratcliffe*, L. R. 6 Ex. 224; and not merely as to one item in an account: *Imhof v. Sutton*, L. R. 2 C. P. 406.

The following matters have been held to be within agreements to refer:—The construction of the partnership deed and all other matters: *Willesford v. Watson*, 8 Ch. 473; the validity of a notice of dissolution: *Plews v. Baker*, 16 Eq. 564 (but see *Witt v. Corcoran*, 21 W. R. 47, 48; 8 Ch. 476, n.); the partnership accounts: *Gillett v. Thornton*, 19 Eq. 599; questions of law, as well as of fact, arising on construction of contract: *Forwood & Co. v. Watney*, 49 L. J. Q. B. 447; but *semble*, a question whether a custom ought to be imported into a contract is not a dispute arising upon the contract: *Hutcherson v. Eaton*, 11 Q. B. Div. 861.

The question whether the matters in dispute are included in the reference is one for the decision of the Court: *Piercy v. Young*, 14 Ch. Div. 200, 208, explaining *Willesford v. Watson*, *sup.*, on this point.

The question whether a reference to arbitration and an award thereunder is a condition precedent to the right to sue, depends on the terms of the particular contract between the parties, as to which see *Collins v. Locke*, 4 App. Ca. 674; *Viney v. Bignold*, 20 Q. B. D. 172.

In the exercise of its discretion the Court declined to stay proceedings where one of the parties had acted contrary to the agreement to refer: *Davis v. Starr*, 41 Ch. Div. 247; or where there was a question of construction which was specially appropriate for the decision of a Court: *Lyon v. Johnson*, 40 Ch. D. 579; or a question of law which, if sent to the arbitrator, ought to be referred back by him to the Court: *Re Carlisle, Clegg v. Clegg*, 44 Ch. D. 200 (where the application for a stay was ordered to stand over until after delivery of defences); and a stay was refused where the party applying had obtained time to plead and was under terms to take short notice of trial: *Smith & Co. v. British Mar. Mutual Ins. Assoc.*, W. N. (83) 176.

Where the partnership was being carried on after the term fixed by the articles containing the submission had expired, an arbitration clause in the articles was held applicable: *Gillett v. Thornton*, 19 Eq. 599; and see *Cope v. C.*, 52 L. T. N.S. 607.

In an action for dissolution of partnership, the question of dissolution being one for the discretion of the Court, the motion for a stay was ordered to stand to the trial: *Joplin v. Postlethwaite*, 61 L. T. N.S. 629; *Turnell v. Sanderson*, W. N. (91) 71; 64 L. T. N.S. 654; and in *Dennehy v. Jolly*, 22 W. R. 449 (Ir. M. R.), the fact that the applicants had carried on the business after dissolution of partnership was held a ground for not staying proceedings.

Where proceedings had been stayed and an award had been made, it was held at law that the costs of the action could be dealt with by a subsequent order: *Bustros v. Lenders*, L. R. 6 C. P. 259.

As to the meaning of the requirement that the applicant should "be ready and willing to do all things necessary to the proper conduct of the reference," and that he must be ready to refer the whole matter, see *Davis v. Starr*, 41 Ch. Div. 247.

As to the *onus probandi* whether there exists "sufficient reason" why the

dispute should not be referred, see *Hodgson v. Railway Passengers' Ass. Co.*, 9 Q. B. Div. 188; *Fox v. Railway Passengers' Ass. Co.*, 52 L. T. N.S. 672.

As to the difference between a covenant not to do an act, followed by an agreement to refer the amount of damages, and a covenant to pay such a sum as shall be settled by arbitration, see *Dawson v. Fitzgerald*, 1 Ex. D. 261.

If the submission to arbitration is not co-extensive with the object of the action the action will not be stayed: *Wheatley v. Westminster, &c. Co.*, 2 Dr. & Sm. 347; *Turnock v. Sartoris*, 43 Ch. Div. 150 (distinguishing *Wade-Gery v. Morison*, 37 L. T. N.S. 270); nor if something different from what a referee can do is required, such as the appointment of a receiver: *Cook v. Catchpole*, 13 W. R. 42; 34 L. J. Ch. 60; but the fact that an injunction is asked for and may be required is not enough: *Willesford v. Watson*, 8 Ch. 473.

And where a case is made out for the appointment of a receiver, the Court may, nevertheless, refer the action to arbitration, and still protect the property pending the award: *Compagnie du Sénégal v. Smith*, 32 W. R. 111; 46 L. T. N.S. 527; and see *Halsey v. Windham*, W. N. (82) 108.

The Court has declined to stay proceedings on the application of Defta, a building society, who had neglected to appoint a standing body of arbitrators as contemplated by their rules: *Christie v. Northern Counties B. Soc.*, 43 Ch. D. 62.

*Prima facie* it is the duty of the Court to act upon an agreement to refer: *Willesford v. Watson*, 8 Ch. at p. 480; but the Court has a discretion as well under the new as under the old section: see *Re Carlisle, Clegg v. C.*, 44 Ch. D. 200; and its jurisdiction is not ousted by the agreement so as to make the action demurrable: *Sharpe v. San Paulo Ry.*, 8 Ch. 597, 612; *Pickering v. Cape Town Ry.*, 1 Eq. 89; *Cooke v. C.*, 4 Eq. 77; *Lyon v. Johnson*, 40 Ch. D. 579; *secus*, under an agreement confirmed by statute binding two railways to settle all differences by arbitration: *Caledonian Ry. v. Greenock, &c. Ry.*, L. R. 2 H. L., Sc. 347; but see *L. C. & D. Ry. Co. v. L. & S. W. Ry. Co.*, 40 Ch. Div. 100; or under the Ry. Co.'s Arb. Act, 1859; *Watford, &c. Ry. v. L. & N. W. Ry.*, 8 Eq. 231; and as to that Act, *v. inf.* Chap. LIV.

Under the Public Health Act, 1875, s. 308, a party claiming compensation has a right to go to arbitration, although there is a dispute as to the liability to pay: *Brierley Hill Local Board v. Pearsall*, 9 App. Ca. 595.

#### PROCEEDINGS UNDER A REFERENCE TO ARBITRATION.

By sect. 5 of the Arbitration Act, 1889, "In any of the following cases:—

"(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator:

"(b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

"(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

"(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

By sect. 6, "Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

"(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place:

"(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven



clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent."

These sections correspond with sects. 12 and 13 of the C. L. P. Act, 1854, and do not apply where the submission provides for a reference to three arbitrators, one to be appointed by each party, and the third by the first two: *Gumm v. Hallett*, 14 Eq. 555; *Re Smith and Service and Nelson*, 25 Q. B. Div. 545, 552.

By sect. 7, the arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have (*inter alia*) power to administer oaths or to take affirmations of the parties and witnesses appearing.

By sect. 8, "Any party to a submission may sue out a writ of *subpoena ad testificandum*, or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action."

For the practice as to suing out *subpoena* and *subpoena duces tecum*, see O. xxxvii. 26—34.

An order for attendance of witnesses before an arbitrator is an order of course: *Re Ricketts*, 3 N. B. 56; and may be made on summons in the Chancery Division: *Clarbrough v. Toothill*, 17 Ch. D. 787. For forms of order, see R. S. C. Appx. K., 25, 26.

As to enforcing attendance of witnesses, see Russ. on Arb. 182. As to the power of the Court to compel attendance of witnesses out of the jurisdiction, and that there is no such power where the action and all matters in difference have been referred, see *Hall v. Brand*, 12 Q. B. Div. 39.

By sect. 22, "any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire, shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly."

By s. 19, "any referee, arbitrator, or umpire may, at any stage of the proceedings, under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

By sect. 11, where an arbitrator or umpire has misconducted himself, the Court may remove him or set his award aside.

As to the jurisdiction of the Court to restrain an arbitrator from making an award, see *Beddow v. B.*, 9 Ch. D. 89; *Pickering v. Cape Town Ry. Co.*, 1 Eq. 84; *Malmesbury Ry. v. Budd*, 2 Ch. D. 113.

Though the Court can in a proper case (*e.g.*, where injury to the applicant would otherwise result) restrain a party from proceeding to arbitration, it will not exercise the jurisdiction where the result of the arbitration would be futile: *Farrar v. Cooper*, 44 Ch. D. 323; *L. and Blackwall Ry. Co. v. Cross*, 31 Ch. Div. 354, 368; *N. L. Ry. Co. v. G. N. Ry. Co.*, 11 Q. B. D. 30; and *v. inf.* Chap. XXXI., "INJUNCTIONS."

An injunction has been granted restraining a person, appointed by arbitrators drawing lots, from acting as umpire: *Pescod v. P.*, 58 L. T. N.S. 76; *W. N.* (88) 2; but see *contra Smith v. Liverpool, London, and Globe Ins. Co.*, 14 Court of Sess. Cas. 931.

#### AWARD.

**Time.]**—By sect. 9, "the time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not."

For the provisions implied in a submission as to time for award of arbitrators or umpire and extension of time, *v. sup.* p. 354.

Under the similar provision in the C. L. P. Act, 1854, s. 11, the Court could enlarge the time beyond that to which the arbitrator had power to enlarge, and had enlarged it: *Denton v. Strong*, L. R. 9 Q. B. 117; and might enlarge it after the award had been made: *Lord v. Lee*, 3 Q. B. 404; *May v. Harcourt*, 13 Q. B. D. 688.

Irregularity of an enlargement of time might be waived by subsequent attendance before the arbitrator, but the party so attending did not thereby

lose the right to complain of a further enlargement: *Dudson v. Norton*, W. N. (66) 58.

The Court could not enlarge the time for making an award under s. 180 of the Public Health Act, 1875: *In re Mackenzie*, 17 Q. B. D. 114; distinguishing *Re Dare Valley Ry. Co.*, 4 Ch. 554, as being under the Lands Clauses Act, 1845, which was anterior to the C. L. P. Act, 1854; and that the same limit of time applies by analogy to the award of an umpire under the Act of 1875, see *Re Yeaton Local Board*, 41 Ch. Div. 52.

And s. 24 of the Arbitration Act, 1889, excludes the operation of that Act so far as it is inconsistent with other Acts regulating arbitrations. As to the effect of this section, see *Re Knight and Tabernacle Building Soc.*, (1891) 2 Q. B. 63.

Where the time had expired except as to an isolated dispute arising in the course of other differences, the Court refused to direct a reference: *Young v. Buckett*, 51 L. J. Ch. 504.

Enlargement of time was refused where there had been great delay: *Re Dare Valley Ry. Co.*, 4 Ch. 554.

**Form.**—By sect. 7, the arbitrators or umpire (unless the submission expresses a contrary intention), are empowered to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and to correct in an award any clerical mistake or error arising from any accidental slip or omission.

The provision as to the statement of a special case supersedes and simplifies s. 5 of the C. L. P. Act, 1854, under which it was held that an umpire appointed to ascertain compensation under the Lands Clauses Act, 1845, had power to state a special case: *Rhodes v. Airedale Comms.*, 1 C. P. D. 402.

The provision as to correction of the award overrules *Mordue v. Palmer*, 6 Ch. 22, where it was held that even a clerical error could not be corrected by the arbitrator, but application must be made to the Court. The wording is similar to O. XXVIII. 11, in reference to mistakes in judgments or orders, as to which *v. sup.* p. 167.

**Enforcement.**—By sect. 12, "an award on a submission may, by leave of the Court or a Judge, be enforced in the same way as a judgment or order to the same effect."

As to process for enforcement of judgments and orders, *v. inf.* Chap. XXVII., "EXECUTION."

As to suing for enforcement of award, see *inf.* Chap. L., "SPECIFIC PERFORMANCE," and Russ. Arb. 562; and as to pleading an award as a defence, *Ibid.* 547.

Where an arbitrator awarded compensation under an Act, but said nothing as to costs to which a right was given by the Act, an action could be maintained for the costs, though not taxed or ascertained: *Met. Dist. Ry. Co. v. Sharpe*, 5 App. Ca. 425.

**Setting aside and remitting.**—By sect. 10 (1), "in all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

"(2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order."

By sect. 11, "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

By O. LXIV. 14, an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.

The application should be by motion: see O. LII. 1; and is to be considered as made when the notice of motion is given: *Re Gallop*, 25 Q. B. D. 230; and see *Re Corporation of Huddersfield and Jacomb*, 10 Ch. 92; *Smith v. Parkside Mining Co.*, 6 Q. B. D. 67.

The notice of motion should specify the grounds of objection to the award; a notice stating objections "on good grounds" is insufficient: *Mercier v. Pepperell*, 19 Ch. D. 58.

Under O. LXIV. 7, the Court has jurisdiction, on good cause shown, to extend the time for moving to set aside an award, although the time limited

by r. 14 has expired: *Re Oliver and Scott's Arbitration*, 43 Ch. D. 310; and see *Re Wiggeston Hospital*, 54 L. J. Q. B. 248.

As to referring the award back to the arbitrator and his duties thereon, see Russ. Arb. 480.

As to the jurisdiction of the Court to remit back to the arbitrator an award under the Public Health Act, 1875, see *Warburton v. Haslingden Local Bd.*, 48 L. J. C. P. 451.

Under the C. L. P. Act, 1854, the Court would not set aside the award or remit it to the arbitrators, except for reasons which before the Act would have induced the Court to set it aside, or treat it as a nullity: *Mills v. Bowyers' Co.*, 3 K. & J. 66. But would refer it back when there had been a clear mistake by the arbitrators: *S. C.*; *Flynn v. Robertson*, L. R. 4 C. P. 324; though the mistake only affected part of the award: *Re Aitken*, 6 W. R. 145; 3 Jur. N.S. 1296; and as to awards being bad in part only, see *Lewis v. Rossiter*, 23 W. R. 832.

Where by mistake the award had been signed after the time fixed by the agreement, the Court enlarged the time and remitted it: *Re Warner and Powell's Arb.*, 3 Eq. 261.

But the parties to an arbitration having selected their own judge on a question of law, are bound by his decision: *Adams v. Gt. North of Scotland Railway Co.*, (1891) A. 31, 40; *Stimpson v. Emmerson*, 9 L. T. 199; *Knox v. Symmonds*, 1 Ves. 369; and a mistake as to the legal principle on which the award was founded, or as to the mode of treating evidence, had to be admitted by the arbitrator: *The Imperial, &c. v. Funder*, 21 W. R. 67, 116; *Dinn v. Blake*, L. R. 10 C. P. 388; Russ. Arb. 315.

Awards were set aside or remitted where the arbitrator had decided on certain bills of costs without giving the other side an opportunity of examining them, and had without authority appointed an accountant: *Re Tidwell*, 33 Beav. 213; or obtained and acted on an accountant's report without conferring with the parties thereon: *Re E. C. Ry.*, 3 D. J. & S. 610; and see *Haigh v. H.*, 8 Jur. N.S. 983; 3 D. F. & J. 157; or improperly excluded some of the parties from the proceedings: *S. C.*; or refused to hear evidence: Russ. Arb. 192; *Re Maunder*, 49 L. T. N.S. 535; or improperly delegated his authority: Russ. Arb. 214; or did not make his award within the appointed time: *Re Yeadon Waterworks Co., and Yeadon L. B.*, 37 W. R. 360; or in effect made a new contract for the parties; *ex. gr.*, where under a contract stipulating for "customary allowances" for deficient weight the arbitrator had increased the allowance beyond the customary sum: *Hooper v. Balfour*, 62 L. T. N.S. 646; or where the question referred being whether goods were up to guaranty, the arbitrators awarded that the buyer should accept them with allowance by way of compensation: *Re Green and Balfour*, W. N. (90) 139, 156; 63 L. T. N.S. 325; or where costs were to follow event, and the arbitrator failed to find specific issues: *Ellis v. Desilva*, 6 Q. B. Div. 521; or the arbitrator in construing the contract erroneously imported into it a custom relieving a party from liability: *Hutcheson v. Eaton*, 11 Q. B. Div. 861; or where the award left some of the questions undecided, or ambiguously decided: *Wakefield v. Llanelly Ry., &c. Co.*, 13 W. R. 823; *secus*, where the ambiguity was explained: *Lord Blantyre v. Babbie*, 13 App. Cas. 631; and where the umpire heard the two arbitrators, but not the parties or witnesses, his award was upheld: *Bottomley v. Ambler*, 26 W. R. 566; 38 L. T. N.S. 545.

And "no award, when there is anything like fraud, can stand for a moment": per Giffard, V.-C., in *Re Dare Valley Ry.*, 6 Eq. 435; *Greenhill v. Church*, 3 Ch. Rep. 49 [89]: see Story, Eq. Jur. s. 1451.

And generally, as to the duties and powers of an arbitrator in the conduct of the reference, see Russ. Arb. 175.

An arbitrator's evidence in explanation of his award will be admitted on a motion to set it aside, or refer it back for mistake: *Re Dare Valley Ry. Co.*, 6 Eq. 429; *Brown v. B.*, 1 Vern. 157; or in an action on the award: *D. of Buccleuch v. Met. Bd. of Works*, L. R. 5 Ex. 221; 5 H. L. 418; *Rhodes v. Airedale Drainage Commrs.*, 1 C. P. D. 380; but a mere admission of misconduct made by an arbitrator after award is not admissible on motion to set it aside: *Re Whiteley*, (1891) 1 Ch. 558.

A Plt who had accepted the money awarded "under protest," was precluded by a delay of nine months from disputing the award: *Parrott v. Shellard*, 16 W. R. 928.

When an award is set aside it will be sent back to the same arbitrators, unless they have shown themselves untrustworthy: *Re Dare Valley Ry. Co.*, 6 Eq. 429; *Anning v. Hartley*, 27 L. J. Ex. 145.

When an umpire has once been summoned the jurisdiction of the arbitrators is gone, and the Court in referring back the award will send it to the umpire: *The Westminster, &c. Co. v. Clayton*, 13 W. R. 134.

As to waiver of irregularities, see *Russ. Arb.* 204; *Moseley v. Simpson*, 16 Eq. 226.

The Court of Chancery could not review the award of a master of a common law Court to whom an action had been referred: *Grafham v. Turnbull*, 23 W. R. 645; nor, *semble*, an inclosure award: *Bateman v. Boynton*, 1 Ch. 359.

On a reference in an action of tort, a direction that the arbitrator should publish his award ready to be delivered to the parties or their representatives, "if either should die before the making of the award," did not make the cause of action continue on the death of a party before award made: *Bowler v. Evans*, 15 Q. B. Div. 565.

Actions for negligence cannot be brought against referees who have acted *bonâ fide* and to the best of their judgment: *Pappa v. Rose*, L. R. 7 C. P. 32, 525; *Tharvis, &c. Co. v. Loftus*, L. R. 8 C. P. 1; *Stevenson v. Watson*, 4 C. P. D. 148.

#### COSTS.

By sect. 20, "any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just."

And it is an implied term of every submission, unless a contrary intention is expressed, that the costs of the reference and award are to be in the discretion of the arbitrators or umpire, who may give directions as to payment, may tax and settle the amount to be paid, and award costs as between solr and client: *v. sup.* p. 364.

The power to give costs extends to an arbitration commenced after the Act under a submission made before the Act, and silent as to costs: *Re Williams and Stepney*, W. N. (91) 111; 39 W. R. 533.

An arbitrator appointed by the Court, and empowered to deal with the costs of the action, has jurisdiction to give costs as between solr and client: *Mordue v. Palmer*, 6 Ch. 22; and see *Andrews v. Barnes*, 39 Ch. Div. 133.

Where an arbitrator having power over costs has not awarded any, the Court may deal with them, but ought to remit the case to him: *Harland v. Mayor of Newcastle*, L. R. 5 Q. B. 47; and see *Fearon v. Flinn*, L. R. 5 C. P. 34. As to allowing fees of two counsel, see *Sinclair v. G. E. Ry.*, *Ib.* 135.

After reference of partnership questions and award, the general rule as to costs in partnership cases was followed: *Newton v. Taylor*, 19 Eq. 14.

Where the order of reference made no provision as to the costs of the action, it was varied after award made: *Bustros v. Lenders*, L. R. 6 C. P. 259.

The arbitrator had no power over the costs of the reference and award unless specially given to him: *Boodle v. Davies*, 3 A. & E. 200. But where a cause was referred he had an implied power over the costs of the cause, though not of the reference or award: *Russ. Arb.* 381. Where a compulsory reference was silent as to costs he had no power over them at all: *Ib.* 382.

By s. 15 (3), the remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge.

*Semble*, where a mercantile dispute is referred to arbitration there is an implied contract by the parties jointly to pay to the arbitrators and umpire reasonable remuneration: *Crampton v. Ridley*, 20 Q. B. D. 48.

Power to arbitrator over "cost of reference" includes power to give costs of award: *Re Walker and Brown*, 9 Q. B. D. 434.

Costs of negotiating and settling terms of submission upon reference by consent may be allowed on taxation as "costs of reference": *Re Autothreptic Steam Boiler Co.*, 21 Q. B. D. 182.

As to costs of reference, where not more than £50 is recovered in action of contract, see O. LXV. 12; *Hyde v. Beardsley*, 18 Q. B. D. 244; *Emmett v. Heyes*, 36 W. R. 237.

Where costs are to follow the event, the word "event" must be read

distributively: *Ellis v. Desilva*, 6 Q. B. Div. 521; *Hawke v. Brear*, 14 Q. B. D. 841.

And Defts having judgment for balance on claim and counter-claim were entitled to costs of action, reference, and award, and Plt to costs of issues found in his favour: *Lund v. Campbell*, 14 Q. B. Div. 821; explaining *Baines v. Bromley*, 6 Q. B. D. 691; and *vice versa*: *Waring v. Pearman*, 50 L. T. N.S. 633; *Pearson v. Ripley*, 50 L. T. N.S. 629; and see *Ahrbecker v. Frost*, 17 Q. B. D. 606.

As to costs of reference under Public Health Act, 1875, see *Peake v. Finchley Local Board*, 57 L. T. N.S. 882.

Where a question submitted is referred to the Court by special case, the Court has jurisdiction as to the costs of the award, although the question of costs was not submitted: *Portishead, &c. Co. v. Bristol, &c. Co.*, W. N. (87) 75.

#### FRIENDLY SOCIETIES.

By the Friendly Societies Act, 1875 (38 & 39 V. c. 60), s. 22, disputes between a member and the society, or an officer thereof, are to be decided as directed by the rules of the society, and the decision so made is to be conclusive and without appeal, and not removable into any Court of law, or restrainable by injunction, and may be enforced by the County Court. But the parties to a dispute may, by consent, unless the rules forbid it, refer the dispute to the chief registrar, on whom powers are conferred by the Act to enable him to deal with the reference.

This reference to the County Court is permissive and not compulsory, and such a case may be removed by certiorari into the High Court: *The Royal Liver Friendly Soc.*, 35 Ch. D. 332.

The same section provides that disputes which the rules direct shall be referred to justices, shall be decided by a Court of summary jurisdiction, or may by consent be referred to a County Court.

When the rules contain no direction as to disputes, or where no decision is made within forty days after an application to the society for a reference under its rules, the member or person aggrieved may apply either to the County Court, or a Court of summary jurisdiction, which may hear and determine the matter: *Ib.*

The Court or registrar may state a case for the opinion of the superior Courts of England, Scotland, or Ireland, and enforce discovery, &c.: *Ib.*

As to the powers of a Court of summary jurisdiction under sect. 30, see *Re Holt*, 4 Q. B. D. 29.

For the previous and similar enactments, and decisions as to when the jurisdiction of the Court is ousted, see *Russ. Arb.* 34; *Thompson v. Planet B. B. Soc.*, 15 Eq. 333.

The dispute must be one between the co. and a member as a member. If the co. deny his membership the rules do not apply: *Prentice v. London*, L. R. 10 O. P. 679.

The decision of the justices or arbitrators is final: *Callaghan v. Dolwin*, L. R. 4 O. P. 288.

#### BUILDING SOCIETIES.

For order staying proceedings by a member of a building society, the rules of which provided that disputes between the society and its members should be referred to arbitration pursuant to the Building Societies Act, 1874, s. 16 (9), see *Wright v. Monarch, &c. Soc.*, M. R., 23 Mar. 1877, B. 693, 5 Ch. D. 726; followed in *Hack v. London Provident Bldg. Soc.*, 23 Ch. Div. 103; and see *Municipal Permanent, &c. Soc. v. Kent*, H. L. 9 App. Ca. 260, where the principle of the decision was affirmed.

As to the effect of arbitration clauses in the rules of building societies as respects disputes between the societies and their members in the capacity of mortgagors of the society, see *Building Societies Act*, 1884 (47 & 48 V. c. 41); *Western Suburban Bldg. Soc. v. Martin*, 17 Q. B. D. 609; and *inf.* Chap. XLVII., "MORTGAGES"; as respects an impeached sale by the society to a member of property mortgaged to it by other members:

*French v. Municipal Permanent Bldg. Soc.*, 53 L. J. Ch. 743; 50 L. T. N.S. 566; and as to the applicability of such a clause to a retiring member: *Walker v. Gen. Mutual Bldg. Soc.*, 36 Ch. Div. 777; *Davies v. Chatham Bldg. Soc.*, 61 L. T. N.S. 680.

The Court has power to order arbitrators under the Building Societies Act, 1874, to state a special case; s. 36 of that Act not being "inconsistent" (within s. 24 of the Arbitration Act, 1889) with the exercise of such a power: *Re Knight and Tabernacle Bldg. Soc.*, (1891) 2 Q. B. (C. A.) 63.

Where the rules of a society contemplated the appointment of a standing body of arbitrators, of whom three were to be chosen by lot to decide any dispute, the society could not, after litigation commenced against them, elect arbitrators under the rules: *Christie v. Northern Counties P. Bldg. Soc.*, 43 Ch. D. 62.

## SECTION II.—REFERENCES BY THE COURT.

### 1. *Reference to Official or Special Referee for Inquiry and Report*— 52 & 53 V. c. 49, s. 13.

LET the following questions arising in this action be referred to the Official Referee in rotation [*or to Mr. —, one of the Official Referees of the Supreme Court &c., or to Mr. —, as Special Referee*] for inquiry and report, that is to say, [*State the question, and if the reference is made at the hearing or trial, add, Adjourn further consideration &c.*]  
—Liberty to apply.

For reference to a special referee, under s. 56 of the Jud. Act, 1873, to inquire and report the amount of the debt due to the Plt from the testator's estate, distinguishing principal from interest, if any, and adjourning further consideration: see *Re Perrin, Court v. Perrin*, M. R., 8 Nov. 1875, B. 1688.

And for further order after the report, see S. C., M. R., 31 Jan. 1876, B. 127, and see Form 2, *inf.*

For order appointing an architect special referee to report as to whether the Plt's premises were likely to be affected by noise and drainage from Deft's stables, with special directions, see *Broder v. Saillard*, 2 Ch. D. 694, and *inf.* Chap. XXXI., "INJUNCTIONS."

In *Cartwright v. Last*, V.-O. M., 3 Feb. 1876, *inf.* p. 490, a case of inter-ception of ancient lights was referred to a surveyor as special referee to inspect and report: and see *Craven v. Kaye*, *inf.* p. 498.

In *Ormond v. Townsend*, M. R., 16th Dec. 1875, B. 2099, an order was made referring all the accounts in a partnership suit. And for order of the official referee for Deft to bring in his account, see S. C., Form 9, *inf.*

### 2. *Further Order after Report of Referee*—O. xxxvi. 54, 55.

THIS action coming on &c. for further consideration &c. [*or, if so, upon motion for judgment this day made unto this Court by &c.*], and upon hearing &c., and upon reading the order dated &c., and the report of Mr. —, the Official [*or Special*] Referee, dated &c., This Court doth &c.

3. *Order for Trial before Official or Special Referee—52 & 53 V. c. 49, s. 14.—O. xxxvi. 50.*

LET this action be tried before the Official Referee in rotation [or Mr. —, one of &c., or before Mr. —, Special Referee. *If so, with &c. as assessors. If so, state the questions or issues*].—Liberty to apply.

4. *Entering Judgment, after Report, by Direction of Official Referee—O. xxxvi. 50.*

THIS action having, by an order dated &c. been referred to Mr. —, one of the Official Referees [or to the Official Referee in rotation], and the said Mr. — [or Official Referee] having found that the Plt was entitled to recover from the Defts the sum of £— for his entire damages, and ordered that judgment be entered for that sum and costs, It is adjudged that the Plt recover against the Defts the sum of £—, and costs to be taxed.—See also R. S. C., App. F., Forms 8 and 9.

5. *Judgment after Trial of Action before Referee—O. xxxvi. 50.*

THIS action having this day [or the — day of —] been tried before Mr. —, an Official [or Special] Referee, and the said Referee having found &c. [*State the findings*], It is ordered and adjudged that &c.

6. *Motion for Judgment after Trial of Questions or Issues before Referee—O. xl. 2.*

THE questions [or issues] of fact [or account] arising in this action, by the order dated &c., ordered to be tried before the Official Referee in rotation [or Mr. —, the Official or Special Referee; *If so, with &c. as assessors*] having on the — day of — been tried before &c. accordingly; And the said Mr. — having found [*State the findings*], but having abstained from directing judgment to be entered; Now upon motion &c. for judgment, and upon hearing &c., and upon reading the said order, and the certificate of the said Mr. —, This Court doth &c.

7. *Reference under 33 & 34 V. c. 61 (Life Ass. Coy's Act) to reduce Contracts.*

UPON motion this day made unto this Court by counsel for B. and others, being the committee of policy holders in the G. B. Mutual Life Assurance Society, appointed at a meeting of policy holders held on &c., and upon hearing counsel for the said society, and upon reading &c., Let it be referred to Mr. —, of &c., as Special Referee, to inquire and report to the Court upon what terms and subject to what conditions the contracts of the company should be reduced in place of making a

winding-up order, and to settle a scheme for reducing such contracts for the approval of the Court, and for such purposes to cause an actuarial valuation of the company's risks to be made, and to make and take all necessary inquiries and accounts, and in so doing to employ actuaries, or an actuary; and the said Referee is to be at liberty without further order to exercise and do any power or thing given or authorized by O. xxxvi. r. 52; Refer it to Chambers to determine who shall be served with this order, and who shall have liberty to attend before such Special Referee for the purpose of representing classes of persons having the same interest.—*Re The Great Britain Mutual Life Ass. Soc.*, V.-C. H., 27 January, 1881, A. 229.

8. *Order to set aside Judgment after Trial of Action before Referee—*  
O. XL. 6.

UPON the appeal of the Plt [*or* Deft] this day made unto this Court to set aside the judgment of the Official Referee dated &c., and to enter judgment for &c., and upon hearing counsel for the Deft [*or* Plt], This Court doth order that the said judgment dated &c., be set aside, and that judgment be entered for &c.

9. *Order by Official Referee for bringing in Accounts.*

UPON the application of the Deft and upon hearing the Plt in person and the solrs of the Deft, It is ordered that the Plt W. O., do, on or before the — day of —, leave at the court room of Mr. H., the Official Referee to whom the taking of the accounts mentioned in the order dated &c. stands referred, situate No. 3, Rolls Yard, Chancery Lane, in the county of M., the accounts following, duly verified by affidavit, that is to say &c.—*Ormond v. Townsend*, 9 Aug. 1876, B. 1545.

10. *Report remitted for Rehearing—*O. xxxvi. 52, 54, 55.

THIS action having &c. [Form 6, *sup.*]. Now upon motion &c., This Court doth order that the said report be remitted to the said Referee in order that this action [*or* the following question, that is to say &c.] be reheard.

NOTES.

REFERENCE TO OFFICIAL OR SPECIAL REFEREE.

The Jud. Act, 1873, s. 83, provides for the appointment of officers to be called official referees, for the trial of such questions as shall under the Act be directed to be tried by such referees. Official referees have accordingly been appointed.

By O. xxxvi. 7, actions may (amongst other modes) be tried before an official or special referee, with or without assessors.

By the Arbitration Act, 1889 (52 & 53 V. c. 49), s. 3, where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or Judge



as to transfer or otherwise, hear and determine the matters agreed to be referred.

By sect. 13, "(1) subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2) The report of an official or special referee may be adopted wholly or partially by the Court or a Judge, and if so adopted may be enforced as a judgment or order to the same effect."

A question "arising" in the cause was held to be one which must necessarily arise: *Weed v. Ward*, 40 Ch. Div. 555; and see *Asser v. Goetze*, W. N. (80) 204.

As to the meaning of the word "inquiry," see *Baroness Wenlock v. River Dee Co.*, 19 Q. B. Div. 155, 158, 159; *Weed v. Ward*, *sup.*

As to the report being of no effect until adopted by the Court, see *Serle v. Fordell*, 44 Ch. D. 299, 301; *Dyke v. Cannell*, 11 Q. B. D. 180.

By sect. 14, "In any cause or matter (other than a criminal proceeding by the Crown),—

"(a) If all the parties interested who are not under disability consent: or,

"(b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers: or,

"(c) If the question in dispute consists wholly or in part of matters of account;

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court."

This section in substance follows sect. 57 of the Jud. Act, 1873, under which the Court declined to refer cases involving charges of fraud and matters affecting personal character, which the Deft was entitled to have tried in open Court: *Leigh v. Brooks*, 5 Ch. Div. 592; and see *Clow v. Harper*, 26 W. R. 364; 3 Ex. D. 198.

A large construction was to be given to the word "account": *Re Leigh, Rowcliffe v. Leigh*, 3 Ch. D. 292, where a claim in an admon suit for a large sum for pictures sold to the testator was referred, though consisting only of twenty-four items and no cross claims.

Any question of account which might be referred compulsorily to a master under sect. 3 of the C. L. P. Act, 1854, might also be referred to an official referee under sect. 57: *Knight v. Coates*, 19 Q. B. Div. at p. 302; *Ward v. Pilley*, 5 Q. B. Div. 427.

An order of the Court for reference to a special referee may be in one of the Forms 32 and 33a in B. S. C., Appendix K.: see *White v. Peto*, W. N. (86) 165; *Baroness Wenlock v. River Dee Co.*, 19 Q. B. Div. 155, 159.

*Semble*, the prolonged examination of documents intended in this section is such as is necessary in order to enable the Judge to determine questions of fact, not legal rights: *Ormerod v. Todmorden Mill Co.*, 8 Q. B. Div. 664, 667, per Brett, M. R.

In *Pember v. Eames*, W. N. (90) 143, questions of law and issues of fact were referred with direction to state a special case under sect. 19 of the recent Act; and issues of fact in a patent case requiring scientific investigation were referred: *Saxby v. Gloucester Wagon Co.*, W. N. (80) 28.

Where the issue was whether or not a particular twist in a ship was caused by perils of the sea, and the evidence taken on commission filled 300 printed pages, and six scientific witnesses were to be examined, it was held that the case ought not to be withheld from a jury: *Hamilton v. Merchants' Mar. Ins. Co.*, 58 L. J. Q. B. 544.

By O. xxxvi. 45, the business to be referred to the official referees is to be distributed among them in rotation by the clerk to the senior official referee in rotation, or in such other manner as the L. C. may from time to time direct.

By r. 47 (b), "the L. C. and the Lord Chief Justice of England, or either

of them, shall have power to order the transfer of any causes or matters from any one or more of the official referees to any other or others of them, whenever, in his opinion, it shall be expedient so to do, having regard to the state of the business pending before the referees."

As to appeals from orders of reference, and that the discretion of the Judge will not as a rule be interfered with, see *Ormerod v. Todmorden Mill Co.*, 8 Q. B. Div. 664; *Hoch v. Boor*, 49 L. J. Q. B. 667; *Knight v. Coales*, 19 Q. B. D. 296.

#### PROCEEDINGS UNDER SUCH REFERENCE.

By the Arbitration Act, 1889, s. 15 (1), "in all cases of reference to an official or special referee or arbitrator under an order of the Court or a Judge in any cause or matter the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority and shall conduct the reference in such manner as may be prescribed by rules of Court, and subject thereto as the Court or a Judge may direct."

The provision that the referee is to be deemed an officer of the Court applies to references under sect. 14, as well as to those under sect. 13: *Re Palmer*, *P. v. Hardwick*, 63 L. T. N.S. 302.

By O. xxxvi. 48, "where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried with a jury."

The provision as to sitting *de die in diem* is merely directory, and non-compliance with it is not *per se* a ground for setting aside an award: *Robinson v. R.*, 24 W. R. 675. By r. 55 (c), the provision is not applicable where the arbitrator is appointed otherwise than by an order of Court.

As to the power of a referee to make a peremptory appointment for the hearing, see *Baroness Wenlock v. River Dee Co.*, 53 L. J. Q. B. 208; 32 W. R. 220; 49 L. T. N.S. 617.

Sect. 18 of the Arbitration Act, 1889, provides that, "(1) the Court or a Judge may order that a writ of *subpœna ad testificandum* or of *subpœna duces tecum* shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

"(2) The Court or a Judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire."

For the practice as to suing out *subpœna ad testificandum* or *duces tecum*, see O. xxxvii. 26—34.

The evidence before a referee is to be taken, the attendance of witnesses enforced, and the trial to be conducted as nearly as circumstances will admit, as trials are conducted before a Judge: O. xxxvi. 49.

Under this rule, an official referee, to whom an action has been referred for trial, has power to grant a commission to examine witnesses abroad, and his decision is subject to review by the Judge at Chambers: *Hayward v. Mutual Reserve Assoc.*, W. N. (91) 114; 39 W. R. 624.

By r. 50, subject to any order to be made by the Court or Judge, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party as a Judge of the High Court.

An official referee has power to make an order for addition of parties under O. xvi. 11: *Byrne v. Brown*, 22 Q. B. Div. 657. As to appeal to Judge at Chambers from official referee declining to postpone hearing, see *Richard v. Talbot*, 38 W. R. 478.

By the Arbitration Act, 1889, s. 22, any person who wilfully and corruptly gives false evidence before any referee shall be guilty of perjury as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly.

By O. xxxvi. 51, "nothing in these rules contained shall authorize any

referee to commit any person to prison or to enforce any order by attachment or otherwise."

By r. 52, "the referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the Court may direct."

A motion under this rule to remit issues to a referee need not be made within the time limited for moving against the verdict of a jury: *Dyke v. Cannell*, 11 Q. B. D. 180, explaining *Sullivan v. Rivington*, 28 W. R. 372.

The Arbitration Act, 1889, s. 19, provides that, "any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

By O. XXXVI. 55 (c), the provisions of the above rules, and of rr. 53 to 55 (v. *inf.*), are to apply, where any cause or matter or any question or issue of fact therein is referred to an officer of the Court or to a special referee or arbitrator.

Where the report of a referee does not direct any act to be done, two days' notice of motion for judgment dismissing the action is sufficient under O. XL. 7: *Larkin v. Lloyd*, 64 L. T. N.S. 507.

#### REPORT OF REFEREE.

By sect. 15, sub-s. 2, of the Arbitration Act, 1889, the report or award of an official or special referee or arbitrator on any reference under an order of the Court or a Judge is, unless set aside by the Court or a Judge, to be equivalent to the verdict of a jury.

The section does not affect the finality of the award of an arbitrator under a reference by consent of the parties, including matters other than the action, and owing its validity to such consent: *Darlington Wagon Co. v. Harding*, (1891) 1 Q. B. (C. A.) 245.

A referee acting under s. 57 of the Jud. Act, 1873 (corresponding with s. 14 of the Arbitration Act, 1889), was not bound to set out in his report the reasons or grounds for his findings of fact: *Miller v. Pilling*, 9 Q. B. Div. 736; and so where a preliminary account was referred: *Walker v. Bunkell*, 22 Ch. Div. 722 (per Kay, J.); but the report should state what items of an account have been allowed and what disallowed: *Burrard v. Calisher*, 19 Ch. D. 644.

And a referee is not bound to take accounts and inquiries in the strict way usual before the chief clerk, though he may adopt that course if he thinks it expedient: *In re Taylor*, *Turpin v. Pain*, 44 Ch. D. 128; *q. v.* as to the practice and method of taking accounts before an official referee.

By O. XXXVI. 53, "whenever a report shall be made by a referee, he shall on the same day cause notice thereof to be given to all the parties to the trial or reference before him, by prepaid post letter, directed to the address for service of each party, who shall in due course of post be deemed to have notice of such report."

By r. 54, "where, under s. 13 of the Arbitration Act, 1889, the report of the referee has been made in a cause or matter, the further consideration of which has been adjourned, it shall be lawful for any party, on the hearing of such further consideration, without notice of motion or summons, to apply to the Court or Judge to adopt the report, or without leave of the Court or a Judge to give not less than four days' notice of motion, to come on with the further consideration, to vary the report or to remit the cause or matter or any part thereof for re-hearing or further consideration to the same or any other referee."

By r. 55, "where, under s. 13 of the Arbitration Act, 1889, the report of the referee has been made in a cause or matter, the further consideration of which has not been adjourned, it shall be lawful for any party by an eight days' notice of motion to apply to the Court to adopt and carry into effect the report of the referee, or to vary the report, or to remit the cause or matter or any part thereof for re-hearing or further consideration to the same or any other referee."

No summons to confirm the report is required before the case is restored to the paper: *Deacon v. Dolby*, 51 L. J. Ch. 248; 30 W. R. 317.

For the practice on motion to vary the report, see *Burrard v. Calisher*, 19 Ch. D. 644; *Re Taylor, Turpin v. Pain*, 44 Ch. D. 128.

The Court may differ from the referee as to any finding which is an inference from the facts reported: *Longman v. East*, 3 O. P. Div. 142, at p. 155.

#### JUDGMENT ON TRIAL BEFORE REFEREE.

By O. XL. 2, where at the trial the referee abstains from directing any judgment to be entered, the Plt may set down a motion for judgment, and if he does not do so and give notice to the other parties within ten days after the trial, any Deft may set down a motion for judgment, and give notice to the other parties; and by r. 6, where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment on the ground that upon the finding as entered the judgment is wrong, "provided that in the Q. B. D. such motion shall be made to a Divisional Court."

Judgment when entered takes effect from the date when the requisite documents are left with the proper officer for the purpose of such entry, not (as in the case of a judgment by a Judge in Court) from the time when it is pronounced: see O. XLI. 3, 4.

Where judgment has been actually entered, pursuant to the official referee's report and direction, any motion to set aside the judgment must be made not to the Ch. D., but to the Court of Appeal: *Serle v. Fardell*, 44 Ch. D. 299; but see *Palmer v. Hardwicke*, W. N. (90) 162.

But in Q. B. D. it was held that, though judgment had been entered, application might be made to the Divisional Court to set aside the findings on which it was based: *Proudfoot v. Hart*, 25 Q. B. D. 43.

On appeal the Court has power not only to set aside the judgment which the referee has ordered to be entered for the Plt, but to enter judgment for the Deft: *Clark v. Sonnenschein*, 25 Q. B. Div. 464; affirming *S. C.*, *Ib.* 226.

In the Chancery Division judgments which any official or special referee has directed to be entered, will be entered by the registrars; and in Chancery cases the report is filed in the Central Office.

Where there has been a trial before an official referee, a motion for a new trial must be made in the High Court, the Jud. Act, 1890, s. 1, not being applicable to such a case: *Gower v. Tobitt*, 39 W. R. 193.

#### COSTS.

By O. XXXVI. 55b, where the whole of any cause or matter is referred to an official referee under an order of Court, he may, subject to any directions in the order, exercise the same discretion as to costs as the Court or a Judge could have exercised.

By the Arbitration Act, 1889, s. 15 (3), the remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or Judge.

In *Wallis v. Lichfield*, W. N. (76) 130, and in *Re Perrin, Court v. Perrin*, M. R., 31 Jan. 1876, B. 127, where the referees were Queen's counsel, the remuneration allowed was five guineas a sitting. In the latter case a fee of two guineas for a conference was allowed.

As to the power of the Judge to order that extra costs occasioned by trial before official, instead of special, referee be reserved, see *London and Lanc. Fire Ins. Co. v. British American Assoc.*, 54 L. J. Q. B. 302.

## CHAPTER XXVII.

## EXECUTION AND CONTEMPT.

## SECTION I.—EXECUTION GENERALLY.

## (1.) ENFORCING DECREES, JUDGMENTS, AND ORDERS.

## PROCESS AGAINST PERSONS NOT PRIVILEGED.

By the Jud. Act, 1873, s. 100, the word judgment includes decree.

By O. XLII. 24, "every order of the Court or a Judge, in any cause or matter, may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." But the word judgment in other Acts of Parliament does not of necessity include order: *Exp. Chinery*, 12 Q. B. Div. 342.

By r. 26, any person not being a party to a cause or matter who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party; and any person, not being a party to a cause or matter, against whom obedience to any judgment or order may be enforced, is liable to the same process for enforcing obedience to such judgment or order as if he were a party.

A judgment or order requiring a person to do an act is to state a time, or time after service, within which the act is to be done: O. XLI. 5; or a limit of time may be supplied by an order on motion: see *Gilbert v. Endean*, 9 Ch. D. 259, 266; and the copy judgment or order which is to be served is to bear an indorsement warning the person served that if he neglects to obey he will be liable to process of execution: O. XLI. 5.

Where the person liable (by O. LXXI. 1, person includes a body corporate) is not a body corporate, and is not privileged:—

1. A judgment for recovery by or payment to a *person* of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court, whose jurisdiction was transferred by the Jud. Act, 1873, might have been enforced at the commencement of the Act: O. XLII. 3; that is to say:—
  - (a.) A judgment for recovery of money may be enforced immediately, or on the expiration of any time allowed for payment,
    - (1.) By . . . . . *writ of fi. fa. or elegit*; and on return of these writs, by the other writs in aid: O. XLIII. 2, 3, 5;
 

—and, in the case of lands actually delivered in execution, by proceedings for sale after process of execution has been registered: *v. inf.* Chap. XLVII., "MORTGAGES."
    - (2.) By proceedings for . . . . . *attachment of debts*; O. XLV.; *v. inf.* Chap. XXVIII., "CHARGING ORDERS."
    - (3.) Upon proof of means, and neglect or refusal to pay, by an order on notice for . . . *committal for six weeks*; 32 & 33 V. c. 62, s. 5. As to this section, see Bankruptcy Act, 1883, s. 103; and Bankruptcy Rules, 1883, r. 265; and see 46 & 47 V. c. 52. The jurisdiction to commit for six weeks is transferred to bankruptcy.

- (4.) Where there is any impediment in the way of execution at law, by the appointment of a receiver by way of equitable execution: *v. inf.* Chap. XXXII., "RECEIVERS."
- (b.) A judgment for payment to a person of money may be enforced
- (1.) Whether a time be limited or not—without service (see *Land Credit Co. of Ireland v. Fermoy*, 5 Ch. 323), by any of the modes by which a judgment for the recovery of money is enforced.
- (2.) Where by the judgment or any subsequent order a time is limited,  
Upon proof of due service of the judgment (or order) limiting time and of non-compliance:—
- (a) In the case of a trustee or person in a fiduciary capacity, or a solr in his character as an officer of the Court: Debtors Act, 1869 (32 & 33 V. c. 62), s. 4; by leave of the Court or a Judge on notice, by . . . . . *writ of attachment*;  
O. XLIV. 2; *inf.* SECT. III., p. 381.  
[A return by the sheriff is enforced by order for . . . . . *committal or attachment of the sheriff*;  
see *inf.* p. 389; O. LII. 11.]  
On return by the sheriff *non est inventus* on motion *ex parte* by the . . . . . *serjeant-at-arms*;
- (B) After attachment, by leave of the Court on motion *ex parte*, or
- (7) Where no attachment has issued, without leave by . . . . . *writ of sequestration*;  
*v. inf.* SECT. VI., p. 392.
2. A judgment for payment of money *into Court* may be enforced: O. XLII. 4; upon proof of due service of the judgment (or order) limiting time, and of non-payment—
- (a.) Without further order: O. XLIII. 6; see *Sprunt v. Pugh*, 7 Ch. D. 567; by . . . . . *writ of sequestration*;
- (b.) In the case of a trustee or person in a fiduciary capacity, or a solr in his character as an officer of the Court: 32 & 33 V. c. 62, s. 4; by order of the Court or a Judge on notice, by . . . . . *writ of attachment*;
- (c.) By equitable execution, as in No. 1: *Re Coney, C. v. Bennett*, 29 Ch. D. 993.
3. A judgment for the recovery or for delivery of possession of land may be enforced: O. XLII. 5;
- (a.) If to the effect that a party do recover possession, without service: O. XLVII. 1; and
- (b.) If to the effect that any person do deliver possession, upon proof of due service of the judgment (or order) limiting time, and of non-compliance: r. 2; by  
*writ of possession*;  
*inf.* p. 380.
- (c.) In the latter case the judgment may also be enforced as a judgment to do any act: *inf.* No. 6.
4. A judgment for the delivery of any property (other than land or money) may be enforced: O. XLII. 6;
- (a.) Without service by . . . . . *writ of delivery*;  
O. XLVIII., *v. inf.* p. 381.  
Or in special circumstances by order of Court, by  
*writ of assistance*;  
*v. inf.* p. 381.
- (b.) Upon proof of due service, &c.:—  
As a judgment to do any act: *inf.* No. 5.
5. A judgment to do any act (other than payment of money) may be enforced upon proof of due service, &c.: O. XLII. 7;

- (a.) Where a time is limited by the judgment, without further order by . . . . . *writ of sequestration*;  
O. XLIII. 6.
  - (b.) By order of the Court or a Judge on notice by  
And subsequent process as in No. 1: O. XLIV. *writ of attachment*;
  - (c.) By order on notice for . . . . . *committal*;  
*inf.* SECT. III., p. 381, and SECT. VII., p. 404.
6. A judgment to abstain from doing any act  
may be enforced: O. XLII. 7.
- (a.) By order of the Court or a Judge on notice by  
*writ of attachment*;  
O. XLIV.
  - (b.) By order on notice for . . . . . *committal*.
7. An order to answer interrogatories or to give discovery or inspection of documents  
upon proof of service on the person liable or his solr:  
O. XXXI. 21, 22; and of non-compliance, may be enforced  
by order of the Court or a Judge on notice, by . *writ of attachment*;  
And as to other remedies in default, *v. sup.*, Chap. VII.,  
"DISCOVERY."
8. A judgment or order for payment of costs:—
- If ascertained, so soon as the costs are payable, or after any time limited: O. XLII. 17; and,
  - If not ascertained, on filing the taxing master's certificate, and,
  - If not ascertained, where a time is limited after taxation, on filing the taxing master's certificate and on proof of service of the order and certificate, may be enforced—
- (a.) Without service, or on proof of due service where a time is limited to run from service, or service of the order and certificate is requisite as above mentioned, by . . . . . *writ of fi. fa. or elegit*;
  - (b.) Upon proof of due service of the order limiting time and (if the costs are not ascertained), of the certificate.
    - (i.) In the case of a solr ordered to pay costs for misconduct as such, by order of the Court, or a Judge on notice, by . . . . . *writ of attachment*;  
O. XLIV.; and subsequent process as in No. 1;  
Or, at the option of the person entitled, by leave of the Court or a Judge: O. XLIII. 7;  
by *writ of sequestration*;  
see *Snow v. Bolton*, 17 Oh. D. 433.
    - (ii.) In the case of any other person, by writ of attachment, committal, or attachment of debts, as in the case of an order for payment of money, or (by leave of the Court) sequestration: O. XLIII. 7; *v. sup.* No. 1.

## PROCESS AGAINST PARTICULAR PERSONS OR PARTIES.

1. *Against Partners*:—

By O. XLVINA. (June, 1891), r. 8, "where a judgment is against a firm, execution may issue:—

- (a.) Against any property of the partnership within the jurisdiction:
- (b.) Against any person who has appeared in his own name under rule 5 or 6" (substituted for O. XII. 15), "or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner:
- (c.) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm,

he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined. But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof, who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ, unless he has been made a party to the action under O. XI., or has been served within the jurisdiction after the writ in the action was issued."

And see O. XLVIII. 4, 5, 6, obviating difficulties which formerly arose in cases of default in appearance, as indicated in *Davies & Co. v. André & Co.*, 24 Q. B. Div. 598.

By O. XLVIII. 10, the above rules are to apply, "to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided such firm or firms carry on business within the jurisdiction; but no execution shall be issued in such actions without leave of the Court or a Judge, and on an application for leave to issue such execution all such accounts and inquiries may be directed to be taken and made, and directions given, as may be just."

By the Partnership Act, 1890 (53 & 54 V. c. 39), s. 23, after the commencement of that Act (1st January, 1891), a writ of execution is not to issue against any partnership property, except on a judgment against the firm. The Court or a Judge "may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require." The other partner or partners are to be at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase the same.

The procedure under this section is now regulated by O. XLVI. 1a, 1b (June, 1891).

## 2. Against Bodies Corporate or Politic:—

By O. XLII. 31, any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a Judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property.

The writ of *distringas*, formerly necessary before making an order for the writ of sequestration to issue against a corporate body, and in case of a return *nulla bona*, the subsequent writs of *alias* and *pluries distringas*, are not now necessary, since the word "person," by O. LXXI., includes a body corporate or politic; and for the purpose of enforcing a judgment or order for payment of money into Court, or doing any act, sequestration may be issued as against an ordinary Deft.

By O. XLII. 23, a party alleging himself to be entitled to execution against shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, may apply for leave to issue execution, and the Court, if satisfied that he is entitled, may either make an order to that effect, or order the trial of any issue or question necessary to determine the rights of the parties; and in either case may impose terms as to costs or otherwise.

The writs of *fiery facias* and *elegit*, and the writs in aid, may also be issued against such parties: *v. inf.* p. 376.

Land held by a local authority in trust for a contributory place under the Public Health Act, 1875, can only be taken in execution for judgment debts exclusively chargeable against that contributory place: *Earl of Jersey v. Uxbridge Rural Sanitary Authority*, W. N. (91), 113.

## 3. Against Peers, Members of Parliament, and other Privileged Persons:—

O. XLIII. 6, 7, as interpreted by O. LXXI., applies to "any person," and



therefore it seems that sequestration may be issued against such persons as above mentioned without further order, and that the former practice of obtaining orders *nisi*, and absolute, for that purpose against such persons is superseded. It may be observed that the privilege of such persons (as to which, see further, *inf.* Sect. VII., p. 404), is a privilege from arrest, and not from any other process.

The writs of *fiert facias* and *elegit*, and writs in aid, may therefore also be issued for non-payment of money or costs in such cases; as to which, *v. inf.* p. 376.

For process against beneficed clergymen, *v. inf.* p. 396.

#### ISSUE OF WRITS.

By O. XLII. 9, "where a judgment or order is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, such party may, upon the fulfilment of the condition or contingency and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution (which, by r. 8, includes all the processes for enforcing orders) against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried."

By r. 11, no writ of execution is to issue without production of the judgment or order, or an office copy thereof; and the officer is to be satisfied that the proper time has elapsed.

Rules 12, 13, 14, and 16, relate to the *præcipe* and the indorsements and date of the writ. Rule 18, to issue of two separate writs of execution for money and costs respectively, the second not less than eight days after the first.

Every writ of execution is in force for a year, but it may be renewed by the leave of the Court or Judge, and on resealing the writ, or on notice of renewal signed by the party or his attorney and sealed: rr. 20, 21.

"As between original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order": r. 22.

By r. 23, where six years have elapsed, or any change has taken place by death, or otherwise, in the parties entitled, or liable to execution, or where a husband is entitled or liable to execution upon a judgment or order for or against a wife; or a party is entitled to execution upon a judgment of assets *in futuro*; or to execution against shareholders, &c. (*v. sup.* p. 372), the party alleging himself to be entitled to it may apply to the Court or Judge for leave to issue it. And the Court or Judge may, if satisfied that the party applying is entitled thereto, make an order to that effect, or direct any question or issue to be tried, and in either case may impose terms as to costs or otherwise. Whether the rule applies to attachment of debts, *quære: Fellows v. Thornton*, 14 Q. B. D. 335.

Judgment having been given with costs for a Plt who died before payment of the amount, his exors obtained leave to issue execution on an *ex parte* application, but without costs: *Mercer v. Lawrence*, 26 W. R. 506.

Leave of the Court to issue execution is also necessary in cases coming within O. XLII. 9, 22, 23; O. XLVIII. 8; and in all cases of attachment: O. XLIV. 2, *inf.* p. 384.

By r. 28, "nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner, or against any property whatsoever." As to the effect of this rule, see *Re Coney, C. v. Bennett*, 29 Ch. D. 793.

By the Land Charges Registration and Searches Act, 1888 (51 & 52 V. c. 51), s. 6, writs affecting land are void as against a purchaser for value of the land unless registered as required by sect. 5, except in the case of writs previously registered under 27 & 28 V. c. 112, or where the proceeding in which the writ is issued is registered as a *lis pendens* in the name of the person whose land is affected.

The issue of a writ not being a judicial act, the Court can inquire at what period of the day it was issued: *Clarke v. Bradlaugh*, 18 Q. B. Div. 63,

An application for stay of execution under a judgment, unless made immediately after the judgment has been pronounced, must be supported by affidavit showing special circumstances: *Tuck v. Southern Counties Deposit Bank*, 42 Ch. Div. 471.

#### DISCOVERY IN AID OF EXECUTION.

By O. XLII. 32, the party entitled to enforce a judgment or order for the recovery or payment of money may apply to the Judge for an order that the debtor liable, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether he has any and what other property or means of satisfying the judgment or order, before a Judge or an officer of the Court as the Judge shall appoint; and the Judge may make an order for the attendance and examination of such debtor, or of "any other person," and for the production of any books or documents.

By r. 33, in case of any judgment or order other than for the recovery or payment of money, if any difficulty arises in or about the execution or enforcement thereof, any party interested may apply to the Judge, who may make such order thereon for the attendance and examination of any party or otherwise as may be just.

By r. 34, the costs of any application under the last two preceding rules, or either of them, and of any proceedings arising from or incidental thereto, are to be in the discretion of the Judge, or of such officer as in r. 32 mentioned, if the Judge shall so direct.

The examination under r. 32 is intended to be of the severest kind, and the debtor must answer all questions and give all particulars necessary to enable the interrogating party to recover under garnishee proceedings: *Republic of Costa Rica v. Strousberg*, 16 Ch. Div. 8.

A garnishee against whom an order absolute has been made is liable to be examined under the rule: *Cowan v. Carlill*, 33 W. R. 583; 52 L. T. N.S. 431.

The words "any other person," in r. 32, refer to the case of a corporation, and do not authorize the examination of the manager of the debtor's business in place of the debtor himself: *Irwell v. Eden*, 18 Q. B. Div. 588.

#### (II.) SUBSTITUTED SERVICE.

##### 1. *Substituted Service of Judgment or Order.*

WHEREAS by the judgment [*or order*], dated &c., it was ordered [*Recite directions required to be performed*]; Now upon motion &c., who alleged [*state from affidavit to the effect*] that the Plt hath been unable to serve the Deft B. with the said judgment [*or order*], although due diligence hath been used for that purpose, as by the affidavit of &c. filed &c. appears; and upon reading the said judgment [*or order*], and affidavit, This Court doth order, that service of the said judgment [*or order*], dated &c., together with a copy of this order, upon — at — [*or upon C. D. &c.*, members of the firm of &c., or one of them], be deemed good service on the said Deft B.

For order for service of the judgment with a copy of the order for service on the Deft's solr, and also by sending copies thereof through the post in a registered letter addressed to the Deft's place of business, see *Nichols v. Pedder*, M. R., 14 Mar. 1879, B. 482.

#### NOTES.

An order (other than an order for discovery: O. XXXI. 22; and see *Joy v. Hadley*, 22 Ch. D. 572, and *inf.* p. 386) requiring any act to be done, the non-performance of which will be a contempt of Court, must be personally served on the party required to perform the act, by delivering and producing a true copy duly indorsed, and producing the original judgment or order duly passed and entered, unless substituted service is expressly authorised.

Where the order is for payment of money, or delivery or transfer of any property, actual demand on effecting service has been rendered unnecessary by O. XLII. 1.

The rule does not make service on the judgment debtor necessary before suing out *fi. fa.* or *elegit* under r. 17: *Land Credit Co. of Ireland v. Fermoyle*, 6 Ch. 323.

Where an order for payment of costs was served on the solr acting in the taxation, the applicant was allowed to sue out a *fi. fa.* against the client at his own risk: *Re A Solicitor*, 33 W. R. 131.

Service of an order for discovery or inspection made against any party on his solr shall be sufficient service to found an application for attachment for disobedience to the order: O. XXXI. 22.

Service of a judgment or order requiring personal service cannot be effected by filing it with the proper officer under O. XIX. 10: *Cunliffe v. Ashworth*, V.-C. H., at Chambers, 1 Aug. 1878; and see O. LXVII. 5.

The order for substituted service may be obtained on an *ex parte* application in Court, and may be so obtained at Chambers, if for the purpose of proceedings that originated or are pending there; for the practice thereon, see Dan. 878, 879; and see *Skegg v. Simpson*, 2 D. & S. 454; *Burilton v. Carpenter*, 11 Beav. 33; *Re Mourilyan*, 13 Beav. 84; *Griffiths v. Cowper*, 2 D. F. & J. 208; 2 Gif. 230; *Rider v. Kidder*, 12 Ves. 202; *De Mandeville v. De M.*, 1b. 203; *Deanes v. Kitchen*, 13 Eq. 461; *Lechmere v. Clamp*, 9 W. R. 355; *Bland v. B.*, L. R. 3 P. & M. 233; *Exp. Chatteris*, 10 Ch. 227.

The affidavit in support should show how service is proposed to be substituted, and that every effort has been made to effect personal service.

## SECTION II.—RECOVERY OF MONEY, LAND, OR OTHER PROPERTY.

### 1. Order under Sect. 14 of Judicature Act, 1884, to execute Deed.

UPON the application &c., And the Deft M. having refused or neglected to execute a settlement in pursuance of the order dated &c., Let a proper settlement in accordance with the order dated &c., be settled by the Judge, And Let the Deft M. within four days after service of this order and tender to him of such proper settlement for execution, execute the same; costs of application to be costs in the cause.—*Mitchell v. M.*, Pearson, J., at Chambers, 4 May, 1885, B. 619.

### 2. Chief Clerk nominated under Sect. 14 of Judicature Act, 1884, to execute Deed.

UPON motion &c., and upon reading an order dated &c., whereby it was ordered that the Deft G. should within ten days after service of the order execute such transfers, authorities, and documents, as should be necessary or proper for the purpose of vesting the property mentioned in the schedule thereto, and the right to demand delivery of, sue for, and recover and transfer the said property, or any part thereof, so far as relates to the property numbered &c., in the first part of the said schedule to B. and K., and so far as regards the remainder of the said property in the same schedule to G., and carrying out the directions contained in the judgment dated &c., such documents to be settled by the Judge in duplicate, the chief clerk's certificate dated &c., and setting forth a description of the transfers, authorities, and documents, settled

pursuant to the said order dated &c., an affidavit of &c., filed &c., whereby it appears that the said G. has not executed the said transfers, authorities, and documents, This Court doth nominate W., the chief clerk, to execute on behalf of G. the transfers, authorities, and documents, in the chief clerk's certificate dated &c., mentioned; G. to pay Plt's costs of motion.—*Gudin v. G.*, Pearson, J., 24 July, 1885, A. 1091; and see *Re Edwards, Owen v. Edwards*, 33 W. R. 578.

### 3. Writ of Assistance—Chattels.

UPON motion &c., by counsel for the Plt, And it appearing by an affidavit of &c., that the Defts have not delivered to A. B., the receiver, the securities and other documents of title &c., pursuant to the order dated &c., and that the same are locked up in a safe at the office of &c., situate &c., and that it is impossible for the said receiver to get possession of the said securities and documents without the assistance of this Court, Let a writ of assistance issue, directed to the sheriff of &c., to put the said receiver in possession of the premises in question pursuant to the said order dated &c., and this order.—*Wyman v. Knight*, Chitty, J., 6 July, 1888, B. 797; 39 Ch. D. 165.

#### NOTES.

##### RECOVERY OF MONEY OR COSTS BY WRITS OF FIERI FACIAS AND ELEGIT.

By O. XLIII. 1, 5, these writs, and also writs of *venditioni exponas*, *fi. fa. de bonis ecclesiasticis*, and all other writs in aid of a writ of *fi. fa.* or of *elegit*, shall have the same force and effect, and are to be executed in the same manner, as heretofore.

By the Bankruptcy Act, 1883, s. 146, "the sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods;" and by s. 169, 13 Edw. 1, c. 18, is repealed with the usual saving.

By O. XLII. 17, every person to whom any sum of money, or any costs, shall be payable under a judgment or order, shall, as soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fi. fa.* or of *elegit* to enforce payment thereof. If, however, the judgment or order is for payment within a period therein mentioned, the writ shall not be issued until after the expiration of such period; and the Court or a Judge may stay execution until any time after the expiration of the prescribed period.

The writ of *venditioni exponas* may, where it appears upon the return of the writ of *fi. fa.* that the sheriff has seized but not sold any goods of the person against whom execution is issued, for want of buyers, be obtained after the writ with such return shall have been filed as of record: O. XLIII. 5; for form of writ, see R. S. C. Appx. H., Form 4.

If after the issue of this writ the sheriff goes out of office, he may be compelled to proceed to sale by the writ *distringas nuper vice-comitem*: see Chit. Archb. 867.

The writ of *fieri facias de bonis ecclesiasticis*, or *sequestrari facias de bonis ecclesiasticis*, may be obtained upon the return (after it has been filed as of record) of any writ of *fi. fa.* or of *elegit*, that the person against whom such writ is issued is a beneficed clerk, and has no goods or chattels, nor any lay fee within the jurisdiction of the sheriff: O. XLIII. 3.

To obtain this writ there must have been an actual return of *nulla bona* under the former writ; it will not be issued upon a mere recital that the property returned under the former writ (*e.g.*, a life estate in real estate of small value) was insufficient to pay the balance: see *Rabbitts v. Woodward*, 20 L. T. N.S. 693, 778; *Norton v. Pritchard*, 2 Sm. & G. 455, n.

For the form of these writs, see R. S. C., Appx. H., Forms 4—6; Chit. Forms, 575, 576.

By O. XLII. 15, in every case of execution the party entitled to execution may levy the poundage fees and expenses beyond the sum recovered.

The sheriff is entitled to poundage where the judgment debt has been recovered by compulsion of the writ of *fi. fa.* (i.e., actual levy and seizure), although no actual sale has taken place: *Mortimore v. Cragg*, 3 C. P. D. 216 (overruling *Roe v. Hammond*, 2 C. P. D. 300); *Bissicks v. Bath Coll. Co.*, 2 Ex. D. 459; *Smith v. Darlow*, 26 Ch. Div. 605; *Re Ludmore*, 13 Q. B. D. 415; *secus*, if before actual seizure the debt, &c. has been paid under protest on mere production of the warrant: *Nash v. Dickenson*, L. R. 2 C. P. 252.

Where bankruptcy supervened after seizure, but before sale, the sheriff was not entitled to poundage as "costs of execution" under the Bankruptcy Act, 1883, s. 46, sub-s. 1 (see now Bankruptcy Act, 1890, s. 11, sub-s. 1): *Re Ludmore*, 13 Q. B. D. 415; and see *Re Woodham, Exp. Conder*, 20 Q. B. D. 40.

If the right of the execution creditor to recover the judgment debt under the *fi. fa.* has ceased after seizure, the sheriff is not entitled to proceed to a sale of the goods seized in order to obtain his fees and possession money: *Sneary v. Abdy*, 1 Ex. D. 299; but, after seizure, the bankruptcy of the debtor and injunction against further proceedings under the *fi. fa.* will not affect the right of the sheriff to payment by the trustee in liquidation of the necessary expenses of possession and preparing to sell: *Re Craycraft, Exp. Browning*, 8 Ch. D. 596, or his right to retain possession until the debt and costs, including possession money, are satisfied: *Exp. Lithgow*, 10 Ch. D. 169; and see further, as to the sheriff's poundage, Chitt. Archb. p. 824; Lush, Pr. 593.

By the Bankruptcy Act, 1890, s. 11 (1), where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff is, on request, to deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution are to be a first charge on the goods or money so delivered.

By the Sheriffs Act, 1887 (50 & 51 V. c. 55), s. 20, a sheriff may demand such fees and poundage as may from time to time be fixed by the L. C., with consent of Judges and concurrence of the Treasury. By order of August 31, 1888, the fees were fixed and provision made for taxation of the amount payable by a master or district registrar, and from such taxation there is no appeal: *Townend v. Sheriff of Yorkshire*, 24 Q. B. D. 621. As to the non-application of the table of fees to a subject-matter such as a ship sold under a *fi. fa.*, see *Cohen v. De Las Rivas*, 39 W. R. 539; 64 L. T. N. S. 661.

A solr who delivers a writ to the sheriff for execution does not thereby contract to pay the fees; *secus*, if he requests that a particular bailiff may be employed: *Royle v. Busby*, 6 Q. B. D. 171; *Maybery v. Mansfield*, 9 Q. B. 754. It is not within the implied authority of a solr to tell the sheriff how to perform his duty; e.g., by seizing particular goods: *Smith v. Veal*, 9 Q. B. Div. 340.

The writ must be indorsed with a direction to the sheriff to levy the money really due and payable and sought to be recovered, and also to levy interest, if sought for, at £4 p. c. per ann. from judgment, unless there be an agreement to pay more: r. 16. For Form of Writ, see Appx. H., Form 1.

Service of the judgment or order directing payment of money or costs is not necessary as a preliminary to issuing these writs: *Land Credit Co. of Ireland v. Fermoy*, 5 Ch. 323; *Streeten v. Whitmore*, 5 Beav. 228; unless the judgment or order expressly limits a time after service within which payment is to be made.

The order must direct payment to some person, and it is not enough to direct payment to his account at a banker's: *Re Leeds Banking Co.*, 1 Ch. 150.

It is a question of fact whether a seizure of particular goods was directed by the execution creditor, so as to make him liable if the seizure is wrongful: *Smith v. Veal*, *sup.*; but he will be held liable for a misleading indorsement on the writ made by his solr: *Morris v. Salberg*, 22 Q. B. Div. 614.

For the mode of enforcing a judgment against equitable interests in land, *v. inf.* Chap. XXXII., "RECEIVERS."

As to the protection of the rolling stock and plant of a railway company from execution, see the Railway Companies Act, 1867 (30 & 31 V. c. 127), s. 3, and the Railway Rolling Stock Protection Act, 1872 (35 & 36 V. c. 50), s. 3; the protection extends to a dock co. having power to make a railway: *G. N. Rail. Co. v. Tahourdin*, 13 Q. B. Div. 320; *In re East and West India Dock Co.*, 38 Ch. Div. 576; and continues though the railway is closed for traffic: *Midland Waggon Co. v. Potteries Rail. Co.*, 6 Q. B. D. 36. As to the meaning of the expression "work" in the Act of 1872, see *Easton Estate and Mining Co. v. Western Waggon and Property Co.*, 54 L. T. N.S. 735; and that the substituted right to the appointment of a receiver, which the Act of 1867 confers on a judgment creditor, is independent of the fact whether the co. has rolling stock, see *Re Manchester and Milford Rail. Co.*, *Exp. Cambrian Rail Co.*, 14 Ch. Div. 645; and as to the appointment of a receiver under the Acts, *v. inf.* Chap. XXXII., "RECEIVERS."

Neither the C. L. P. Act, 1860, s. 13, nor O. LVII. 12 (which is substituted for it), empowering the Court to order the sale of goods seized, and application of the proceeds, enables the sheriff to seize the equitable interests of the debtor in goods assigned by way of security: *Scarlett v. Hanson*, 12 Q. B. Div. 213; nor could the sheriff sell a partner's interest in goodwill or book debts, or anything else which he cannot seize: *Helmors v. Smith*, 35 Ch. Div. 436; but a pawnbroker's interest in redeemable pledges may be taken in execution: *Re Rollason, R. v. R.*, 34 Ch. D. 495.

And where an exor carries on the testator's business in his own name, a trade creditor of the exor cannot take in execution assets of the testator employed in the business; though lapse of time and enjoyment of the assets in a manner inconsistent with the will, coupled with consent of beneficiaries, might raise an inference that the assets had been given to the exor: *Re Morgan, Pillgrem v. P.*, 18 Ch. Div. 93.

#### EFFECT OF BANKRUPTCY—SALE BY SHERIFF, ETC.

By the Bankruptcy Act, 1883, s. 9, on the making of a receiving order, an official receiver is constituted receiver of the debtor's property, "and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court" (of bankruptcy), "and on such terms as the Court may impose;" but the section is not to affect the power of a secured creditor to realize or deal with his security.

The section is not made applicable to the admon of insolvent estates by sect. 10 of the Jud. Act, 1875: *Pratt v. Inman*, 43 Ch. D. 175.

The word "remedy" extends to process of commitment to enforce payment of a debt: *Re Ryley, Exp. Official Receiver*, 15 Q. B. D. 329; but not to process of contempt, so that there is jurisdiction to issue an attachment against an undischarged bankrupt solr for disobedience to an order for payment in his character of officer of the Court: *Re Edye*, 63 L. T. N.S. 762, following *In re Wray*, 37 Ch. D. 138, 143, and disapproving *Re Simes, S. v. S.*, W. N. (90) 114; 38 W. R. 570; 62 L. T. N.S. 721; and see *In re Mackintosh, Exp. M.*, 13 Q. B. D. 235.

The receiving order is "made" on the day when it is pronounced. A debtor arrested under an attachment after the order was pronounced, but before it was drawn up, was ordered to be discharged, although he had by his counsel submitted to the order for attachment: *Re Manning*, 30 Ch. Div. 480.

By sect. 10 (2), "the Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor, may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings, or allow them to continue on such terms as it may think just."

By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been either sold or held by the sheriff for

twenty-one days; but where an interpleader summons has been taken out the time between the date of taking out such summons, and that at which the sheriff is ordered to withdraw, or any interpleader issue is finally disposed of, is not to be counted in the twenty-one days.

By the Bankruptcy Act, 1883, s. 45, a creditor who has issued execution against goods or lands of a debtor, or has attached any debt due to him, cannot retain the benefit against the debtor's trustee in bankruptcy, unless execution or attachment is completed before the receiving order, and before notice of presentation of a bankruptcy petition, or of the commission of an available act of bankruptcy; and for the purposes of the Act an execution against goods is completed by seizure and sale, an attachment of a debt by receipt of the debt, and an execution against land by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

The delivery of the land in execution under an *elegit* is "seizure," so that a receiving order made subsequently, though before the return of the writ, does not oust the right of the judgment creditor: *Re Hobson*, 33 Ch. D. 493.

By the Bankruptcy Act, 1890, s. 11 (2) (amending sect. 46, sub-s. 2, of the Bankruptcy Act, 1883), where, under an execution in respect of a judgment for a sum exceeding £20, the goods of a debtor are sold, or money is paid in order to avoid sale, the sheriff is to deduct his costs of the execution from the proceeds of sale, or the money paid, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made thereon, or on any other petition of which the sheriff has notice, he is to pay the balance retained to the official receiver or trustee in bankruptcy, who is to be entitled to retain the same as against the execution creditor.

The notice must be served on the sheriff or his recognized agent, not on an ordinary bailiff or man in possession: *Exp. Warren, Re Holland*, 15 Q. B. Div. 48. The effect of it is to deprive the creditor of the fruits of the execution, and transfer them to the trustee in bankruptcy for the benefit of the creditors at large; and where the sheriff is in possession under several writs, he must, on receiving the notice, apply the proceeds of sale in satisfaction of those under £20 according to their priorities: *Re Pearce, Exp. Crosthwaite*, 14 Q. B. D. 266.

Section 10 of the Jud. Act, 1875, does not extend these provisions to the winding up of a co.: *Re Richards & Co.*, 11 Ch. D. 676.

By the Bankruptcy Act, 1883, s. 145, where the sheriff sells under an execution for a sum exceeding £20 (including legal incidental expenses), the sale is to be by public auction, publicly advertised, and not by bill of sale or private contract, unless the Court otherwise orders.

A sale by private contract might be ordered under this section upon an *ex parte* application by the execution creditor: *Hunt v. Frensham*, 12 Q. B. D. 162.

Now, by the Bankruptcy Act, 1890, s. 12, where the sheriff has notice of other executions, the Court is not to consider an application for leave to sell privately until notice has been given to the execution creditors who may appear and be heard on the application. The procedure upon such application (which is to be made by summons in Chambers) is now regulated by O. XLIII. 8—15 (Dec. 17th, 1890).

The sheriff cannot make a valid contract for sale until he has actually seized the goods: *Exp. Hall, Re Townsend*, 14 Ch. Div. 132.

Where the effects of a partnership are seized, and a partner buys his share back out of partnership moneys, there is no dissolution of the partnership; *quare* whether there would be if he bought with his own money: *Helmors v. Smith*, 35 Ch. Div. 436.

By the Bankruptcy Act, 1883, s. 46 (3), a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy.

As to the duty of a sheriff's officer who receives notice by telegram of an injunction granted by the Court of Bankruptcy to restrain a sale, see *Exp. Langley, Re Bishop*, 13 Ch. Div. 110.

Rejection of proof for debt by judgment creditor in the debtor's bankruptcy remains valid though the bankruptcy is annulled: *Brandon v. McHenry*, (1891) 1 Q. B. (C. A.) 538.

## RECOVERY OF LAND BY WRIT OF POSSESSION.

By O. XLVII. 1, a judgment or order that a party recover possession of any land may be enforced by writ of possession in manner heretofore in use in actions of ejectment in the Superior Courts of Common Law.

By r. 2, where by any judgment or order any person therein named is directed to deliver possession of any lands to some other person, the person prosecuting such judgment or order may without order sue out a writ of possession on filing an affidavit of due service of the judgment or order, and that it has not been obeyed.

The writ of possession was by this rule introduced in substitution for the former writ of assistance: *Hall v. H.*, 47 L. J. Ch. 680; following *Re Holden*, M. R., 7 May, 1878. The writ of assistance, however (which is more extensive in terms than the writ of possession, and which was not issued without an order for that purpose: Cons. Ord. 29, r. 5, and see O. LXXII. 2), may still be required, and has been issued for the purpose of recovering possession of and preserving chattels which had been ordered to be delivered to a receiver: *Wyman v. Knight*, 39 Ch. D. 165; *sup.* Form 3.

An order for the issue of the writ of possession is not now necessary in any case; but where there is a judgment for recovery of possession under O. XLVII. 1 (which affects parties only), the writ will be sealed, according to the practice at law, on production of the judgment only. And in cases under r. 2 (which includes persons as well as parties), the writ will be sealed on production of the affidavit mentioned in that rule.

For the form of judgment for the possession of land upon Deft's default, see pp. 146, 147, Forms 8 and 9; and R. S. C. Appx. F., Form 3. And for the form of the writ, see *Ib.*, App. H., Form 7a.

A judgment for foreclosure absolute is not a judgment for recovery of possession of land enforceable by writ of possession: *Wood v. Wheeler*, 22 Ch. D. 281; *secus*, if it contain an order for delivery of possession; and see O. XVIII. 2. An order for delivery of possession by the mortgagor should contain a description of the property, so that the same may be indicated in the writ of possession: *Thynne v. Sarl*, (1891) 1 Ch. 79.

Where a lessee recovered judgment for possession against sub-lessee, and the lessee's estate expired after action and before trial, writ of possession was allowed to issue, it not being shown that the issuing of it would be futile or unjust: *Knight v. Clarke*, 15 Q. B. Div. 294; *Gibbons v. Buckland*, 1 H. & C. 736.

Under the old practice, where the Deft had refused to allow the sequestrators to enter into possession, an order was granted for an injunction enjoining the Deft to cause possession of a house, and premises belonging to it, to be delivered to them: see *Bird v. Littlehales*, L. C., 18 Feb. 1743, A. 177; *S. C.*, 3 Sw. 300, n. And for the further order for the writ of assistance to issue, see *S. C.*, 19th March, 1743, A. 235.

And orders for the writ of assistance to put the sequestrators into possession were granted in *Barkley v. B.*, 7 June, 1849, A. 1720; *Pelham v. De. Newcastle*, 3 Swa. 289, n.

The same remedy might be obtained by a receiver: *Cazet de la Borde v. Othon*, 23 W. R. 110; *Sharp v. Carter*, 3 P. Wms. 379, n.; *A. G. v. De Tastet*, V.-C. K., 31 Jan. 1855; or by a purchaser who was kept out of possession of property sold by the Court: see *Toynbee v. Ducknell*, V.-C. W., 19 July, 1856, B. 1437; *Wilson v. Angus*, V.-C. S., 28 June, 1858, B. 1089; and his costs of proceedings for the purpose of obtaining possession were payable out of the purchase-money in Court: *Thomas v. Buxton*, 8 Eq. 120; *et v. sup.* Chap. XIX., "SALES BY THE COURT."

Where, after a writ of possession executed, the Deft forcibly re-took possession, the Court made an order renewing the writ: *Stackpoole v. Walsh*, 7 L. R. Ir. 444.

As to form of order, in action where judgment was given for recovery of land against the Deft who was not in possession, and possession was given to the Plt under a writ of possession, setting aside the judgment on application of the person in possession who did not derive title from the Deft, see *Minet v. Johnson*, 63 L. T. N.S. 507.

Issue of execution for possession is not necessarily a waiver of right to costs: *Harrold v. Daly*, 24 L. R. Ir. 412.



## ENFORCING CONVEYANCE OF LAND.

A direction in a judgment or order for the execution of a deed or conveyance may be enforced, as a judgment to do any act, by writ of attachment or by committal: see O. XLII. 7.

The provisions of 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, for enforcing a conveyance by compulsory process, have been superseded by the Trustee Acts, 1850 and 1852, enabling the Court to vest lands and other property in the cases therein mentioned; and more recently by the Jud. Act, 1884 (47 & 48 V. c. 61), s. 14, which provides that where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, &c. be executed, or such negotiable instrument indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, &c. so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it. And for instance of the appointment under this section of the chief clerk to execute, see *Re Edwards, Owen v. Edwards*, 33 W. R. 578; Form 2, *sup.*

The jurisdiction might be exercised by the P. D.: see *Howarth v. H.*, 11 P. Div. 95, where an order for execution by the registrar was made on a simple motion for attachment for non-compliance, the person in default having by himself or his solr received notice that the application to the Court would be made in the alternative.

## RECOVERY OF PROPERTY, OTHER THAN LAND OR MONEY, BY WRIT OF DELIVERY.

By O. XLVIII. 2, a writ of delivery of property other than land or money (which is mentioned in O. XLII. 6, as one of the modes in which a judgment for that purpose may be enforced), may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

The writ (forms of which are given in R. S. C., Appx. H., Nos. 10, 11) is either (1) for the return of the chattels, and a distress of all the lands and chattels of the Deft until they are returned, without giving him the option of retaining them, and paying their assessed value, or (2) for the return of the chattels, or if they cannot be found, the levying of their assessed value. In the latter case, the writ issues without order; in the former, an order is required.

Where it was necessary to give a receiver actual delivery of specific chattels, a writ of assistance was ordered to issue: *Wyman v. Knight*, 39 Ch. D. 165.

## SECTION III.—ATTACHMENT OR COMMITTAL.

1. *Order for Attachment for Default other than for non-payment of Money*—O. XLII. 6, 7; O. XLIV. 2.

WHEREAS by the judgment [or order], dated &c., It was ordered [*Recite direction for the act to be done*], Now upon motion &c., by counsel for (the Plt) A., who alleged that (the Deft) B. has not &c. [*state default*], as by the affidavit of &c. filed &c. appears, and [upon hearing counsel for (the Deft) B., and] upon reading the said judgment [or order], the said affidavit [*enter evidence of service of the judgment &c., and if the person in contempt does not appear*, and an affidavit

of &c., filed &c., of service of notice of this motion upon the said (Deft) B.]; This Court doth order, that the said (Plt) A. be at liberty to sue out a writ or writs of attachment against the said (Deft) B. for his contempt in not &c. [*as above*]; And it is ordered that the said (Deft) B. do pay to the said (Plt) A. his costs of this application and of the said attachment, to be taxed by the taxing master.

### *2. Attachment in Default of payment by Instalments.*

WHEREAS by an order dated &c., It was ordered that the Deft should within &c., lodge in Court as directed in the schedule thereto £— being &c., Now upon motion &c., by counsel for the Plt, and upon hearing counsel for the Deft, and it appearing to the satisfaction of the Court that the Deft has made default in payment of the said £— as directed by the said order, and that such default is a default made by a trustee or person acting in a fiduciary capacity, and ordered to pay a sum in his possession or under his control within the meaning of the Debtors Act, 1869, Let the Plt be at liberty to sue out a writ or writs of attachment against the Deft for his contempt in not lodging the said £— in Court pursuant to the said order; And counsel for the Deft alleging that the Deft is unable to pay the said £— except by instalments, and offering to lodge the same in Court by monthly instalments as hereinafter mentioned, Let the Deft be at liberty to make the lodgment in Court of the said £— as directed in the schedule hereto, the Plt undertaking not to sue out such writ of attachment unless the Deft shall make default in payment into Court of the said monthly instalments of the said £— or any of them. Costs. [*Add Lodgment Schedule, Form No. 1, with necessary additions.*]*—Re Lawes, Cole v. C., North, J., 28 Oct. 1887, B. 2477.*

### *3. The Like—for not transferring Stock into Court.*

WHEREAS by the order, dated &c., It was ordered that, without prejudice to any question, the Defts J. H. and C. H. should within seven days after service of the said order, transfer into Court, as directed in the schedule thereto, the sum of £— (New Consols); Now upon motion &c. by counsel for the Plts, and upon hearing counsel for the Deft C. H., and upon reading the said order, an affidavit of &c., filed &c., of service of the said order on the said J. H. and C. H., on the — day of —, the order dated &c., an affidavit of &c., filed &c., of service of notice of this motion on the Deft J. H., the Chancery paymaster's certificate, dated &c., of the non-transfer of the said Consols into Court [*enter any other evidence*], This Court doth order; that the Plt be at liberty to sue out a writ or writs of attachment against the said Defts J. H. and C. H. for their contempt in not having transferred the said sum of £—, New Consols, into Court pursuant to the said order [*if so, but such writ or writs of attachment is or are not to be issued until the — day of —*]; And it is ordered

that the said Defts J. H. and C. H. do pay to the Plt M. S. the costs of the Plts of this motion, such costs to be taxed &c.—See *Street v. Hope*, Lopes, J., for V.-C. M., 27 Sept. 1877, B. 1712.

For an order for attachment against the Defts for not leaving at the Chambers of the Judge an abstract of their title to the lands in question, pursuant to an order, see *Peacock v. Morgan*, M. R., 16 March, 1877, B. 320.

For an order for attachment against solrs for non-compliance with an order to procure certain deeds to be registered and stamped at their own expense, and to rectify any omissions, and for delivery of the deeds duly rectified and stamped to their clients, see *Re Scard*, M. R., 21 Aug. 1878, B. 1734.

4. *The Like—for not obeying an Order to make Affidavit as to Documents—O. XXXI. 21.*

WHEREAS by an order, dated &c., it was ordered that [*Recite order to make affidavit as to documents*]; Now upon motion this day made unto this Court by counsel for the Plt, who alleged that the Deft B. has been guilty of a contempt of this Court in not complying with the said order, as by an affidavit of &c., filed &c., appears, and [upon hearing counsel for the said Deft], and upon reading the said order and affidavit [*or, if the Deft does not appear*, and an affidavit of &c., filed &c., of service of notice of this motion on the said Deft]; This Court doth order that the Plt be at liberty to sue out a writ of attachment against the said Deft B., for his contempt in not complying with the said order, dated &c.

For order for attachment for default in leaving at Chambers accounts pursuant to a four-day order, see *Whitaker v. Thurston*, M. R., 21 July, 1876, B. 1347; and see *Caulcutt v. C.*, 30 March, 1876, A. 636.

It has been held that orders for delivery of the names of a firm under O. XVI. 14 (see now O. XLVIII. 1, June, 1891); or for the account claimed, to be verified by affidavit (O. xv. 1), will not be enforced by attachment: *Pike v. Keene*, 24 W. R. 322; but in the Ch. Div. it is the usual practice to direct an attachment to be issued in default of bringing in accounts, or making a sufficient affidavit of documents.

5. *The Like for non-payment of Money by a Trustee under the Debtors Act (32 & 33 V. c. 62), s. 4.*

WHEREAS by the judgment [*or order*], dated &c., it was ordered that (the Deft) B. should, within — days after service thereof, pay to (the Plt) A. the sum of £— as therein mentioned [*or lodge in Court to the credit of &c., as directed by the schedule thereto, the sum of £—, by the chief clerk's certificate, dated &c., certified to be due from him on the account of &c. by the said judgment [or order] directed*]; Now upon motion this day made unto this Court by counsel for the (Plt) A., and upon reading the said judgment [*or order*], an affidavit &c., filed &c., of service of the said judgment [*or order*] upon the (Deft) B., an affidavit of the (Plt) A., filed &c., of nonpayment of the said sum of £— [*or if so, the paymaster's certificate, whereby it appears that the (Deft) B. has made default in payment of the said sum of £— into Court pursuant to the said judgment [or order], an affidavit of &c.,*

filed &c., of service of notice of this motion on the (Deft) B.]; And it appearing to the satisfaction of the Court that the (Deft) B. has made default in payment of the said sum of £— as directed by the said judgment [or order], and that such default is a default made by a trustee or person acting in a fiduciary capacity, and ordered to pay a sum in his possession, or under his control, within the meaning of the Debtors Act, 1869, This Court doth order that the (Plt) A. be at liberty to sue out a writ or writs of attachment against the (Deft) B. for his contempt in not having paid the said sum of £— to the (Plt) A. [or into Court] as aforesaid, pursuant to the said judgment [or order]. [If so, And it is ordered that the (Deft) B. do pay to the (Plt) A. his costs of this application and of the said attachment, such costs to be taxed &c.].—See *Young v. Dallimore*, V.-C. S., 28 Feb. 1870, B. 549; *Moorhouse v. M.*, M. R., 12 July, 1878, B. 1394; *European Assurance Co. v. Lee*, M. R., 13 Dec. 1878, A. 2217.

For order for attachment to issue against a solr for non-payment of a sum certified to be due from him on the taxation of his bill of fees and disbursements, see *Re Peters*, Form 2, Chap. XVII., Sect. XI., p. 270, "Costs"; and see *Re Rush*, 9 Eq. 147.

#### NOTES.

##### WRIT OF ATTACHMENT—COMMITTAL.

By O. XLII. 7, "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal."

By O. XLIV. 1, a writ of attachment is to have the same effect as a writ of attachment issued out of the Ch. Div. theretofore had; and by r. 2, no such writ is to be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued.

An important change has been introduced by r. 2, the former practice in Chancery (though not at Common Law) having been that an attachment might be obtained without further order, or notice to the party, on proof of service and non-compliance: see *Abud v. Riches*, 2 Ch. D. 528.

Notice is necessary upon an application for attachment against a sheriff for not returning a writ of *fi. fa.*: *Jupp v. Cooper*, 5 C. P. D. 26; or against persons removing goods out of the sheriff's custody: *Eynde v. Gould*, 9 Q. B. D. 335.

An order for attachment, if now obtained without notice to the party, will be discharged: *Dallas v. Glyn*, 3 Ch. D. 190; but not an order for committal after leave has been obtained to issue a writ of attachment: *Buest v. Bridge*, 29 W. R. 117; but see *Callow v. Bridge*, 56 L. J. Ch. 690.

A writ of attachment may be ordered to issue on a notice of motion to commit for contempt: *Piper v. P.*, W. N. (76) 202.

An application for leave to issue the writ may be properly made in Chambers and dealt with by the chief clerk, unless it becomes necessary to give the leave, in which case it will be adjourned to the Judge: *Davis v. Galmoye*, 39 Ch. D. 322; explaining *S. C.*, 40 Ch. D. 355.

An order for payment of money, whether interlocutory or final, can only be enforced by attachment in cases within the Debtors Act, 1869, s. 4 (3) and (4): *Phosphate Sewage Co. v. Hartmont*, 25 W. R. 743; and this applies equally where the order is for payment into Court: see *Hutchinson v. Hartmont*, W. N. (77) 29.

#### DEBTORS ACT.

Under the Debtors Act, 1869 (32 & 33 V. c. 62), s. 4, arrest and imprisonment for making default in payment of money have been abolished, except

in the following cases *inter alia* :—(3) Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum “in his possession or under his control.” (4) Default by a solr in payment of costs, when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court; and in these instances (by this section) the imprisonment is limited to one year.

A trustee who, by carelessness or wilful default, without moral delinquency, has lost trust moneys in his possession or under his control, is a defaulting trustee within the Debtors Act, s. 4 (3): *Middleton v. Chichester*, 6 Ch. 152; *secus*, if he has merely omitted to get in trust moneys: *Ferguson v. F.*, 10 Ch. 661; or it is not shown that he ever had them in his possession: *Exp. Cuddeford*, 45 L. J. Bkcy. 127.

And a writ of attachment cannot be issued where the order directs payment of a sum, part of which was not in the possession or control of the trustee, *e.g.*, a sum consisting of a principal debt due from an executor with interest thereon, as the interest cannot be said to have been in his possession or control: *Re Hickey, H. v. Colmer*, 55 L. T. N.S. 588; 35 W. R. 53; and *v. sup.* p. 175, Chap. XVI., Form 3; or the existing market value of bonds improperly sold by trustees, as the difference between such value and the amount produced by the sale never came to their hands: *Re Walker's Estate, W. v. W.*, 38 W. R. 766; 60 L. J. Ch. 25; 63 L. T. N.S. 237; and see *Cronin v. Twinberrow, W. N.* (87) 201.

A trustee is also liable under sect. 4 (3), though personally innocent, where the trust money has been misapplied and lost from being placed in the sole name of his co-trustee: *Evans v. Bear*, 10 Ch. 76.

The promoter of a co. is not “a trustee or person acting in a fiduciary capacity” within sect. 4 (3): see *Phosphate Sewage Co. v. Hartmont*, 25 W. R. 743; nor is a person ordered to repay money received by way of fraudulent preference: *Exp. Hooson*, 8 Ch. 231.

*Secus*, an agent; as a son managing a farm for his father: *Marris v. Ingram*, 13 Ch. D. 338; or a London agent indebted on account of his agency: *Litchfield v. Jones*, 36 Ch. D. 530; or an auctioneer as to the proceeds of property sold by him: *Crowther v. Elgood*, 34 Ch. Div. 691; or a debtor who has admitted that a sum is due from him, and submitted to an order directing that he should hold it upon certain trusts: *Preston v. Etherington*, 37 Ch. Div. 104; or an administratrix ordered to pay assets received by her into Court in a subsequent action propounding a will, under which she was not an executrix: *Tinnuchi v. Smart*, 10 P. D. 184.

But the remedy provided by the section is only available by c. q. tr., not by a mere creditor: *Re Firmin, London Banking Co. v. F.*, 57 L. T. N.S. 45.

Under sect. 4 (4), a solr is liable to attachment for non-payment of a balance found due from him on taxing his bill of costs: *Re Rush*, 9 Eq. 147; *Re White*, 19 W. R. 39; or of money of his client which he has improperly dealt with: *In re Dudley*, 12 Q. B. Div. 44.

And as disobedience by a solr to an order made on him as such is in the nature of an offence, he cannot claim privilege from arrest under an attachment for such disobedience: *Re Freston*, 11 Q. B. Div. 545.

But this liability to attachment is for non-payment of money or costs as an officer of the Court, not as an unsuccessful litigant: *Re Hope*, 7 Ch. 523 (overruling *Re Barfield and Rush*, 19 W. R. 466).

The liability remains, though the solr be struck off the roll after the order against him is made, or (*semble*) previously: *Re Strong*, 32 Ch. Div. 342.

Although in cases of contempt generally an order to commit for non-compliance with an order was in the discretion of the Court (see *Ashworth v. Outram* (2), 5 Ch. Div. 943), in cases coming within sect. 4 (3) or (4) attachment was a matter of right, and the Court had no discretion to refuse the order for attachment: see *Evans v. Bear*, 10 Ch. 76; nor to discharge a defaulting trustee where he had not cleared his contempt: *Ransom v. Boyd, W. N.* (77) 236.

At common law, however, it was held that to warrant an attachment for non-payment of money under the exceptions mentioned in sect. 4, it must be shown that the party had the means of paying, as well as that he had refused or neglected to do so: *Re Ball*, L. B. 8 C. P. 104; and see *Re Robinson*, 10 B. & S. 75.

And now by the Debtors Act, 1878 (41 & 42 V. c. 54), in any case coming within the Debtors Act, 1869, s. 4 (3) and (4), the Court or Judge making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisos contained in sect. 4) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process, or order for arrest and imprisonment, and any application to stay the operation of any such writ, or process, or order, or for discharge from arrest, or imprisonment, thereunder.

Under the discretion given by this Act, the Court has declined to grant a writ of attachment against a defaulting trustee where it appeared that he had no present means, and that there was no prospect of future payment: *Barrett v. Hammond*, 10 Ch. D. 285; *Street v. Hope*, *lb.* 286 (n.); or where the misapplication of money had been erroneous, but not fraudulent: *Holroyde v. Garnett*, 20 Ch. D. 532; but, *per M. R.*, mere inability to pay is not, alone, sufficient ground for refusing an attachment or granting a discharge under the Acts: *Simpson v. Bell*, 1 May, 1879, *ex rel.*; which are intended for the punishment of a fraudulent or dishonest debtor, and are in that sense vindictive: *Marris v. Ingram*, 13 Ch. D. 338; *Re Knowles, Doodson v. Turner*, 52 L. J. Ch. 685; 48 L. T. N.S. 760.

The Debtors Act, 1869, does not affect the power of imprisonment for contempt of Court in not complying with an order to do any act, even though payment of money is directed as an alternative: *Harvey v. Hall*, 11 Eq. 31; but the Court has no power to commit to prison for non-payment of the costs of a motion to commit on which no other order is made: *Micklethwaite v. Fletcher*, 27 W. R. 793; nor, when the contempt has been cleared, to detain the contemnor in prison for non-payment of the costs of his contempt: *Jackson v. Mawby*, 1 Ch. D. 87.

The Debtors Act does not apply to Crown debts, including an estreated recognizance for payment of the respondent's costs of an appeal to the House of Lords if unsuccessful; and the appellant making default was not entitled to be discharged from custody: *Re Smith*, 2 Ex. D. 47.

A Plt who has levied execution, in an action against a trustee of a will for a sum of money admitted to have been received by such trustee, cannot, by obtaining an order absolute for payment within a limited time, avail himself of the remedy given by the Debtors Act, s. 4 (3): *Drewitt v. Edwards*, 26 W. R. 60.

An order is no longer necessary for the discharge of a person who has been imprisoned under s. 4 (3) or (4), as the practice is to indorse on the writ a note that the writ does not authorise an imprisonment for any longer period than one year: and see *Re Edwards, Brooke v. E.*, 21 Ch. D. 236.

#### SERVICE—EVIDENCE.

Service of the order for payment, &c., on which the attachment is sought to be grounded, must, unless substituted service has been authorized, be personal: *v. sup.* p. 374; except in cases under O. XXXI. 22, by which service on the solr of an order for discovery or inspection (failure to comply with which renders a party liable to attachment: r. 21) shall be sufficient service to found an application for attachment for disobedience to the order. But the party, against whom the application is made, may show that he has had no notice or knowledge of the order.

Personal service is not waived by the party, whose solr is served, taking out a summons for further time: *Hampden v. Wallis*, 26 Ch. Div. 746; nor by correspondence by the party, a solr, promising performance of the required act, the delivery of a bill of costs: *Re Cunningham*, W. N. (86) 176; 55 L. T. N.S. 766.

By the appearance of counsel for the contemnor, personal service of a rule nisi for his attachment was held to be waived: *Exp. Alcock*, 1 O. P. D. 68.

A true copy of the order, for non-compliance with which the writ of attachment has issued, must have been served; otherwise the writ may be set aside and the party discharged out of custody: *Re Holt*, 11 Ch. D. 168.

Personal service of the notice of motion or other application for attachment under O. XLIV. 2, is not indispensable: *Browning v. Sabin*, 5 Ch. D. 511; *Richards v. Kitchen*, 25 W. R. 602; when there is no difficulty in effecting

personal service, the Court may insist upon it; but when there was difficulty, and the original order had been personally served, the Court acted on proof of service in ordinary form on the party's solr: *Howarth v. Howarth*, 11 P. Div. 95; *Mann v. Perry*, 50 L. J. Ch. 251; *Re Luzmore, Gordon v. Woods*, W. N. (88) 63; and under O. xxxi. 21, the writ issued, though both the order for discovery and the notice of motion were served only on the solr: *Joy v. Hadley*, 22 Ch. D. 571; *Re Mulcaster, Dalton v. Nanson*, 47 L. J. Ch. 609; 26 W. R. 435. Service at the residence of the party has been held sufficient: *Re A Solicitor*, 14 Ch. D. 152; 49 L. J. Ch. 295.

And where the party has not appeared, the notice may be served by filing with the proper officer pursuant to O. LXVII. 4; *Re Morris, M. v. Fowler*, 44 Ch. D. 151.

By O. LII. 4, every notice of motion for attachment is to state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit is to be served with the notice of motion.

The rule applies to a motion to commit for disobedience to an order for discovery: *Litchfield v. Jones*, 25 Ch. D. 64.

The copy affidavits and notice of motion should be served together, and if not personally, at the address for service; and service of the affidavits separately on the country solr, though two clear days before the hearing, is irregular: *Petty v. Daniel*, 34 Ch. D. 172; but see *contra*, *Hampden v. Wallis*, 26 Ch. Div. 746.

As to what is a sufficient statement of the grounds of the application, see *Treherne v. Dale*, 27 Ch. Div. 66.

The certificate of the Paymaster-General that the money is not in Court must be dated on a day subsequent to the last day for payment pursuant to the order. The want of such evidence may be cured by the appearance of the party, and his not disputing the fact: *Treherne v. Dale*, *sup.*

An order made by the chief clerk in Chambers cannot be enforced by attachment until after entry: *Ballard v. Tomlinson*, 52 L. J. Ch. 656.

Where the time for payment limited by the order was enlarged by a subsequent order, it was sufficient that the indorsement required by O. XLI. 5 was on the first order: *Treherne v. Dale*, 27 Ch. Div. 66.

To obtain the attachment of a judgment debtor for non-compliance with an order under O. XLII. 32, for his attendance for oral examination at Chambers, it must be shown that conduct money has been tendered, and that there is some necessity for bringing him up from his place of residence: see *Protector Endowment Co. v. Whitlam*, 36 L. T. N.S. 467; and an order for payment of the debt by instalments must be abandoned by the creditor, as the two processes cannot be allowed to run simultaneously: *Hayton v. Beall*, 29 W. R. 333.

#### APPEAL.

An appeal has been held to lie from an order to commit, or a refusal to commit, involving a finding: *Jarmain v. Chatterton*, 20 Ch. Div. 491; *Witt v. Corcoran*, 2 Ch. D. 69; but see *Reg. v. Jordan*, W. N. (88) 152, per Lindley, L. J. The Court of Appeal, however, is reluctant to interfere with the discretion of the Court below: *Ashworth v. Outram*, 5 Ch. Div. 943; *Esdaile v. Visser*, 13 Ch. Div. 421; *Chard v. Jarvis*, 9 Q. B. Div. 178.

But an application for attachment for contempt in publishing comments calculated to prejudice the fair trial of an action is "a criminal cause or matter" within Jud. Act, 1873, s. 47, so that no appeal will lie: *O'Shea v. O'Shea*, 15 P. Div. 59.

An attachment for disobedience to an order of Court, being a coercive process in a civil action, is not an offence within sect. 19 of the Extradition Act, 1870: *Pooley v. Whetham*, 15 Ch. Div. 435.

#### BANKRUPTCY OF CONTEMNOR.

Under the Bankruptcy Act, 1869, a person liable to arrest within s. 4 (3), or (4) of the Debtors Act, might, if he became bankrupt, be protected pending such bankruptcy from attachment for nonpayment, &c.: *Cobham v. Dalton*, 10 Ch. 655; *Phosphate Sewage Co. v. Hartmont*, 25 W. R. 743; but in such case the application to discharge the attachment ought, it seems, to have

been made to the Court in which the writ was issued, and not to the Court of Bankruptcy: *Re Deere*, 10 Ch. 658.

But bankruptcy subsequent to the issue of the writ would not protect him from arrest, nor entitle him, if already in custody, to his discharge: *E. Lewes v. Barnett*, 6 Ch. D. 252; and see *Re Wray*, 36 Ch. Div. 138.

And the protection from process of attachment pending bankruptcy proceedings given to a bankrupt debtor by s. 12, and the rules of 1870, r. 282, did not extend to the case of a compounding debtor: *Pashler v. Vincent*, 8 Ch. D. 825.

As to the effect of bankruptcy generally, under the Act of 1883, *v. sup.* p. 378.

#### COSTS.

The costs of an executed attachment are no longer a fixed sum of 13s. 4d. (as under the former practice, except where directed to be taxed, see Dan. 5th ed., 431, n.), but are now, as of any other proceedings, in the discretion of the Court under O. LXV. 1: *Abud v. Riches*, 2 Ch. D. 528; and should be asked for upon the application for the writ: *S. C.*

#### EXECUTION OF WRIT.

The officer charged with the execution of a writ of attachment for contempt in non-compliance with an order for discovery may break open the outer door of a house: *Harvey v. H.*, 26 Ch. D. 644.

For committal in cases of special contempt, privilege from arrest, and discharge on clearing the contempt, *v. inf.* Sects. vii. and viii.

#### COMMITTAL UNDER DEBTORS ACT, 1869, s. 5—ARREST UNDER SECT. 6.

The jurisdiction by the Debtors Act, 1869, s. 5, given to any Court to commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court, is now, by the operation of the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 103, and the Bankruptcy Rules (1886), 355—362, transferred to the Judge and registrars in bankruptcy.

Where judgment has been given for payment of a past debt by instalments *in futuro*, an order for commitment for default in payment of an instalment is not an anticipatory order, and may be validly made: *Stonor v. Fowle*, 13 App. Ca. 20.

Sect. 14 (1) of the Sheriffs Act, 1887 (50 & 51 V. c. 55), does not apply to commitment under s. 5 of the Debtors Act, and does not prevent the imprisonment of the debtor within twenty-four hours after his arrest: *Mitchell v. Simpson*, 52 Q. B. Div. 183.

By sect. 6 of the Debtors Act, 1869 (which abolished arrest on mesne process in any action), power was given to the Superior Courts of Law to order the arrest of the Deft against whom the Plt before final judgment proves a good cause of action of £50 and upwards, and that the Deft intends to leave England, and his absence will materially prejudice the Plt in the prosecution of his action. But in general no order is granted unless the Deft is a material witness, or is taking away material documents.

But after final judgment a Deft could not be detained in prison under s. 6, as the prosecution of the Plt's action could not then be prejudiced by the Deft's absence: see *Hume v. Druryff*, L. R. 8 Ex. 214.

Under the similar provisions of the Absconding Debtors Act, 1870 (33 & 34 V. c. 76, repealed by sect. 169 of the Bankruptcy Act, 1883), a distinction was taken between a foreigner in this country for temporary purposes only, and a domiciled Englishman: see *Exp. Gutierrez*, 11 Ch. Div. 298; *Exp. Crispin*, 8 Ch. 374.



## SECTION IV.—ENFORCING RETURN OF WRITS.

1. *Order Nisi for Sheriff's Committal*—O. LII. 11.

WHEREAS the solr for the Plt on the — day of —, gave notice to the sheriff of —, calling upon him to return the writ of attachment issued against the Deft B. for his contempt in not &c. [*State the contempt*]; Now upon motion &c., by counsel &c., who alleged that notwithstanding the said notice the said sheriff has not returned the said writ of attachment; and upon reading the affidavit of &c., This Court doth order that the said sheriff do within six days after personal notice hereof, return the said writ of attachment, or in default thereof that the said sheriff do stand committed to prison.

2. *Order absolute for Committal.*

WHEREAS by an order dated &c. [*Recite order nisi*], Now upon motion &c., by counsel &c., who alleged that the sheriff of —, has been duly served with the said order, as by the affidavit of &c., filed &c., appears, notwithstanding which service the said sheriff has not returned the said writ, although the time limited for that purpose by the said order has expired; and upon reading the said order and affidavit, This Court doth order that —, the said sheriff of —, do stand committed to prison for his said contempt.

## NOTES.

By O. LII. 2, no motion or application for a rule *nisi* or order to show cause shall hereafter be made in an action against a sheriff to pay money levied under an execution. O. LII. 11 provides that no order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solr), or by his solr, calling upon the sheriff to return such writ, or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such sheriff.

The notice is substituted for the former order of course.

Upon application *ex parte* for order *nisi*, the sheriff was ordered to pay both the costs of the order *nisi* and of the previous order of course: *Re Heiron's Estate, Hall v. Fry*, 12 Ch. D. 795.

It seems that under O. XLII. 7, 26, the applicant may move on notice (see *Jupp v. Cooper*, 5 C. P. D. 26) for his committal, or for an attachment.

If the attachment is to go against the late sheriff, it will be directed to the present sheriff, but if against the present sheriff it will be directed to the coroner: see *Chitt. Archb. pt. i. p. 823*.

Pending an interpleader issue, the sheriff cannot be compelled to make his return immediately: *Angell v. Baddeley*, 3 Ex. Div. 49.

Since the Jud. Acts came into operation (Nov. 1875) no particular return day has been inserted in writs of attachment issued out of the Central Office. The form of that writ given in R. S. C. Appx. H., Form 12, does not suggest the insertion of a date of return; but when a reasonable interval has elapsed the sheriff may be required to make a return to the writ: see *Owen v. Pritchard*, W. N. (76) 147.

The sheriff may in like manner be ordered to return the writs of *fieri facias*, *elegit*, and other writs directed to him.

For the practice as to the returns of the writs in the Q. B. and other Common Law Divisions, see Chitt. Archb. pt. i. pp. 815—822.

The seizure of land by the sheriff is complete when he delivers in execution, and is not governed by the formal return of the writ: *Re Hobson*, 33 Ch. D. 493.

### SECTION V.—SERJEANT-AT-ARMS—HABEAS CORPUS.

#### 1. *Order for Serjeant-at-Arms, on return of Attachment Non est Inventus—Gen. Ord. 7 Jan. 1870, r. 6.*

WHEREAS by an order dated &c., it was ordered, &c. [*Recite the direction required to be performed*]; Now, upon motion &c. by counsel &c., who alleged that a writ of attachment issued against the said (Deft) B. for not, &c. [*State the default*] directed to the sheriff of —, and that the said sheriff hath returned *non est inventus* thereon; and upon reading the said order, writ, and return, This Court doth order that the Serjeant-at-Arms attending this Court do apprehend the said (Deft) B., and bring him to the bar of this Court to answer his said contempt; and thereupon such further order shall be made as shall be just.

#### NOTES.

Where an attachment is issued and returned *non est inventus*, the party prosecuting will still be entitled to an order for the Serjeant-at-Arms: Ord. 7 Jan. 1870, rr. 6, 7, and 8; O. XLII. 28.

For the practice as to the Serjeant-at-Arms, and as to his powers, see Cons. Ord. 29, r. 4, and 30, rr. 1, 2; O. XLII. 1; Gen. Ord. 7 Jan. 1870, r. 6; Dan. 910; *G. v. L.*, W. N. (91) 119; 64 L. T. N.S. 732; where he was directed to deliver the person of an infant to the guardian having the right of custody under the order of the Court.

The order for the serjeant must be delivered to him, or to his deputy by the Registrar: Cons. Ord. 30, r. 2.

The same order (rr. 4, 5) abolished the former writs of execution under the Great Seal, attachment with proclamation, and writ of rebellion, which were preliminary to the order of the Court for the Serjeant-at-Arms, and the subsequent process of sequestration: See Gilb. For. Rom. 77, 166.

But where the party was proved to be abroad, the attachment was not required to be issued *pro forma* as a foundation for subsequent process: *Hodgson v. H.*, 23 Beav. 604; *Butler v. Mathews*, 19 Beav. 549; *Re East of England Bk.*, 2 Dr. & Sm. 284.

#### 2. *Order to turn over Prisoner brought up by Serjeant-at-Arms to Holloway Prison.*

THE (Deft) A. being this day brought to the bar of this Court by the Serjeant-at-Arms attending this Court to answer his contempt in not &c. [*State the default*], and still persisting in his said contempt, It is upon motion &c., ordered that the said (Deft) A. be turned over to Holloway prison, and do remain there until he shall &c. [*State what he is required to do*] clear his contempt, and this Court make other order to the contrary.

#### 3. *Order for Habeas to bring up Prisoner on his own Application.*

UPON motion &c., by counsel for the (Plt or Deft) A., who alleged that an attachment issued against him for his contempt in not &c.

[*State the default*], pursuant to the judgment [*or order*] dated &c., directed to the sheriff of &c., and that the said (Plt or Deft) A. is now a prisoner in the custody of the said sheriff; and upon reading the said judgment [*or order*] &c., This Court doth order that a writ of *habeas corpus cum causis* do issue directed to the said sheriff, at the return thereof, commanding him to bring the said (Plt or Deft) A. to the bar of this Court; whereupon such further order shall be made as shall be just.

4. *Order for Habeas to bring up Prisoner to make Application touching his Contempt.*

UPON the humble petition of S., a prisoner for contempt of Court in the prison at W., in the county of &c., this day preferred unto &c. for the reasons therein contained, it is ordered that a writ of *habeas corpus cum causis* do issue directed to the keeper of the W. prison, commanding him to bring the body of the Petr S. to the bar of this Court before the Hon. Mr. Justice —, on (Friday) the — day of —, to make any application touching his said contempt, and to be dealt with as the Court may direct.—*Re Scard*, M. R., 11 March, 1879, on petition of course.

5. *To turn over a Prisoner brought up on Habeas obtained by himself.*

(THE Deft) B. against whom a writ of attachment hath been issued for not &c. [*State contempt*], being this day brought to the bar of this Court by virtue of a writ of *habeas corpus cum causis* directed to the sheriff of &c. and issued pursuant to an order made upon the application of the said (Deft) B., It is upon motion by counsel for the said (Deft) B. ordered that the said (Deft) B. be turned over to (Holloway) prison, and do remain there until he shall [*State what he is required to do*] clear his contempt and this Court make other order to the contrary.

For the alternative order where, on being brought up, the prisoner obtains his discharge, see Form 1, *inf.* p. 411.

NOTES.

The order to turn over is made on motion of course.

Where, on the party being brought up, the matter is postponed, and a new writ is directed to issue (which, if the Court shall so direct, may be without payment of any fee), the registrar indorses the order for the habeas "Let another habeas issue, returnable on the &c., at — o'clock in the — noon of the — day of —": see O. xxxvi. 35.

A person taken to prison under an attachment need not be brought up to the bar of the Court, to be turned over to Holloway prison (substituted for Whitecross Street Prison by order of the Home Secretary under 25 & 26 V. c. 104, s. 12), but where the person in contempt himself desires to be brought before the Court in reference to his contempt, or where he has been taken to a country prison and wishes to be turned over to Holloway prison, the habeas will still be necessary: see Dan. 890.

For form of writ of *habeas corpus*, see R. S. O., Appx. J., Form 2.

If the prisoner is already imprisoned or detained in Holloway prison, the

order will remand him there: *Davies v. Nixon*, V.-C. K., 25 Nov. 1862, A. 2116.

The Court cannot grant a habeas corpus to a party to an action in custody to enable him to appear in Court merely for the purpose of arguing his case in person: *Weldon v. Neal*, 15 Q. B. D. 471; *Benns v. Moseley*, 2 C. B. N.S. 116; *Shortt's Crown Office Practice*, 366.

## SECTION VI.—SEQUESTRATION.

### (I.)—ISSUE OF SEQUESTRATION.

#### 1. *Order for Sequestration on Return of Attachment.*

WHEREAS by the judgment [or order] dated &c., it was ordered [Recite the direction required to be performed]; Now upon motion by counsel &c., who alleged that an attachment issued against (the Deft) B. for his contempt in not &c. [state the default] directed to the sheriff of —, and that the said sheriff hath returned that the said (Deft) B. is a prisoner in his custody [or, *non est inventus* thereon]; and upon reading the said judgment [or order], and the said writ and return thereon, This Court doth order, that a commission of sequestration do issue, directed to certain commissioners to be therein named, to sequester the said (Deft) B.'s personal estate, and the rents, profits, and issues of his real estate, until the said (Deft) B. shall [state the act required to be done] clear his contempt, and this Court make other order to the contrary.—See *Morgan v. Davies*, V.-C. E., 3 Dec. 1847, B. 117.

For orders for sequestration against a local board and against railway co. for breach of an injunction and for breach of an undertaking, see Chap. XXXI., "INJUNCTIONS."

For the form of the writs of sequestration, see R. S. C., Appx. H., Form 13; and for the *præcipe*, *Ib.* Appx. G., Form 6; and of the writ of *sequestrari facias de bonis ecclesiasticis* issuable upon return of the ordinary writ of *fiery facias*, see Appx. H., Form 7; and see O. XLIII. 3, 4; *Allen v. Williams*, 2 S. & G. 455; *Norton v. Pritchard*, V.-C. E., 7 Oct. 1845, B. 1568; Dan. 913, Forms (4th Ed.), p. 385.

An order for the commission of sequestration to issue is necessary if the writ of attachment has already issued, but not otherwise: *v. inf.* p. 393.

#### 2. *The like—On return of Serjeant-at-Arms Non est Inventus.*

WHEREAS by an order dated &c. it was ordered &c. [Recite direction required to be performed]: And whereas the (Deft) B. sits out all process of contempt to a Serjeant-at-Arms for not &c. [State the default] pursuant to the said order, and cannot be found to be taken thereon, as by the return of the Serjeant-at-Arms appears; And upon reading the said order and return, This Court doth order that a commission of sequestration &c. [Form 1, *sup.*]

#### 3. *The Like—on return against a Prisoner.*

WHEREAS by the judgment [or order] dated &c., it was ordered &c. [Recite the direction required to be performed]; Now upon motion &c.,

by counsel &c., who alleged &c. [*state the process of contempt issued*], that it appears by the certificate of the Governor of Holloway prison that the said (Deft) B. is a prisoner in the said prison for his said contempt, and upon reading the said judgment [*or order*] and certificate, This Court doth order that a commission of sequestration &c. [Form 1, *sup.*]

The order is made on *ex parte* motion, and on producing the Governor's certificate of the prisoner being in custody.

4. *The Like—in aid of Decree of the Arches Court—2 & 3 W. 4, c. 93, s. 2.*

UPON motion &c. by counsel for W. &c., who alleged that pursuant to the order made in this matter dated &c., a copy of the exemplification of the decree of the Arches Court of Canterbury dated &c. and of the several proceedings thereunder, has been inrolled in the rolls of the (*now* Chancery Division of the High Court of Justice) pursuant to the Act of the 2 & 3 W. 4, c. 93, s. 2, and that C. (in the said order named) has not paid the sum of £—, being the taxed costs mentioned in the said decree and the said several proceedings thereunder, It is thereupon ordered that a commission of sequestration do issue, directed to certain commissioners to be therein named, to sequester the said C.'s personal estate, and the rents, issues, and profits of his real estate until the said C. shall pay to the said W. &c. the said sum of £—, and this Court make other order to the contrary.—*Craig v. Watson*, L.JJ., 1 Aug. 1871, A. 2378.

For the preceding order in *Craig v. Watson*, to inrol the decree of the Arches Court, see Chap. XV., Sect. IV., Form 2, *sup.* p. 171. The order for sequestration was entitled in the matter of the Act as well as in the cause.

And for an order for sequestration for non-payment of costs after inrolment of a decree of the Court of Arches, see *Marriner v. Bp. of Bath and Wells*, L. C., 12 Feb. 1879, B. 379.

For order for an injunction in aid of a sequestration against a retired County Court Judge, restraining him from receiving the moneys payable to him in respect of the pension granted to him by Government, to the extent of the arrears of the instalments of the judgment debt; and for the sequestrators to receive that amount from the Treasury or Paymaster General out of the payments due in respect of the pension, and to pay over the same to the Plt, with liberty to apply at Chambers, in case of further default, for similar orders as against any future sums payable in respect of the pension, see *Willcock v. Terrell*, 3 Ex. D. 332; and see *Knight v. Bulkeley*, 4 Jur. N.S. 527; 5 *Ib.* 817.

For order against a City corporation, which had notice of the application, for payment to sequestrators of the arrears and future payments of a life annuity granted by the corporation to the Deft, see *Rees v. Williams*, V.-C. K. B., 1848, B. 1106.

#### NOTES.

#### PROCESS OF SEQUESTRATION.

By O. XLIII. 6, upon refusal or neglect, after due service of a judgment or order directing payment of money into Court or any other act in a limited

time, to obey the same, the person prosecuting the judgment shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to obtain a writ of sequestration against the estate and effects of such disobedient person; *Sprunt v. Pugh*, 7 Ch. D. 567; *Sykes v. Dyson*, 9 Eq. 228.

The rule applies to things which are to be done within a limited time, and not to things which are prohibited from being done at all, as in the case of an injunction against sewer nuisance by a corporation: *Selous v. Croydon Local Board*, 53 L. T. N.S. 209.

By the Debtors Act, 1869, s. 8, sequestration against the property of a debtor may, after the commencement of that Act, be issued by a Court of Equity in the same manner as if such debtor had been actually arrested.

By O. XLIII. 7, no sequestration for the payment of costs is to be issued unless by leave of the Court or a Judge.

Under Gen. Ord. 7 Jan. 1870, r. 6, in case the disobedient person, after he has been taken or detained in custody, persists in his disobedience, the person prosecuting shall, upon the sheriff's return of capture, be entitled to a writ of sequestration against the estate and effects of the disobedient person; and upon a return of *non est inventus* the person prosecuting shall be entitled at his option either to a commission of sequestration in the first instance or otherwise to an order for the Serjeant-at-Arms, and to such other process as he was formerly entitled to upon a return of *non est inventus* to a commission of rebellion: and see O. XLIII. 6.

A sequestration for costs was granted when it was shown that the debtor had no property other than a military pension, so that a *fi. fa.* was useless: *Snow v. Bolton*, 17 Ch. D. 433.

It is questionable whether a writ of sequestration can be properly issued to enforce a simple judgment for payment of debt: see *Ex parte Nelson, Re Hoare*, 14 Ch. Div. 41; though sequestrations have been issued in cases where no time for payment was limited.

The present practice appears to be to issue the writ, without order, only on judgments or orders for payment into Court, or performance of any other act in a limited time (O. XLII. 4; O. XLIII. 6); recovery of any property other than land or money (O. XLII. 6); and payment of money or costs within a limited time (Chan. Gen. Ord., 7 Jan. 1870, r. 3); and, by order, on judgments or orders for costs (O. XLIII. 7), and against a corporation (O. XLII. 31).

In the case of a judgment requiring the party to abstain from doing any act, the mode of enforcing a judgment to that effect being, as prescribed by O. XLII. 7, by writ of attachment or by committal, sequestration does not seem applicable (*Selous v. Croydon Local Board, sup.*); but in other cases it may be available either instead of, or upon any return to, a writ of attachment, and, as distinguished from attachment, it is also the proper remedy when the persons disobeying the order, from being members of a corporation aggregate (*v. sup.* p. 372; *Spokes v. Banbury Board*, 1 Eq. 42; *Sutton v. Barnet Board*, W. N. (77) 167; *A. G. v. Walthamstow Board*, W. N. (78) 90), or from privilege of Parliament (see Sect. VII., *inf.* p. 372), are not liable to process of attachment.

O. LII. 4, as to service of copies of affidavits (*v. sup.* p. 387), is not applicable to sequestration: *Selous v. Croydon Local Board*, 53 L. T. N.S. 209.

For form of order for sequestration against a corporation, *v. inf.* p. 631.

If the writ of attachment has been already issued, an order for the commission of sequestration must be obtained: Form 1, *sup.*

For form of writ of sequestration, see R. S. C., Appx. H., Form 13.

#### NATURE OF SEQUESTRATION.

The commission of sequestration, which is a process of contempt *in rem*, and not *in personam* (see *Tatham v. Parker*, 1 Sm. & G. pp. 513, 514), should be directed to not less than four commrs, nominated by the person prosecuting the judgment or order, and empowers the commrs to enter upon all the messuages, lands, tenements, and real estate of the person disobeying the order and in contempt, and to collect, receive, and sequester not only all the

rents and profits of such real estate, but also all his goods, chattels, and personal estate, and keep the same under sequestration until the person disobeying the order of the Court shall have cleared his contempt. For form of writ, see R. S. C., Appx. H., Form 13; Dan. Forms, p. 406.

Sequestration to compel payment into Court is not determined by the death of the person against whose property it has been issued, and proceedings may be continued against his legal pers. represves: *Pratt v. Inman*, 43 Ch. D. 175; following *Hyde v. Greenhill*, 1 Dick. 106.

For the practice before the Jud. Acts as to sequestration continuing against the heir or pers. represve, see *Burdett v. Rockley*, 1 Vern. 58, 118; *Wharam v. Broughton*, 1 Vez. 180; *Coulston v. Gardiner*, 2 Ch. Ca. 43; 3 Swa. 283, n.; Dan. 919.

Sequestration upon *mesne process*, e.g., to compel appearance or an answer, has been superseded: O. XXXI. 21, 22. For remedies on such default since the Jud. Acts, see O. XXVII.; O. XXXI. 21, 22; and see *sup.* Chap. VII., "DISCOVERY," and Chap. XII., "TRIAL AND JUDGMENT." Although the writ might be executed in a proper case (see *Goldsmith v. G.*, 5 Ha. 123, and cases there cited), it was usually only resorted to as a step to a decree *pro confesso* under the old practice.

Sequestration will issue for non-compliance by a *non compos* with an order for payment of money made against him when sane, provided the order has been served as directed by O. LXVII. 5, and O. IX. 5: *Robinson v. Galland*, W. N. (89) 108.

Where a respondent in a restitution suit was evading service of decree, and an order as to custody of children, though she was not abroad, sequestration issued without previous writ of attachment or service of the decree or order: *Allen v. A.*, 10 P. D. 187; and see *Hyde v. H.*, 13 P. Div. 166.

#### PROPERTY LIABLE TO SEQUESTRATION.

##### *Personalty:—*

All goods and chattels in the possession of the contemnor, or which can be reached by the sequestrators without suit or action, are liable to sequestration; and if the keys are denied them, the sequestrators may open boxes and rooms that are locked, to schedule the goods in them, though they may remove nothing from the house without special order of the Court: *L. Pelham v. Ds. Newcastle*, 3 Swa. 290, n.; and see Form 1, *sup.*

It has been doubted whether the books and papers of a corporation could be seized under a sequestration on *mesne process*: see *Louten v. Colchester Corp.*, 2 Mer. 395; but by 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, r. 16, sequestrators have the same power to seize books, papers, writings, or other things in the custody or power of a contemnor who has been committed for not delivering them or depositing them in Court, as they would have over the contemnor's own property.

For an order under this rule, see *Dodd v. Turnbull*, V.-C. H. at Chambers, 15 May, 1879, A. 1092.

Separate estate of a married woman is liable to sequestration: *Miller v. M.*, L. R. 2 P. & M. 54; and also dividends on a fund in Court, or other arrears of income of property to which she is entitled for her separate use without power of anticipation: *Claydon v. Finch*, 15 Eq. 266; *Hyde v. H.*, 13 P. D. 166; but not future income where she is so restrained: *Hyde v. H.*, *sup.*

A trust fund belonging to the contemnor being in Court in an admon action in the Ch. Div. was ordered to be transferred to sequestrators in an action in the Divorce Div.: *Re Slade*, S. v. *Hulme*, 18 Ch. D. 653 (and see Form, *ib.* at p. 654).

##### *Choses in Action:—*

If a third person has money or any chose in action in his hands belonging to the party against whom sequestration has issued, it may, provided the holder, who should have notice of the application, admits possession and submits to the order of the Court, be directed to be seized by the sequestrators and paid into Court: see *Wilson v. Metcalfe*, 1 Beav. 263; *Crispin v. Cuman*, L. R. 1 P. & M. 622; *Rees v. Williams*, *sup.* p. 393; *Miller v. Huddleston*, 22 Ch. D. 233 (where bankers, upon motion in the action, were

required to verify the amount of, or admit, the balance due from them and pay same into Court); and such third person's costs of appearing have been allowed: see *White v. Wood*, 7 Jur. 1123.

But if the stakeholder, or person indebted, does not consent to the order, or disputes the title of the contemnor and the amount, the Court cannot, it seems, order payment to the sequestrators: *Simmons v. L. Kinnaird*, 4 Ves. 735; *Crispin v. Cumano*, L. R. 1 P. & M. 622; *Johnson v. Chippendall*, 2 Sim. 55, 65; and see *Franklyn v. Colhoun*, 3 Swa. pp. 309, 310.

#### *Pensions:—*

Pensions granted by the Crown entirely for past services may be seized under a writ of sequestration: *Willcock v. Terrell*, 3 Ex. Div. 323; *Dent v. D.*, L. R. 1 P. & M. 366; *McCarthy v. Gould*, 1 Ba. & B. 387; *Sansom v. S.*, 27 W. R. 692; *Exp. Huggins*, 21 Ch. Div. 85.

But where the services are still being rendered, as in the case of an equerry: *Fenton v. Louther*, 1 Cox, 315; or of a naval officer on active service: *Apthorpe v. A.*, 35 W. R. 728; or may be again required, as in the case of an officer on half-pay: *M'Carthy v. Gould*, *sup.*; *Stone v. Lidderdale*, 2 Anst. 533; *Collyer v. Fallon*, 1 T. & R. 459; *Spooner v. Payne*, 1 D. M. & G. 388; the salary or half-pay cannot be sequestered; and see *Lloyd v. Cheetham*, 3 Gif. 171; nor can the pension of an officer in the army, which is rendered inalienable by the Army Act, 1881 (44 & 45 V. c. 58): *Lucas v. Harris*, 18 Q. B. Div. 127; *Birch v. B.*, 8 P. D. 163; *secus*, money received from commutation of such pension: *Crowe v. Price*, 37 W. R. 424.

Where the pension is charged on and payable out of the Consolidated Fund (15 & 16 V. c. 54, s. 5), the Court has no jurisdiction to order the Lords of the Treasury or the Paymaster General to pay the pension to the sequestrators; but the pensioner may be restrained from receiving, and the sequestrators authorized to receive it, the writ of sequestration being served on the Lords of the Treasury; but it is understood that the Treasury decline to be bound by such an order, and will exercise their discretion as to the extent to which they will recognise and act upon it *Willcock v. Terrell*, *sup.* at p. 393.

#### *Real Estate and Chattels Real:—*

Rents and profits of real estate paid in kind, or the natural produce of a farm, are liable under a sequestration and may be applied; but the land itself, whether freehold, copyhold, or leasehold, or property which passes by title and not by delivery, cannot be sold, as the writ, though it confers a right to take possession, does not transfer the land or the term to the sequestrators: *Shaw v. Wright*, 4 Ves. 22; and see *Sutton v. Stone*, 1 Dick. 187; *et inf.* (II.) p. 398.

#### *Bona Ecclesiastica:—*

Where the contemnor is a beneficed clerk, and has no lay property, a writ of *sequestrari facias de bonis ecclesiasticis* and other writs in aid may, on the commrs' return to the ordinary writ of sequestration of *nulla bona*, and that the contemnor is a beneficed clerk, be issued to the bishop of the diocese, and the benefice sequestered thereunder: *Norton v. Pritchard*, 2 Sm. & G. 455, n.; *Rabbitts v. Woodward*, 20 L. T. N.S. 693; *Braith*. 239, 242; *Dan*. 911, 913; *et v. sup.* p. 376.

As to the right of an incumbent pending sequestration to appoint a parish clerk, and as to the effect of the Sequestration Act, 1871 (34 & 35 V. c. 45), see *Lawrence v. Edwards*, (1891) 1 Ch. 144.

#### (II.) PROCEEDINGS UNDER SEQUESTRATION.

##### 1. *Order for Sequestrators to sell and pay in Proceeds—Taxation and Payment of Costs—Power to remove Effects saleable and unsaleable.*

“UPON the application of D. &c. [names], the sequestrators acting under the sequestration issued in this action on the — day of — against the Deft H., and of the Plts; and upon hearing the solrs for



the applicants, and for the Deft H.; and upon reading the order dated &c., an affidavit of &c., filed &c., Let the said [names], the sequestrators acting under the said commission, or any three or two of them, be at liberty to sell, or cause to be sold, either by public auction or private contract, the household furniture, goods, chattels, and personal estate of the said H., now at his residence situate &c., and also all the share and interest of the said H. as partner with one J. of and in all the book debts, materials, tools, implements, goods, chattels, personal estate, goodwill, and stock in trade used in the partnership business of &c. carried on by the said H. and J. at &c. aforesaid, under the style or firm of J. and H., all of which household furniture, goods, chattels, personal estate, and property are now under control of the said sequestrators; And Let, for the purpose aforesaid, the said sequestrators, or any three or two of them, be at liberty to remove the same household furniture, goods, chattels, personal estate, and property from the said residence and place of business of the said H. or elsewhere soever the same may have been deposited by or on his behalf to any convenient place in the discretion of the said sequestrators."—Sequestrators to pay proceeds into Court, and the costs of executing the writ to be taxed and paid thereout to their solrs, and the balance to be invested.—"And Let the said sequestrators, or any three or two of them, be at liberty to remove all unsaleable effects and property of the said H. from his said residence and place of business or elsewhere soever the same may have been deposited by or on behalf of the said H., to a convenient place under the control of the said sequestrators."—*Street v. Hope*, V.-C. M., 21 June, 1875, B. 1584.

For similar order, on the relator's application, and on affidavit of notice to Defts, for sequestrators to sell the effects of a corporation under a sequestration, and pay proceeds and rents and profits of realty into Court, deducting expenses, see *A. G. v. Mayor, &c. of Newbury*, M. R., 27 April, 1839, A. 882.

And for further order for the sequestrators to apply the proceeds of personalty in part satisfaction of the decree and in payment of the costs, and to pay into Court the subsequent rents, see *S. C.*, M. R., 2 Dec. 1839.

For order *ex parte* for sale, under a sequestration after a return of *non est inventus* to an attachment, of personal chattels belonging to the contemnor in the custody of third parties, and for removal of books and documents in his custody as solr to a place under the control of the sequestrators, see *Re Rush*, M. R., 10 Feb. 1870, B. 337; 19 W. R. 417; 22 L. T. N.S. 116.

## 2. *The Like*—*And to account and arrange Claims for Dilapidations, and Tenant Right*—*Application of Proceeds.*

UPON the application of the Plt, and upon hearing the solrs for the applicant, for the Deft B. and for D., the trustee in bankruptcy of the said Deft, and upon reading &c.—"Let the sequestrators acting under the commissions of sequestration issued in this cause and dated &c. sell at such convenient time or times as they may determine upon (but so that such sale be carried out on or before the — day of —), all the goods, furniture, plate, chattels, stock, implements, and personal estate of the Deft B., sequestered by them and now remaining in their pos-

session; And Let them also settle and arrange with the incoming tenant as to the amount to be paid by him in respect of the tenant rights upon the Deft's farm, and receive such amount, and give a discharge for the same, and also settle with the landlord, or his incoming tenant, all (if any) claims for dilapidations in and about the farmhouse, buildings, and lands occupied by the Deft; And Let an account be taken of the moneys received and paid by the said sequestrators under and by virtue of the said commissions, including the moneys to be received or paid in pursuance of the directions hereinbefore contained; And Let &c. [names] as such sequestrators, within — days after the filing of the chief clerk's certificate, lodge in Court as directed in the schedule hereto, the balance which shall be certified to be due from them on taking the said account; And Let the taxing master tax the costs (as between solr and client) of the Plt and Deft, and the costs, charges, and expenses of the said sequestrators properly incurred of and relating to the execution of the said commissions of sequestration, including a proper allowance to them for their time and trouble."—[Add schedule containing directions for payment of such costs &c. out of the proceeds when paid in, and for carrying over the sum mentioned in the said sequestration dated &c., to the credit of the action &c.; and payment of part of the sum of £— mentioned in the said sequestration, to the Plt, and the residue of such money to D. as the trustee in bankruptcy of the said Deft B.]—See *Re Burkill, Godfrey v. Burkill*, V.-C. M., at Chambers, 3 March, 1873, A. 721.

For orders for sequestrators to account, see *Shaw v. Wright*, L. C., 21 July, 1796, B. 650; *Const v. Barr*, 1825, A. 1285; *Kinsey v. K.*, 1769, A. 172; to tax the costs and expenses of sequestration, and the sequestrators to pass their accounts, *Bray v. Hooper*, 1784, A. 1; and for sequestrator to pass his accounts, and have an allowance for his care and trouble, *Trigge v. T.*, 1784, B. 271.

### 3. *Order for Tenants to attorn to Sequestrators.*

UPON motion &c. by counsel for the Plts, who alleged that a commission of sequestration issued on &c. against the Deft directed to A. &c., authorizing them, or any two of them, to enter upon all the real estate of the Deft, and to collect, receive, and sequester into their hands all the rents and profits thereof; and that, pursuant to the said commission of sequestration, A. and B., two of the commrs therein named, entered upon all the lands comprised in the said real estate, and situate &c., and in the holding of &c., who refuse to attorn tenants to the said commrs, as by the return of the said commrs of sequestration now produced and read appears; And upon reading an affidavit of &c. of service of notice of this application on the said (tenants) [or, and upon hearing counsel for the said (tenants)], This Court doth order, that the said (tenants) do, within — days after service of this order, attorn to and become the tenants of the said A. and B., the said commrs of sequestration, and pay their rents in arrear and growing rents to the said commrs, until further order.

The return need not be filed, but notice of the application should be given to the tenants: *Goldsmith v. G.*, 5 Ha. 123.

For such orders, see *Rowley v. Ridley*, L. C., 26 Jan. 1784, B. 153; 3 Swa. 306; 4 Ves. 738; *Hammond v. Maber*, V.-C., 25 July, 1821, A. 1740; *Duncombe v. Lewis*, V.-C. K., 2 Nov. 1853, A. 29; in which cases the order was on notice; and in *Duncombe v. Lewis* limited a time; and under O. xli. 5, the order to attorn tenant should limit a time, and may then be enforced by attachment and sequestration, or, on the return of the attachment *non est inventus*, at the option of the party prosecuting, by sequestration: O. xliii. 6; or by an order for the Serjeant-at-Arms, and subsequent process: Gen. Ord. 7 Jan. 1870, 6.

For order for sequestrators to be at liberty to let and set the real estate, see *Rees v. Williams*, V.-C. K. B., 27 April, 1848, B. 842.

For orders for tenants to attorn to receiver, see *inf.* Chap. XXXII., "RECEIVERS."

#### NOTES.

##### POWERS AND DUTIES OF SEQUESTRATORS.

Sequestrators are authorized by the writ to enter into possession of lands, &c. in the possession of the contemnor, and to receive the rents and profits of such of his estates as are in the occupation of tenants, who should be served with notice in writing to attorn and pay their arrears and growing rents to them; and upon refusal to attorn, &c., the sequestrators may upon motion obtain an order for them to attorn, &c.: see Form 3, *sup.*; *Rowley v. Ridley*, 3 Swa. 306; *S. C.*, 4 Ves. 738—740.

Sequestrators will be ordered to account for whatever comes to their hands by virtue of their office, and are bound from time to time to make returns to the Court: *Howell v. Ld. Coningsby*, 1 Fowl. Ex. Pr. 161; Dan. Ch. Pr. 920; Form 2, *sup.*

The sequestrator of a benefice was disallowed expenditure for repairs in excess of the sum estimated by the surveyor's report, under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 V. c. 43): *Kimber v. Paravicini*, 15 Q. B. D. 222.

Under a sequestration for non-performance of an order for payment of money, the proceeds of the goods seized will be applied in satisfaction of the Plt's demand: *Davis v. D.*, 2 Atk. 24.

The sequestrators ought not so to apply the proceeds on their own authority, but should pay them into Court upon leave obtained on motion: Dan. Ch. Pr. 920; or now, unless in special cases, by summons in Chambers.

Sequestrators under an interlocutory order for the non-performance of a duty have the same power as under a final judgment: *Cudell v. Smith*, 3 Swa. 308, n.; *Dunkley v. Scribner*, 2 Mad. 443.

Sequestrators abusing their powers may be committed: *Ld. Pelham v. Ld. Harley*, 3 Swa. 291, n.; and see *Sykes v. Dyson*, W. N. (70) 81.

And obstructing sequestrators is a contempt of Court: *Angel v. Smith*, 9 Ves. 336; *Ld. Pelham v. D. of Newcastle*, 3 Swa. 289, n.; and see *Franklin v. Colhoun*, 3 Swa. 276; Dan. 921.

The title of sequestrators will prevail over that of mortgagees with full notice of the proceedings: *Ward v. Booth*, 14 Eq. 195.

As to the priority of a sequestration issued by a trustee in bankruptcy, see Bankruptcy Act, 1883, s. 52 (corresponding with sect. 88 of the Act of 1869); and *Exp. Chicks, Re Meredith*, 11 Ch. Div. 731.

When necessary, a sale may, on the application of the sequestrators, be ordered:

—of rents in kind, or the natural produce of a farm: *Shaw v. Wright*, 3 Ves. 22.

—of household goods and furniture: *Mitchell v. Draper*, 9 Ves. 208.

—of a Deft's reversionary interest in a fund in Court: *Cowper v. Taylor*, 16 Sim. 314.

But sequestrators cannot sell the estates themselves, as distinguished from the profits, whether freehold, copyhold, or leasehold, as neither the estate nor the term is vested in them by virtue of the writ: see *Shaw v. Wright*, 3 Ves. 22.

The application for a sale should be made by summons in Chambers (see

*Turner v. Clifford*, W. N. (70) 199; or on motion (see *Wharam v. Broughton*, 1 Vez. 184), upon notice (*Mitchell v. Draper*, 9 Ves. 208); but where service of the notice could not be effected, an order for sale was granted upon an *ex parte* motion: *Re Rush*, 19 W. R. 417.

The execution by the sequestrators of the writ by taking possession of such parts of the lands of a Deft, who had failed to comply with an order duly registered for payment of money into Court, as were in his possession, and by procuring an attornment from the tenants of the other parts, does not constitute the Plt, by whom the writ has been issued, a creditor to whom the lands of the debtor have been actually delivered in execution, so as to entitle him to a sale of the land under 27 & 28 V. c. 112: *Johnson v. Burgess*, 15 Eq. 398; not following *Re Rush*, 10 Eq. 442; and as to the effect of the Judgment Law Acts, 1838—1864, *v. inf.* Chap. XLVII., "MORTGAGES." And the mere issuing of a sequestration against a Deft, and service of it on his debtor or trustee, did not make the Plt a secured creditor within the Bankruptcy Act, 1869: *Exp. Nelson, Re Hoare*, 14 Ch. Div. 41.

On a sequestration under a judgment, leave will be given to the sequestrators to let: *Harvey v. H.*, 4 Rep. in Ch. 49; and sequestrators in possession and in receipt of the rents and profits were allowed to let and set the estate, as there should be occasion: *Rees v. Williams*, V.-C. K. B., 27 April, 1848, B. 842; *S. C.*, *sup.* p. 393; *Neale v. Bealing*, L. C., March, 1744, B. 214; 3 Swa. 304, n.; and see *Dunkley v. Scribner*, 2 Mad. 443.

### (III.) EXAMINATION PRO INTERESSE SUO.

#### 1. Inquiry as to Claimant's Interest.

UPON motion &c., by counsel for S., of &c. [*claimant*], and upon hearing counsel for the Plts, and for the Deft; and upon reading &c. [*enter any evidence*]; This Court doth order that an inquiry be made whether the said S. hath any and what interest in the lands and hereditaments specified in the schedules to the return to the commission of sequestration issued in this action, and other the real estates comprised in the indentures dated &c. [*describe the property*] sequestered by &c., the sequestrators acting under the said commission of sequestration, or any and what part thereof; And it is ordered that this motion do stand over until after the chief clerk shall have made his certificate of the result of the said inquiry (but this order is to be without prejudice to any question as to the rents of the said lands &c.).—Liberty to apply.—*Allon v. Harrison*, V.-C. S., 22 June, 1869, A. 1740.

For like order, see *Jacob v. De Morgan*, M. R., 1 Feb. 1878, A. 222.

For order under former practice for claimant to come in and be examined, see *Hamlyn v. Ley*, L. C., 12 Feb. 1743, A. 194; 1 Dick. 94; 3 Swa. 301, n.; for order of reference to see if title made out, *S. C.*, M. R., 9 June, 1743, A. 474; for final order, with declaration in favour of claimant, *Cooper v. Thornton*, L. C., 22 July, 1738, A. 629; 1 Dick. 73.

#### 2. The Like—On Motion that the Sequestrators withdraw, and for Damages, and Cross Motion that they sell.

UPON motion &c., by counsel for S. of &c., and H. of &c. (*claimants*), that the sequestrators might be discharged and ordered to withdraw from possession, and for an inquiry as to damage, and that the Plts might be ordered to pay the amount of such damage, or for an inquiry as to the claimant's interest; and upon hearing counsel for the Plts

and the Deft H.; and upon motion &c., by counsel for the Plts &c. that the said sequestrators might sell the several goods, chattels &c., and articles of personalty in and about the house &c., situate &c., sequestered by the said sequestrators; and upon hearing counsel for the Deft H.; and upon reading &c., This Court doth order that an inquiry be made whether the said S. and H. (*claimants*) have any and what interest in the several goods, chattels &c., and articles of personalty in and about the house &c., situate &c., sequestered by the said sequestrators, or any and what part thereof; and also in the lands and hereditaments comprised in the indenture dated &c.—Rest of motion to stand adjourned until after the result of the inquiry.—*Alton v. Harrison*, V.-C. S., 28 Jan. 1869, A. 262.

3. *Sequestrators to withdraw upon Undertaking by Claimant as to Damages, to keep an Account, and to allow Sequestrators to take Inventory—Inquiry.*

UPON motion &c., that sequestrators withdraw, and for inquiry as to damage and claimant's interest; And the said H. [*claimant*] by his counsel at the bar undertaking to permit the sequestrators acting under the commission of sequestration issued in these actions on the — day of — to take an inventory of the stock in trade, chattels, and effects in and about the warehouse &c., situate &c., sequestered by the said sequestrators, and also not to deal with or dispose of any of the said stock in trade &c., except in the ordinary course of business, and to keep an account of all moneys he shall receive and pay in respect of the said stock in trade &c., and of any disposition thereof in the ordinary course of business, and also submitting to be bound by any order this Court may make as to damages, or with respect to the proceeds of any of the stock in trade &c. dealt with in the ordinary course of business, and to restore possession of the said warehouse &c., if this Court should so order, Let such inventory be taken accordingly; And Let the said sequestrators withdraw from possession of the said stock in trade &c., and also from all interference with the said premises, goods, chattels, and effects, until the inquiry hereinafter directed has been answered, or until further order; And Let an inquiry be made whether the applicant is in any and what manner interested in the said premises, stock in trade, &c., or any and what part or parts thereof.—Rest of motion to stand over until after the result of the inquiry.—*Alton v. Harrison*, V.-C. S., 11 Jan. 1869, A. 112.

The inquiry in this case was directed before the return, on a sufficient case being shown by the affidavits in support of the application: see Dan. 922.

4. *Declaration that Claimants have an Interest against which Sequestrators cannot hold—Direction to withdraw—Costs.*

UPON the application of &c. [*claiming as mortgagees*] to vary the chief clerk's certificate adjourned into Court, and upon the adjourned

motion &c.; Let the said certificate, so far as it is thereby certified that the applicants have not any interest in the several goods, chattels &c., and articles of personalty in and about the house &c., situate &c., sequestered by the said sequestrators, nor in the lands and hereditaments comprised in the indenture dated &c., be varied, And Declare that the said (*claimants*) have under and by virtue of the said indenture an interest in the said several goods &c., and articles of personalty, lands, and hereditaments, against which the said sequestrators cannot hold; And Let the said sequestrators withdraw from the possession of the said several goods &c., and articles of personalty, and from the possession and receipt of the rents and profits of all such parts of such lands and hereditaments of which they are in possession or in receipt of the rents and profits, and they are not hereafter to receive any further rents.—Costs of claimants of this and their former applications, and of the reference, to be added to the amount due to them under their security, such costs to be taxed &c.—*Alton v. Harrison*, V.-C. S., 24 June, 1869, A. 1741; W. N. (69) 81.

## NOTES.

When any person claims to be interested in or entitled to property, whether personal or real, which has been sequestered, either he, or the party issuing the writ, may apply to the Court to direct an inquiry as to his interest therein. The application is now usually made by summons, but may be on motion.

For form of notice of motion, or summons, see Dan. Ch. Forms, p. 730 (4th ed.).

The examination and inquiry as to the title of the adverse claimant is before the Judge at Chambers.

In *Kaye v. Cunningham*, 5 Mad. 406, it was held that an order for the examination of a party *pro interesse suo* could only be made upon his application or by his consent; but the current of cases is not in favour of this decision: see *Hamblyn v. Ley*, 3 Swa. 301, n.; *Bird v. Littlehales*, 3 Swa. 300, n.; *Mitchell v. Draper*, 2 Mad. Ch. 305.

The order cannot usually be made until the return of the sequestration: for until then "it cannot appear to the Court what is sequestered": *L. Pelham v. De. Newcastle*, 3 Swa. 290, n.; but see *Alton v. Harrison*, Form 3, *sup.*

The person obtaining the order for an inquiry may be required to make an affidavit of the documents in his possession: *Alton v. Harrison*, W. N. (69) 81.

It was said that a mortgagee must always come in and be examined: *Anon.*, 6 Ves. 288; but where the right is clear, the Court will give relief, without compelling the party to be examined: *Dixon v. Smith*, 1 Swa. 457; and see *A. G. v. Mayor of Coventry*, 1 P. W. 308.

And a person cannot claim, though by an adverse title, in any other way than by coming to be examined *pro interesse suo*: *Angel v. Smith*, 9 Ves. 336; though leave to bring an ejectment has sometimes been given: see *Brooks v. Greathed*, 1 Jac. & W. 177; *Angel v. Smith*, 9 Ves. p. 340; *A. G. v. Mayor of Coventry*, 1 P. Wms. 308; or the Court, by directing an issue, has put the question of right in course of trial: *Empringham v. Short*, 3 Ha. 461.

In *Hunt v. Priest*, 2 Dick. 540, the Court refused to interfere on petition; but in *Walker v. Bell*, 2 Mad. 21, on the petition of mortgagees, directed an inquiry into their title; and on the report a further order was made.

The mode of proceeding was the same where the property was in the possession of a receiver: *Anon.*, 6 Ves. 287; *Angel v. Smith*; *Brooks v. Greathed*, *sup.*; *Oswald v. Landes*, V.-C., 25 Mar. 1840, B. 546; and in *Hammond v. Maber*, L. C., 4 Aug. 1821, A. 1905, on motion to commit a

person for ousting the receiver, he was ordered to deliver up possession and pay costs, and to go in and be examined *pro interesse suo*; and see *inf. Chap. XXXII., "RECEIVERS."*

If it shall appear that the party examined *pro interesse suo* has a title paramount to the sequestration, it will be discharged as against him, with or without costs, according to the circumstances of the case: see *A. G. v. Mayor of Coventry*, 1 P. Wms. 307, n. (citing *Gilb. For. Rom.* 80; *Wharam v. Broughton*, 1 Ves. 180); *Cooper v. Thornton*, 1 Dick. 72; and in *Copeland v. Mape*, 2 Ba. & B. 67, the goods taken having been ascertained to be the property of the person examined *pro interesse suo*, were directed to be specifically restored, with an inquiry as to damages.

Rents received by sequestrators were ordered to be paid to mortgagees who had been prevented by the sequestrators from taking possession, their title being ascertained under an examination *pro interesse suo*: *Tatham v. Parker*, 1 S. & G. 506.

The inquiry may be applied for by the guardian of an infant, or by a person in *forma pauperis*: *Dan.* 39; *Pelham v. De. Newcastle*, 3 Sw. 290, n.; *James v. Dore*, 2 Dick. 788.

For the former and present practice, see *Dan.* 921.

#### (IV.) DISCHARGE OF SEQUESTRATION.

##### *Order to Discharge Attachment and Dissolve Sequestration.*

UPON the application of &c.; and all parties, by their solrs, consenting to the following order, discharge attachment and dissolve sequestration issued against the Deft S. on &c., for not &c.; And Let the costs of the Plt and of the sequestrators of and incidental to the attachment, and the costs, charges, and expenses of and incidental to the sequestration, including their costs of the application by the mortgagees for the order dated &c. (for inquiry *pro interesse suo*), and all usual and proper allowances to the sequestrators in respect of their office, and of this application, and of and incidental thereto, be taxed (as between solr and client), in case the parties differ, and be respectively retained and paid by the sequestrators as hereinafter mentioned; And Let D. &c., the said sequestrators, withdraw from possession of the said estate of the Deft S. situate at &c., and from receipt of the rents and profits thereof within &c. from the service of this order, and within the time aforesaid give notice of their withdrawal (to the tenants) and be paid their costs thereof (to be taxed as between solr and client), and included in the costs hereinbefore directed to be taxed and retained. Sequestrators to leave accounts in Chambers, and to retain their costs, and costs, charges, and expenses when taxed or agreed to, out of the moneys in their hands; and the mortgagees consenting and abandoning the inquiry as to their interest directed by the said order, sequestrators to pay what shall be found due from them, on the balance of their account, to Deft S., within &c.; and thereupon the sequestrators to be released and discharged from all liability in respect of their office.—See *Rawlinson v. Stringer*, M. R., for V.-C. S., at Chambers, 11 Sept. 1868, B. 2507.

For the order in this case for an inquiry *pro interesse suo*, *S. C.*, 17 July, 1868, B. 2157.

## NOTES.

## SEQUESTRATION DISCHARGED.

Where the contemnor has cleared his contempt, an order for the discharge of the sequestration may be obtained on summons, or by motion, with directions for the sequestrators to withdraw from possession, and to pass their final accounts, and after retaining their costs, charges, and expenses, and any payments properly made by them, to pay the balance to the contemnor: see *Rawlinson v. Stringer*, *sup.*; Dan. 923, 925.

Where a sequestration is issued to compel payment into Court, the death of the contemnor is no ground for restraining the sequestrators from selling as previously authorized: *Pratt v. Inman*, 43 Ch. D. 175.

Unless by consent, upon discharge of the sequestration, the costs of the sequestrators will be allowed as between party and party, and not as between solicitor and client: *Re Shapland*, W. N. (74) 202; 23 W. R. 40; but the sequestrators are entitled to their expenses and proper allowances for executing the commission.

Where the contemnor desires to discharge the sequestration on the ground of irregularity of process, he should apply by motion on notice.

A sequestration is discharged by the appointment of a receiver in the same action: *Shaw v. Wright*, 3 Ves. 22; *semble*, the order appointing the receiver should discharge the sequestrators.

An order for sequestration will not be made where there has been any irregularity in the issue of an attachment under which the contemnor is already in prison: *Martin v. Kerridge*, 3 P. Wms. 241; *Re Brown*, 16 W. R. 962 (where the writ of sequestration was quashed).

But any irregularity in the issue of a sequestration may be waived by the consent of the contemnor, so as to prevent him from afterwards setting aside the sequestration: *Const v. Barr*, 2 Russ. 161 (discharging an order of V.-C., setting aside a sequestration on the ground of irregularity: *S. C.*, 2 S. & S. 452).

Where a writ of sequestration had been registered under the Land Charges Registration and Searches Act, 1888 (51 & 52 V. c. 51), s. 5, there was no power to order such registration to be vacated: *Cook v. C.*, 15 P. D. 116; but now by the Settled Land Act, 1890 (53 & 54 V. c. 69), s. 19, the registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any Judge thereof.

## SECTION VII.—SPECIAL CONTEMPTS OF COURT.

1. *Committal of the Deft, and another Person, for Obstructing the Receiver.*

UPON motion &c., by counsel for the Plts, and upon reading the judgment dated &c., an order dated &c., an affidavit of &c., filed &c., and an affidavit of service of notice of this motion on the Deft J. G.; And it appearing by the said affidavits that the Deft J. G. and W. G. her son have obstructed —, the receiver appointed in this action to receive the rents and profits of the real estates, and to collect and get in the outstanding personal estate of &c., the testator &c., pursuant to the said order dated &c., in receiving such rents and profits, and have persuaded and induced the tenants of the said estates to abstain from attorning and paying the rents of the said estates to the said — as



such receiver, and have distrained for rent upon the effects of H. a tenant on part of the said estates after the date of the said order; This Court being of opinion that the Deft J. G. and the said W. G. have, by such conduct, been guilty of a contempt of this Court, doth order that the said J. G. and W. G. do stand committed to prison for their said contempt.—*Marsh v. Goodall*, M. R., 13 Jan. 1857, B. 288.

*2. Committal of Deft and Another for Violence and abusive Language to a Person effecting Service.*

UPON motion &c., by counsel for the Plts, and upon hearing counsel for the Deft H. and for C. of &c.; and upon reading an affidavit of V., filed &c., whereby it appears that the said Deft H. and C. have assaulted and imprisoned and used violence and abusive language to the said V., a clerk in the employment of the Plt's solrs, whilst serving the said Deft H. with the (Plt's bill) in this cause [*insert any further evidence*]; And This Court being of opinion, upon consideration of the facts disclosed by the said affidavit, that the said Deft H. and the said C. have been guilty of contempt of this Court, doth order that the said Deft H. and the said C. do respectively stand committed to prison for their said contempt.—*Price v. Hutchinson*, V.-C. M., 16 Dec. 1869, B. 2992; 9 Eq. 534.

*3. Committal of a Newspaper Editor for publishing an Article reflecting on Witnesses.*

UPON motion &c., by counsel for the Defts B. and I., that R. of &c., might stand committed to prison for a contempt of this Court in printing and publishing on the — day of —, in a certain newspaper called &c., an article contained therein commencing with the words &c., and concluding with the words &c., and that the said R. might be directed to pay the costs of and occasioned by this application; and upon hearing counsel for the said R., and upon reading &c.; And this Court having taken the matter into consideration, and deeming the conduct of the said R. in printing and publishing the said article in the said newspaper called &c., a contempt of this Court, doth order that the said R. do stand committed to prison for his said contempt.—*Felkin v. Herbert*, V.-C. K., 19 Dec. 1863, A. 2359.

*4. Contemnors apologising, and Plt not insisting on Committal, Contempt condoned, on payment of Costs.*

UPON motion &c., by counsel for the Plt, that &c. [*Recite the notice*]; and upon hearing counsel for the said B. and A., and upon reading &c.; And this Court being of opinion that the said B. and A. have

committed a contempt of this Court by &c., and they now by their counsel apologising and expressing their regret for such contempt, and the Plt by his counsel not insisting on their actual committal, This Court doth order that the said B. and A. do respectively pay to the Plt J. his costs of the said motion, to be taxed &c., and doth not think fit to make any other order upon this motion.—*Jackson v. Brighton Aquarium Co.*, V.-C. M., 8 Feb. 1872, A. 287.

For the like order, see *Bigg v. Mayor of London*, V.-C. B., 17 Nov. 1870, A. 2828, Chap. XXXI., "INJUNCTIONS."

In cases of contempt by breach of an injunction, an order for actual committal is not generally pressed for or directed, the more usual order being for Deft to pay the costs of the application, though not committed. And such order, being an adjudication against him upon the question of contempt, is not an order as to costs only, so as to prevent an appeal by the Deft: see *Witt v. Corcoran*, 2 Ch. D. 69. But an appeal by the applicant will only lie where there has been some miscarriage: *Jarmain v. Chatterton*, 20 Ch. Div. 493; not where the matter is trifling and fairly within the discretion of the Court below: *Ashworth v. Outram* (2), 5 Ch. D. 943; *v. inf.* Chap. XXXVI., "APPEALS."

For an order to commit a member of parliament for writing a threatening letter to the master to influence his judgment, see *Lechmere Charlton's case*, L. C., 25 Nov. 1836, B. 34; S. C., 2 Sand. Ord. 828; 2 My. & C. 316; and for order to commit a person for writing a letter to the L. C., enclosing money; and for his subsequent discharge on submission, asking pardon, and payment of costs, the money being applied for the relief of poor prisoners in the Fleet prison, see *Re Martin*, 2 Russ. & M. 674, n.

For order *nisi* to strike solr off the roll for writing an insulting letter to the master, see *Re Keane*, Chap. XL., "SOLICITORS."

For order to commit Plt for writing a threatening letter to Deft to deter him from defending the suit, see *Smith v. Lakeman*, V.-C. S., 2 Jur. N. S. 1202; and for his discharge on paying full costs, and an apology: S. C., V.-C. S., 20 Nov. 1856, Reg. Min. M. T. 110.

For order to commit a member of parliament for removing his children from the custody of the person appointed to act as their guardian, see *Wellesley v. D. Beaufort*, L. C., 16 July, 1831, B. 1852; S. C., 2 Russ. & M. 639; and for his discharge, S. C., 20 Aug. 1831, B. 2332.

For order for serjeant-at-arms to bring infant before the Court, see Chap. XXXVIII., "INFANTS."

For order to commit a person under whose care an infant had been placed, for opposing the delivery by the officer in Court of the infant to its guardian, see *Re Kimmings*, V.-C. S., 11 July, 1853, A. 1118; and for his subsequent discharge, S. C., V.-C. S., 2 Nov. 1853, A. 1.

For orders to commit the husband for marrying a ward of Court, with inquiry as to abettors, and for discharge, *v. inf.* Chap. XXXVIII., "INFANTS."

For orders to commit for breach of an injunction, and for sequestration against a co. or public body, see Chap. XXXI., "INJUNCTIONS."

For an order for the committal of a person (native of the U. S. of America) for throwing a missile at the Judge in open Court, see *Re Cosgrave*, V.-C. M., 16 March, 1877, A. 450; and for the subsequent order for his discharge on his being placed on board a ship bound for New York, S. C., 22 Aug. 1877, A. 1717.

In a similar case of an assault by firing a pistol at the M. R. at the entrance to the Rolls House, the offender was given into the charge of the police, committed, tried and convicted for a criminal offence, and was afterwards detained at Her Majesty's pleasure as a lunatic: *Re Dodwell*, Feb. 1878.

For order that the publisher of a newspaper containing improper comments on pending proceedings should pay a fine of 50*l.*, and costs of application as between solr and client, see *Re Crown Bank*; *Re O'Malley*, 44 Ch. D. 649, 653.

## NOTES.

## SPECIAL CONTEMPTS.

In cases of special contempt it has been held that the order for committal should contain an adjudication of the contempt, and a declaration of the guilt of the party: see *Exp. Van Sandau*, 1 Ph. 445, 605; but such adjudication is not essential: *S. C., et v. inf.* Chap. XXXI., "INJUNCTIONS," s. xxii.

For contempt of subpoena, and assault on the party serving it, if established by two witnesses, the order to commit was absolute: if by one witness only, *nisi*: *Elliot v. Halmarack*, 1 Mer. 302; *Van v. Price*, 1 Dick. 91; and the course is the same where the contempt is for violence or abusive or scandalous words against the Court or the process thereof: see *Re Johnson*, 36 W. R. 51.

The power of the Court to commit to prison for contempt of Court is not affected by the Debtors Act, 1869: *Harvey v. Hall*, 11 Eq. 31; except in cases when the contempt consists in default of payment of money: *Esdaile v. Visser*, 13 Ch. Div. 421; *Micklethwaite v. Fletcher*, 27 W. R. 793; *Tilney v. Stamford*, 28 W. R. 582.

To publish, with or without comments, the statement of claim, pleadings, or evidence in any pending action or matter, or any *ex parte* or defamatory statement tending to prejudice the minds of the public against persons concerned as parties, or to prevent a fair trial, before the action, &c. is finally heard, is a contempt of Court which will be restrained by injunction (see *inf.* Chap. XXXI., "INJUNCTIONS," s. xi.), and may be punished by imprisonment or fine: *Tichborne v. Mostyn*, 7 Eq. 55, n.; *Daw v. Eley*, 1b. 49; *Re Cheltenham and Swansea Wagon Co.*, 8 Eq. 580; *Bowden v. Russell*, W. N. (77) 55; *Gen. Exch. Bk. v. Horner*, W. N. (68) 259; *Roach v. Garvan*, 2 Dick. 794; *S. C.*, 2 Atk. 469; *Re Crown Bank, Ltd.*, 44 Ch. D. 649; and such a contempt is of a "criminal" nature within sect. 47 of the Jud. Act, 1873, so that there is no appeal: *O'Shea v. O'Shea*, 15 P. Div. 59.

*Secus*, pending a winding-up petition, the issue, and distribution amongst the shareholders, of a circular stating the charges against the directors on which the petition was based: *Re London Flour Co.*, 16 W. R. 474.

So, also, it is a contempt to address public meetings, and allege that a Deft, against whom a true bill has been found, is innocent and the victim of a conspiracy: *Onslow and Whalley's case*, L. R. 9 Q. B. 219; or to advertise the intended delivery of a sermon "with special reference to the trial in which the town is so deeply interested": *Mackett v. Herne Bay Commrs.*, 24 W. R. 845; or prematurely to publish reports of an examination under the Companies Act, 1862, s. 115: *American Exchange v. Gillig*, 58 L. J. Ch. 706.

The Court refused to commit a Deft who published an accurate account of what passed in Court, and who had undertaken not to publish trade "cautions": *Buenos Ayres Gas Co. v. Wilde*, 29 W. R. 43.

Sending letters threatening exposure, using intimidating language, or publication of articles in a newspaper calculated to deter parties from prosecuting their action, or to prevent witnesses from coming forward to give their evidence, is also a contempt of Court: *Smith v. Lakeman*, 2 Jur. N.S. 1202; *Exp. Chetwynd*, 10 Jur. N.S. 1188; *Shaw v. S.*, 2 Sw. & Tr. 517; *Re Tyrone Election Petn.*, I. R. 7 C. L. 242; or slander of title of the business carried on by a receiver and manager appointed by the Court: *Helmore v. Smith*, 35 Ch. Div. 449; or to publish an advertisement offering a reward for evidence in terms tending to prejudice and discredit a petitioner for divorce: *Buller v. B.*, 13 P. D. 73; or denying charges in divorce petition, and offering reward for information which would lead to the conviction of their authors: *Brodrick v. B.*, 11 P. D. 66; but to advertise for witnesses is not *per se* a contempt: *Plating Co. v. Farquharson*, 17 Ch. Div. 49 (per Jessel, M. R., questioning *Pool v. Sacheverel*, 1 P. Wms. 675); nor advertisements, pending appeal in a patent case, for funds, on the ground that it was of general interest to the trade, and offering reward for evidence of anticipations: *S. C.*

After verdict, leave having been reserved to move for a non-suit or new trial on technical grounds, an action is not still pending so as to make the publication of any comments thereon a contempt: *Metzler v. Gounod*, 30 L. T. N.S. 264.

Defiant disobedience of a Judge in the legitimate exercise of his jurisdiction may be punished by immediate committal: *Watt v. Ligertwood*, L. R. 2 H. L. Sc. 361; as also violent conduct and abusive language to a person engaged in serving the process of the Court: *Price v. Hutchinson*, 9 Eq. 534.

Addressing a contemptuous letter to a Judge reflecting upon, or tending to interfere with, the administration of justice in his Court, is a contempt, which in the case of a solr, as an officer of the Court, renders him liable to be struck off the roll, or to suspension from practice: see *Re Keane*, *inf.* Chap. XL., "SOLICITORS;" though not punishable by this extraordinary penalty if the letter is written by the practitioner not as an officer of the Court, but in his capacity as a suitor: *Re Wallace*, L. R. 1 P. C. 283.

An action for libel against the author of a pamphlet which was published pending a motion for new trial of an action for false imprisonment, and severely censured the proceedings and course of trial in such action, is not a bar to a motion by the Plt to commit for contempt of Court in publishing the pamphlet: *Corkery v. Hickson*, I. R. 10 C. L. 174.

The warrant may be for absolute committal, and not necessarily until a fine be paid: *Reg. v. Jordan*, W. N. (88) 152.

Though a party be in contempt, he may move to discharge an adverse order: *Futvoye v. Kennard*, 2 Giff. 110, 533; or may take any steps necessary for his defence: *Fry v. Ernest*, 12 W. R. 97; 9 Jur. N.S. 1151.

As to contempt in cases of interference, or marriage without leave of the Court, with a ward, see *inf.* Chap. XXXVIII., "INFANTS."

As to the necessity of proving *scienter*, see *Lake v. Metropolitan Music Hall Co.*, 58 L. J. Ch. 513, where an application for committal in respect of comments in a newspaper on the subject-matter of an action was refused, in the absence of proof that the alleged contemnor knew of the existence of the action.

For a case in which counsel was ordered to pay costs, and committed for obstructing the course of justice by conniving at a fraud on the Court, see *Linwood v. Andrews*, 58 L. T. N.S. 612; W. N. (88) 81.

#### PRIVILEGE FROM ARREST.

Although a peer or M.P. is not liable in ordinary cases to be attached or proceeded against by any civil process involving personal arrest (see *D. Newcastle v. Morris*, L. R. 4 H. L. 661), this privilege of Parliament is no protection against arrest for a contempt of a gross or criminal nature: *Onslow and Whalley's case*, L. R. 9 Q. B. 219; *Wellesley v. D. Beaufort*; *Lechmere Charlton's case*, *sup.* p. 406; or for breach of an order against a receiver to pay money into Court: *Re Gent, Gent-Davis v. Harris*, 40 Ch. D. 190.

The privilege extends for forty days before and after prorogation or dissolution of Parliament, and although, after dissolution, the member is not re-elected: *Re Anglo-French Co-operative Society*, 14 Ch. D. 533.

Officers and attendants upon the Court, suitors and witnesses, have privilege *eundo, redeundo, et morando* for their necessary attendance, but not otherwise; and the arrest of any of them at such times of necessary attendance is a contempt of Court.

This privilege from arrest extends to witnesses and jurymen: see *Gibbs v. Phillipson*, 1 Russ. & My. 19; to parties to an action: *Andrews v. Walton*, 1 Mac. & G. 380; *Plomer v. Macdonough*, 1 D. & S. 232; to prosecutors, and also to accused persons admitted to bail and attending on their recognizances: *Gilpin v. Cohen*, L. R. 4 Ex. 131.

A solr is privileged from arrest in, and on his way to or from, Court or Judge's Chambers on business of his client: *Dodd v. Holbrook*, 11 Jur. N.S. 969; 12 Jur. N.S. 19; *Re Jewitt*, 33 Beav. 969; *Eyre v. Barrow*, 6 W. R. 767; and see *Cordery*, Solrs. 201—205; and a barrister is entitled to the same privilege: *Anon.*, 1 Y. & C. Ex. 331.

But the privilege does not extend to arrest for disobedience to an order of a punitive and disciplinary character: *Re Freston*, 11 Q. B. Div. 545; and see *Re Dudley*, 12 Q. B. Div. 44.

A bankrupt is privileged from arrest under an attachment for debt issued

pending the proceedings in bankruptcy: *Cobham v. Dalton*, 10 Ch. 665; and see *Re Deere*, 10 Ch. 650.

But a person who has been attached and committed to prison under the Debtors Act, s. 4 (3) or (4), does not by subsequent adjudication of bankruptcy acquire privilege from arrest, or become entitled to his discharge from prison: *E. Lewes v. Barnett*, 6 Ch. D. 252.

### 5. *Committal for Trial for Perjury.*

UPON the trial of this action on the — day of —, and this day before the Court, and upon reading an affidavit of the Plt, filed &c., and the Plt and W. A. having been duly sworn, and upon hearing the evidence of the Plt in his own behalf, and the evidence of the said W. A. on behalf of the Defts, taken upon their respective oral examinations, this Court being of opinion that the Plt has been guilty of wilful and corrupt perjury in his evidence given as aforesaid before this Court, and that there is a reasonable cause for the prosecution of the Plt for perjury, doth order that the Plt (*name*) be prosecuted for such perjury and be committed until the next session of oyer and terminer or gaol delivery for the county of M.; And this Court doth require the Deft (*name*) to enter into a recognizance, conditioned to prosecute, or give evidence against, the said Plt.—*S. v. W.*, V.-C. B., 19 Feb. 1877, B. 207.

### 6. *Recognizance by Person directed to prosecute.*

You [*insert the name or names, and if more than one add, and each of you*] shall acknowledge yourself [*yourselves and each of you*] to owe to our Sovereign Lady the Queen the sum of one hundred pounds [*each*] of good and lawful money of G. B., to be made and levied of your goods and chattels, lands, and tenements to the use of our said Lady the Queen, her heirs and successors; the condition of the recognizance being that if you shall appear at the next session of the Central Criminal Court to be holden in the City of London, and there prefer, or cause to be preferred, a bill of indictment for the offence of perjury against one (*name*), and there also duly prosecute such indictment, then this recognizance to be void, or else to stand in full force and virtue. *Question*.—Are you contented to be so bound? *Answer*.—I am.—*S. v. W.*, *sup*.

This is to be read by the registrar; and the obligee is not required to sign any document.

### 7. *Record of the Recognizance to prosecute.*

BE it remembered that on the — day of —, X. &c., of — (*name &c.*), personally came before me (*name and title of Judge*), and acknowledged himself [*themselves and each of them*] to owe to our Sovereign Lady the Queen the sum of £100 [*each*] of good and lawful money of G. B., to be made and levied of his [*or their*] goods and chattels, lands and tenements, to the use of our said Lady the Queen, her heirs and successors, if he [*or they*] the said (*name*) shall fail in the condition

indorsed.—Taken and acknowledged the day and year first above mentioned at Lincoln's Inn, in the county of M.

Before me,

By the Court,

(Signed) —,

(Signed and sealed), —,

— J.

Registrar.

THE condition of the within written recognizance is such that whereas one (*name*) was on the — day of —, by virtue of an Act passed in the 14 & 15 V. intituled "An Act for further improving the administration of criminal justice" directed by &c. (*name and title of Judge*), to be prosecuted for perjury at the next session of the Central Criminal Court, if therefore he the said (*name*) shall appear at the next session of the Central Criminal Court, and there prefer or cause to be preferred a bill of indictment for the offence aforesaid against the said (*name*), and there also duly prosecute such indictment, then the said recognizance to be void, or else to stand in full force and virtue.—*S. v. W., sup.*

(Signed) —, Registrar.

The recognizance is engrossed on parchment and sent to the chief clerk at the Old Bailey.

8. *Certificate signed by the Judge after the Prosecutor has been bound to enter into a Recognizance.*

I (*name and title of Judge*) do hereby certify that it appears to me that the (Plt) (*name*) has been guilty of wilful and corrupt perjury in his evidence given orally (and by affidavit) before this Court on the trial of this action, and that there is reasonable cause for the prosecution of the said (Plt) for such perjury, and that I have directed the said (Plt) to be prosecuted for such perjury, and have committed him until the next session of oyer and terminer, or gaol delivery for the county of M.; and I have required the (Def't) (*name*) to enter into a recognizance conditioned to prosecute or give evidence against the said — accordingly.—*S. v. W., V.-C. B., 19 Feb. 1877.*

(Signed) —,

— J.

This certificate is given to the prosecutor under 14 & 15 V. c. 100, so as to entitle him to costs.

9. *Appointment of Usher to take Person into Custody in absence of Tipstaff.*

I [*name and title of Judge*] do appoint (*name*) one of the ushers of my Court to execute the orders made by me in the action of &c., on this day directing that (*name*) do stand committed to — prison.

Dated &c.,

Signed —,

— J.

A prisoner committed for perjury should be sent to Holloway prison.

In the Q. B. Div., when a Deft is committed for contempt, a memorandum headed in the action in the following terms is signed by the master: "The Deft C. D. is, for contempt in disobeying an injunction made in this action by Mr. Justice —, on the — day of —, committed to the custody of the keeper of Her Majesty's gaol at Holloway, to be kept in safe custody until the further order of this Court." This is handed to the tipstaff, who leaves the same with the keeper. On the following day the order is drawn up, and a copy sent to the keeper.

## NOTES.

## COMMITTAL AND PROSECUTION FOR PERJURY.

By 14 & 15 V. c. 100, s. 19, the Judges or a Judge of the Superior Courts of Law and Equity, and other judicial persons, are empowered, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury, in any evidence given, or in any affidavit, deposition, or examination, answer, or other proceeding, made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution; and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the Court without leave; and to require any person he or they may think fit to enter into a recognizance conditioned to prosecute and give evidence against such person so directed to be prosecuted, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and on production thereof the costs of the prosecution are to be allowed by the Court before whom the person is tried, unless that Court otherwise specially directs.

These provisions were acted upon by V.-C. Bacon, in *S. v. W.*, 19 Feb. 1877: see Forms 5—8, *sup.* pp. 409, 410.

## SECTION VIII.—DISCHARGE OF CONTEMPT.

1. *Order to discharge Prisoner in Custody under Attachment upon compliance with the Order.*

UPON motion &c., by counsel for (the Deft) B., who alleged that the said B. is a prisoner in (Holloway) prison, in the custody of the sheriff of M., under an attachment issued against him pursuant to the order, dated &c., for his contempt in not [*state the default*], and that the said (Deft) B. hath since [*state the compliance*], and upon hearing counsel for the Plt, and upon reading [*if so*, an affidavit of &c., filed &c., of service of notice of this motion upon the Plt—*enter any other evidence*], This Court doth order that the said (Deft) B. be discharged out of the custody of the said sheriff as to his said contempt; And it is ordered that the said (Deft) B. do pay to the Plt A. his costs of this application, to be taxed &c.

For order to discharge a prisoner in custody for his contempt in not leaving certain accounts and a statement at Chambers pursuant to order upon payment of the Plt's costs occasioned by the said contempt, see *Re Hoggett's Estate*, *Hoggett v. H.*, M. R., 17 April, 1878, A. 705.

*2. Discharge of Prisoner in Custody for not attending to Receiver—  
Plaintiff consenting.*

UPON motion &c., by counsel for A., who alleged that the said A. is a prisoner in (Holloway) prison, as by the return of the governor of the said prison appears, for his contempt of this Court in not attending to and becoming the tenant of S., the receiver appointed in this action in respect of &c., occupied by him, situate at &c., being premises comprised in the Plt's securities, as by the order, dated &c., directed; that the said A. has since attended to and become the tenant of the Plt, and that the said A. is desirous of clearing his said contempt, and the Plt by his counsel consenting, It is ordered that the said A. be discharged out of custody as to his said contempt.—*Smith v. Keene*, V.-C. B., 4 May, 1878, B. 708.

*3. Contempt condoned, and Prisoner discharged on payment of Sum  
on Account of Costs.*

UPON motion &c. by counsel for the Deft H., who alleged that the Deft H. has been by virtue of the order, dated &c., a prisoner in (Holloway) prison since the — day of — for his contempt in the said order mentioned, and that he hath apologised for such contempt, as by his affidavit filed this day appears; and upon hearing counsel for the Plts, and upon reading the said order and affidavit, This Court doth order that the Deft H. do pay to Messrs. —, the Plt's solrs, the sum of £— on account of their costs of the said order, dated &c., and of this application; And it is ordered that upon such payment being made the Deft H. be discharged out of custody (as to his said contempt); And it is ordered that the costs of and relating to the said order and consequent thereon, and of this application, be taxed &c.; the Plts by their counsel undertaking to refund to the Deft H. the excess, if any, in case such costs when taxed shall amount to less than the sum of £—, so to be paid on account thereof; And it is ordered that the Deft H. do pay to the Plts the amount of their taxed costs, if any, beyond the said sum of £—. See *Price v. Hutchinson*, V.-C. M., 12 Jan. 1870, B. 7; *S. C.*, Sect. VII., Form 2, *sup.* p. 405.

The discharge should be limited to the particular contempt in question, because there may be other causes of detention.

*4. Discharge of Prisoner under the Debtors Act, 1878 (41 & 42  
V. c. 54).*

UPON motion &c., by counsel for the Deft B., and upon hearing counsel for the Plt, and upon reading the order dated &c., whereby it was ordered [*state direction for payment*]; the order dated &c., whereby it was ordered [*state the leave to sue out writ of attachment and the nature of the contempt*]; an affidavit of &c., filed &c., and it appearing



by the return of the sheriff of M. that the said (Deft) B. is a prisoner in Holloway prison in the custody of the sheriff of M. under a writ of attachment for his said contempt; and this Court having, pursuant to the Debtors Act, 1878, inquired into the case (and also ascertained that the said (Deft) B. is wholly unable to pay the said sum of £—), doth order that the said Deft B. be discharged out of the custody of the said sheriff of M. as to his said contempt.—See *Michell v. Malings*, V.-C. H., 6 Nov. 1878, B. 1852.

Mere inability to pay is not, in the absence of other circumstances, admitted as sufficient ground for refusing an attachment, or discharging out of custody: see *Simpson v. Bell*, *sup.* p. 386.

#### 5. *The Like Order.*

WHEREAS by an order dated the 2nd day of August, 1878, made upon the application of C., it was ordered that the said C. should be at liberty to sue out a writ of attachment against the above-named S. for his contempt in not paying to the said C. the sum of £30 for costs, as in the said order mentioned, and an attachment was accordingly issued against the said S. directed to the sheriff of Surrey, and the said sheriff hath returned that the said S. is a prisoner in Wandsworth prison under his custody; And the said S. being this day brought to the bar of this Court, by virtue of a writ of *habeas corpus* issued pursuant to an order made upon his application, dated the 11th day of March, 1879, and now moving in person that he might be discharged out of custody under the said writ of attachment; And upon hearing counsel for the said C., and upon reading the said order, an affidavit filed &c., and the return of the said sheriff of Surrey, This Court, having inquired into the case, doth order that the said S. be discharged out of the custody of the said sheriff of Surrey as to his contempt in not complying with the said order dated the 2nd day of August, 1878; And it is ordered that the said S. do pay to the said C. his costs of this application, such costs to be taxed by the taxing master.—*Re Scard*, M. R., 14 Mar. 1879, B. 476.

There is now no necessity for an order to discharge a prisoner in custody for a year under the Debtors Act, 1869, s. 4, as the writ of attachment is indorsed with a note that it does not authorize imprisonment beyond one year: *Re Edwards, Brooke v. E.*, 21 Ch. D. 230; R. S. C., Appendix H., Form 12.

#### 6. *Discharge of Order for Attachment, and Attachment for Irregularity.*

WHEREAS by an order dated &c. [*Recite order to be discharged*]; Now upon motion &c., of counsel for the (Deft) A., who alleged that a writ of attachment was issued against the said (Deft) A., pursuant to the said order directed to the sheriff of &c., and that it appears by the return of the said sheriff to the said writ, that the said A. is a prisoner in

his custody for not &c. [*state default for which the process issued*], and that the said A. is advised that the said order and writ of attachment are irregular; And upon hearing counsel for the (Plt), and upon reading the said order and return, an affidavit of &c., filed &c. [*and if so*, an affidavit of service of notice of this motion on the (Plt)], This Court doth order that the said order dated &c., be discharged, and that the writ of attachment issued in pursuance thereof be set aside, and that the said A. be discharged out of custody as to his said contempt.

For such order, see *Re Hutt*, L. J. James for V.-C. M., 6 March, 1879, A. 385; 11 Ch. Div. 165.

### 7. Discharge of Prisoner on Letter from the Home Secretary.

THIS Court having been informed by a letter from the Secretary of State for the Home Department dated &c., enclosing reports relative to the Deft F., who was committed to prison for contempt on &c., and who is now a prisoner in Her Majesty's prison at Oxford, in the custody of the sheriff of the county of Oxford under writ of attachment issued against him pursuant to an order dated &c., for his contempt in not having lodged the sum of £— in Court pursuant to the said order, and also enclosing a doctor's certificate that it would endanger the life of the said Deft if he remained in prison, and counsel for the Plts being present, Let the Deft F. be forthwith discharged out of the custody of the said sheriff on the ground of his state of ill-health; but this order is to be without prejudice to his said contempt, and the Plts are to be at liberty at any time to apply to the Court with respect to the said contempt as they may be advised.—*Scarlett v. Fletcher*, Kay, J., 7 November, 1885, B. 1386.

### NOTES.

#### DISCHARGE FROM CUSTODY.

A person who has been imprisoned for special contempt will be detained in prison until he has cleared his contempt by performing the act required and paying the costs, or by making an adequate submission, upon which the Court may think fit to release him, upon such terms as to costs or otherwise as shall seem proper.

The form of writ of attachment now in use (see R. S. C., Appx. H., No. 12) bears an indorsement giving notice to the sheriff that the writ, if issued for default in payment of money, under s. 4 of the Debtors Act, 1869, does not authorize imprisonment for any longer period than one year, and it is the duty of the sheriff to act on this direction and discharge the prisoner at the end of the year, without further order: *Re Edwards*, *Brooke v. Edwards*, 21 Ch. D. 230 (as to the mode of computation of time, see *Migotti v. Colville*, 4 C. P. D. 233). In cases not covered by the indorsement, the order of the Court for discharge must be obtained: see *Edmonson v. Keyton*, 2 Y. & C. Ex. 3; *Gray v. Campbell*, 2 Russ. & My. 223; and until such order has been obtained, the gaoler, whose duty is to obey the warrant, is not liable in damages for detaining a prisoner who is in custody under the ordinary writ of attachment: *Greaves v. Keene*, 4 Ex. D. 73; *secus* if the time of detention is expressed in the warrant of committal: *Moore v. Rose*, L. R. 4 Q. B. 486.

Unless compliance with the order or performance of the act required shall have been certified by some officer of the Court, whose certificate is received

as evidence thereof (*e.g.*, the certificate of the Paymaster), the application for discharge must, unless the party prosecuting the order (who should be served with notice) consents, be supported by affidavit.

In the case of committal for contempt in marrying a ward of Court, the contemnor will not be discharged until the certificate of solemnization of the marriage has been produced, and a settlement has been prepared and approved; but when these requisites have been complied with, he will not be kept in prison until the costs have been taxed: *Cox v. Bennett*, 31 L. T. N.S. 83.

So also in *Felkin v. Herbert*, 12 W. R. 333, the contemnor, after purging his contempt by ten days' imprisonment and a humble apology to the Court, was discharged on payment of the fees and paying a sum to be named for costs, subject to taxation, without awaiting taxation.

In cases of contempt for non-payment of money, a year's imprisonment should (*semble*) be treated as purging the contempt: *M'Combe v. Gray*, 4 L. R. Ir. 432.

A Deft who has cleared his contempt by performing the act required cannot, since the Debtors Act, 1869, be detained in prison for non-payment of the costs of his contempt: *Jackson v. Mawby*, 1 Ch. D. 87; and see *Re Jarvis, Ward v. J.*, W. N. (86) 118.

But where the committal has been for breach of an order of the Court, and payment of costs has been imposed as the condition of his discharge, mere inability to pay those costs does not purge the contempt, nor entitle him to be discharged: *Re M.*, 46 L. J. Ch. 24; *S. C. nom. S. v. L.*, W. N. (76) 220.

Inability to pay was no ground for discharging a defaulting trustee or solr who had been committed under the Debtors Act, 1869, s. 4 (3) or (4): *Ransom v. Boyd*, W. N. (77) 236; or for declining to commit in cases within these exceptions: see *Evans v. Bear*, 10 Ch. 76; *et sup.* p. 385.

But by the Debtors Act, 1878 (41 & 42 V. c. 54), in cases coming within the Debtors Act, 1869, s. 4 (3) or (4), the Court has jurisdiction to inquire into the circumstances of the case, and to grant or refuse the application for attachment or other process, or the application for discharge from arrest or imprisonment.

Under this Act (which is retrospective, and therefore extends to a trustee or solr committed before 13th Aug. 1878) a defaulting trustee already in prison under the Act of 1869, s. 4 (3), has been discharged upon inquiry into the circumstances of the case: see *Michell v. Malings*, Form 4, *sup.* p. 412; as also a solr, after three months' imprisonment, upon his making compensation to the client whose money he had misapplied: see *Re Scard*, Form 5, *sup.* p. 413; *secus*, where the conduct of the trustee was shown to have been grossly dishonest: *Re A Solicitor*, M. R., 6 Dec. 1878.

For terms of order of discharge where the contempt consisted in asserting a claim to houses, and endeavouring to take possession of them and declining to abandon claim, see *In re Maria Anna Davies*, 21 Q. B. D. 236; but as to the jurisdiction to make such order, *quere*.

#### DISCHARGE ON THE GROUND OF IRREGULARITY IN PROCESS.

Irregularity in the order on which the attachment is grounded, or in the notice of motion to commit, and *semble*, for leave to issue attachment, or in the affidavits in support, or in the issuing of the writ of attachment, are grounds for discharging an attachment, and for releasing from custody the person imprisoned.

An attachment has been discharged in the following instances:—

—where the indorsement on the copy of the order served stated that in default of payment the Deft would be liable to be arrested by the "Serjeant-at-Arms," instead of "under a writ of attachment": *Hinde v. Blake*, 5 Beav. 431; and see O. XLI. 5; but where the usual four-day order against a solr, who had not brought in his bill of costs, omitted the indorsement directed by O. XLI. 5, leave was given to serve the original order with the indorsement: *Re Bowen*, 11 W. R. 607;

—where the copy of the order on which the attachment had issued was wrongly intitled: *Re Holt*, 11 Ch. D. 168;

—where the copy of the taxing master's certificate, which had been served with an order to pay certain sums found due thereby, contained a clerical

error by omitting the word "pounds:" *Re Reynolds*, 10 W. R. 709; and see *Re v. Calvert*, 4 Tyr. 77; *Reg. v. Burgess*, 3 Nev. & P. 366;

—where the title of the affidavit of service of the order on which the attachment issued varied, though slightly, from the title of the order itself: *McKenzie v. M.*, 5 D. G. & Sm. 338;

—where execution was issued prematurely: *Bartlett v. Stinton*, L. R. 1 C. P. 483; but in this case the Court imposed terms upon the contemnor;

—where the order had been complied with, and notice of such compliance given to the Plt's solrs after issue of the writ, but before it was enforced by imprisonment: *Guy v. Hancock*, 56 L. T. N.S. 726.

Although the indorsement directed by O. XII. 5, has not been inserted, yet if the order is served a second time, properly indorsed, the attachment thereunder will hold good, though the time limited by the first order has elapsed: *Re Gregg*, 9 Eq. 137; and see *Re Belton*, 25 Beav. 368.

Where the time for payment is extended by a subsequent order, it is sufficient if the indorsement is on the first order: *Treherne v. Dale*, 27 Ch. Div. 66.

As to bringing actions at law for damages for wrongful attachment or improper use of the process of the Court, see *Goucher v. Clayton*, 14 L. T. N.S. 494; *Whitehead v. Lynes*, 34 Beav. 161. In such a case, since the Jud. Act, an inquiry as to damages might be directed in Chambers.

Applications to discharge or set aside a process of contempt, on the ground that it was irregularly issued, are made by motion on notice, and supported by affidavit (see Dan. Ch. Pr. 905), and the application must be made before there has been any waiver by the contemnor of the irregularity by compliance with the order (*e.g.*, in the case of sequestration), by permitting the sequestrators to deal with his property, by his direction and with his approbation: see *Const v. Barr*, 2 Russ. 161, 168; Dan. Ch. Pr. 907.

Although a person actually in custody on an attachment irregularly issued will not by any waiver on his part of the irregularity forfeit his right to be discharged (*Haynes v. Ball*, 4 Beav. 101), such waiver, if he is not in custody, is available in answer to his application to set aside proceedings founded on the attachment: *Needham v. N.*, 1 Ph. 640.

An order of course *ex parte* discharging an attachment and made on an insufficient affidavit was discharged so as to revive the original order for attachment: *Price v. P.*, 48 L. J. Ch. 215.

## CHAPTER XXVIII.

ORDERS RESTRAINING, CHARGING, AND ATTACHING FUNDS  
AND SECURITIES.

## SECTION I.—STOP ORDERS.

1. *Order to stay Dealing with Stock, Cash, and Dividends.*

UPON the application of A., of &c. (*assignee*), and upon hearing the solrs for the applicants and for B., of &c. (*assignor*), and upon reading an affidavit of — filed &c., and the exhibit marked A. therein referred to, and the certificate of the fund; And the applicants by their solrs submitting to be bound by O. XLVI. 12, Let no part of the £— (New Cons.), or £— cash in Court to the credit of &c., respectively, to which the said B. is (or may become) entitled, or of any interest to accrue thereon, be transferred, sold, paid out, or otherwise disposed of, without notice to the said A.

2. *The Like—Expectant Share.*

UPON the application of J., W. and C., of &c. (*assignees*), and upon hearing the solrs for the applicants and for H., of &c. (*assignor*), and upon reading an affidavit of &c., filed &c., and the exhibit marked A. therein referred to &c., and the certificate of the fund —; And the applicants by their solrs submitting to be bound by &c. (Form 1), it is ordered that no part of the £— New Cons. in Court to the credit of &c., or of the £— like anns in Court to the credit of &c., to which the said H. is (or may become) entitled expectantly on the decease of C. H., be sold, transferred, or otherwise dealt with without notice to the applicants J., W., and C.—*Re Parke*, V.-C. B., 31 July, 1876, B. 2189.

If a stop order affects capital only, and any subsequent order deals with dividends, the subsequent order need not be expressed to be “notwithstanding the said order,” but if the stop order affects A.’s share only, and the subsequent order deals with B.’s, it must be so expressed.

3. *To stay Dealing with Share of Stock and Cash.*

THE said A. by his solr submitting &c. [Form 1], Let no part or share [*or if share ascertained*, Let not the (one-third) part or share] of

the £— New Cons., or of the sum of £— cash in Court to the credit of &c., to which the said B. is (or may become) entitled, be transferred, sold, paid out, or otherwise disposed of, without notice to the said A.

*4. To stay Payment of Cash, or Dealing with Stock purchased therewith.*

THE said A. by his solr submitting &c., Let no part of the £— cash in Court to the credit of &c., to which the said B. is (or may become) entitled, be paid out except for the purchase of New Cons.; And Let no part of any anns to be purchased with the said cash be transferred, sold out, or otherwise disposed of, without notice to the said A.

*5. To stay Transfer, &c., and pay Dividends to the Assignee, during Life of Assignor.*

Restraining order as above as to stock;—[Add Payment Schedule, Form No. 1, directing “the interest, as it accrues during the life of the said B., on the said anns, to be, until further-order, paid to the said A.”]

*6. Stop Order on Cash when carried over.*

LET no part of the cash directed by the order dated &c., to be carried over to the credit of &c., to an account to be intituled &c., when so carried over, be paid out or otherwise disposed of without notice to the said P.

*7. Stop Order continued on Funds when carried over.*

DIRECTIONS for carrying over—And Let the restraint (imposed by the order dated &c.) upon the (sale), transfer or (other) disposition of the share of R. in the anns in Court to the credit of &c., without notice to — (*assignee*), be continued as to the anns to be so carried over, except so far as they are to be dealt with under this order; And notice of this order is to be given to the said — (*assignor*).—See *Re Robinson*, M. R., 11 Feb. 1865, B. 404.

*8. Like Form.*

“AND Let the said anns and cash when so carried over continue subject to the restraint imposed by the order dated &c.”—*Re Dixon*, M. R., 24 April, 1875, A. 937.

*9. Transferee to have Notice in lieu of Original Assignee.*

By consent of A. (*assignee*) and (*the applicant*) B. of &c., submitting &c. [Form 1], Let the notice required by the order dated &c. to be

given to the said A. previously to the transfer &c., be instead thereof given to the said B.—*Searle v. Sanford*, V.-C. B., at Chambers, 8 April, 1886, B. 1002.

For like orders in effect, see *Wilkinson v. Stretton*, V.-C. S., 3rd Dec. 1864, B. 2804; *Robertson v. Wynch*, M. R., in Chambers, 25 Feb. 1861, B. 382.

#### 10. Order to stay Payment of Cheque, and Payee from receiving.

USUAL undertaking as to damages, and to accept short notice of motion to discharge this order.—Let the note or cheque for £— drawn by the paymaster in favour of M., pursuant to the order dated &c., be not delivered out until after the — day of —, or until further order; And Let the said M. be restrained until after the said — day of —, or until further order, from receiving the said cheque.—*Re How*, V.-C. M., 30 Jan. 1874, A. 127.

For order to stay payment out of cheque for dividend, see *Hamilton v. Marks*, V.-C. W., 1 June, 1855, A. 1011.

For the like order, with the usual undertaking, upon the *ex parte* application of a solr who claimed a lien on the fund for his costs under 23 & 24 V. c. 127, see *Gerrard v. Dawes*, V.-C. S., 5 Nov. 1869, A. 2618; 18 W. R. B. 32.

For orders to stay payee from receiving cheques, see *Courtroy v. Vincent*, M. R., 15 Jan. 1852, A. 201; 15 Beav. 486; and see *Ford v. Robinson*, V.-C. S., 10 Jan. 1854, A. 595.

For order for production, by one of the clerks of the Acc. Gen. with whom it had been left in the office of the Acc. Gen. by the Deft's attorney, of a cheque signed by the Acc. Gen. pursuant to an order; with liberty to the sheriff, if so advised, to take the same under the writ of *feri facias* issued against the goods, &c. of the Deft, see *Watts v. Jefferyes*, L. O., 19 Feb. 1851, B. 397; 3 Mac. & G. 422; 15 Jur. 435.

#### 11. Stop Order on Documents deposited in Court.

"AND the applicant — by his solr submitting &c., and also undertaking to pay any costs, charges, and expenses, which by reason of this order having been obtained (so far as the same relates to the deeds hereinafter mentioned) shall be occasioned to any party to this action, if this Court shall so direct" [Direction for restraint on stock in Court]; "And Let none of the deeds (shares) or other documents deposited by the Deft G. with the masters of the Supreme Court pursuant to the order dated &c. be delivered out or otherwise dealt with, without notice to the said M."—See *Lang v. Griffith*, M. R., at Chambers, 5 Nov. 1870, B. 2717; for like order, *S. C.*, M. R., 11 March, 1861, B. 541.

Since Ch. Funds Ord. 16, the record and writ clerks could not, and under O. LX. 3, the masters of the Supreme Court cannot, receive negotiable securities.

#### 12. Impounding Documents at the Hearing, and Stop Order thereon.

DIRECTIONS for dismissing action with costs.—And on the application of the Deft J. W. I. for the Plt to deposit certain documents in Court, and both sides to have leave to inspect them and have copies made at

their own expense; "And the proper officer is to attend with such documents before this Court at the request of either of the parties, at the expense of the party requiring the same; And the said documents are not to be delivered out of the custody of the masters of the Supreme Court, except upon an order to be made upon the application of the Plt or the Dft J. W. I., on notice to the other of them, or their respective solrs."—See *Burns v. Irving*, V.-C. H., 24 May, 1876, A. 987.

This order must now be made in open Court; O. XLII., 33a.

### 13. Stop Order discharged.

LET the order dated &c., whereby it was ordered that the £— New Cons. in Court to the credit of this action &c., and the interest to accrue thereon, should not be transferred, paid, or otherwise disposed of without notice to A., be discharged.

### 14. The Like—on Terms as to Costs of Plts' Solicitor.

WHEREAS by an order dated &c., made upon the application of Y. and R. therein named, it was ordered that the amount of the Plts' costs when taxed, as by the order dated &c., directed, should be paid to the said R., their solr, out of the money, cash, and dividends in the said order mentioned to the credit of &c., should not be paid out to the said R. until the further order of this Court, and that such further order should not be made without notice to the said Y.; Now, upon the application of the said Y. and R., and upon hearing the applicants in person, and upon reading the said orders dated &c., and the taxing master's certificate dated &c., It is ordered that the said order dated &c., be discharged; And it appearing that the Plts' costs by the said order dated &c., directed to be taxed have been taxed at £—, It is ordered that, notwithstanding the last-mentioned order, and in substitution for the direction therein contained for payment of such costs to the said R., the said costs be paid as directed in the schedule hereto [*Add payment schedule directing £— part of the costs to be paid to Y., and the balance thereof to the said R.*].—See *Beswick v. B.*, V.-C. B., at Chambers, 19 May, 1876, A. 1170.

## NOTES.

### STOP ORDERS.

Jurisdiction to restrain by what are called "stop orders" the transfer or payment of funds or securities standing in Court in the name of the paymaster to the general credit of any cause or matter, or to the account of any person entitled in expectancy or otherwise, without notice to an assignee of the fund, or a person having a lien or charge thereon, is exercised by the Ch. Div. on the application of the assignee or incumbrancer on the fund: see O. XLVI. 12, 13. Stop orders were formerly obtained on petition; and if the assignor did not join in the petition, or consent, he must have been served: *Parsons v. Groome*, 4 Beav. 521; but not the other parties to the cause: *Glazbrook v. Gillatt*, 9 Beav. 611; and by O. XLVI. 13, service of "the petition or summons" upon the parties to the cause or matter, or upon the persons interested in any part of the moneys or securities not sought to be affected by the order is not required.

Persons who have obtained stop orders upon contingent interests in a fund



which, in the event, have never vested, are not necessary parties to and need not be served with a petition for payment out of the fund: *Vernon v. Croft*, 36 W. R. 778.

Since 15 & 16 V. c. 86, applications for stop orders, where the assignor and assignee concur, have been by summons in Chambers: *Edmondson v. Harrison*, 1 W. R. 140; and see *Lister v. Tidd*, 15 W. R. 917; and it is now settled that, even where the assignor opposes, the application, though formerly it was by petition, may be by summons: *Wrench v. Wynne*, 17 W. R. 198; *Walsh v. Wason*, 22 W. R. 676; and the costs of a petition will not be allowed: *Walsh v. Wason*, *sup.*; and the petitioner may be ordered to pay the difference between the costs of obtaining the order in Chambers and the costs of the petition: *Wellesley v. Mornington*, 41 L. J. Ch. 776.

But if the fund has been paid into Court under the Trustee Relief Act, and exceeds £1,000 (see O. L.V. 2 (5)), and there has been no prior application in the matter of the fund, a petition and not a summons is the proper form of application: *Re Toogood's Trusts*, 56 L. T. N.S. 703; *Re Day's Trusts*, 49 L. T. N.S. 499.

The title generally of the assignor, and the assignment, either by proving its execution in the regular way, or by the assignor's appearing and admitting it, must be shown: *Wood v. Vincent*, 4 Beav. 419; *Quarman v. Williams*, 5 Beav. 133; *Lambert v. Hutchinson*, 13 L. J. Ch. 336.

The stop order should express in distinct terms that it affects only the share or interest of the assignor: *Macleod v. Buchanan*, 4 D. J. & S. 265; 33 Beav. 234.

It will not be granted where there is neither any fund in Court, nor any order to bring a fund into Court: *Wellesley v. Mornington*, 11 W. R. 17; but may be where a fund of specified amount is about to be paid into Court under an order: *Shaw v. Hudson*, 48 L. J. Ch. 689.

It does not take effect until the original or an office copy has been lodged with the paymaster, but on notice of an intended application he will not immediately part with the fund.

It does not affect any other right or decide any question of title: *Lucas v. Peacock*, 9 Beav. 177; and accordingly may be made on a fund, the title to which is in dispute: *Hawkesley v. Gowun*, 12 W. R. 1100.

And though it is said, in *Lucas v. Peacock*, *sup.*, that the order need not be made "without prejudice," the order on a fund paid into Court under the Trustee Relief Act was expressed to be without prejudice to a lien for costs claimed by the trustee: *Re Blunt*, 10 W. R. 379.

It may be obtained by a judgment creditor in respect of a fund in Court in the Ch. Div. without obtaining a charging order in the division where judgment was recovered: *Shaw v. Hudson*, 48 L. J. Ch. 689; *Hopewell v. Barnes*, 1 Ch. D. 630.

A stop order on a wife's reversionary chose in action assigned by husband and wife previously to 20 & 21 V. c. 57, was limited in operation to the husband's life: *Moreau v. Polley*, 1 D. & S. 143.

Under the Married Women's Property Act, 1870 (33 & 34 V. c. 93), effect has been given by a stop order to a charge on a married woman's interest in a fund in Court, to which she was entitled for her separate use without restraint on anticipation: *Sanger v. S.*, 11 Eq. 470.

Stop orders on funds transferred into Court in lunacy will not be granted on the application of a next of kin of the lunatic, and the assignee of his expectant interest: *Re Wilkinson*, 10 Ch. 73 (overruling *Re Pigott*, 3 Mac. & G. 268; *Re Moore*, 1 Mac. & G. 103).

So long as the fund charged is in the hands of the trustees, notice to them is sufficient, but when paid into Court, and therefore no longer under their control, a stop order must be obtained in order to perfect the charge: *Pinnock v. Bailey*, 23 Ch. D. 497; and so also where part of the fund only is in Court: *Mutual Life Soc. v. Langley*, 32 Ch. Div. 460.

As to inspection and delivery out of documents impounded by the Court, see O. XLII. 33a (June, 1891).

#### PRIORITIES.

As a general rule the priorities on a fund in Court are determined by the priorities of the respective stop orders rather than by the date or nature of

the charge: *Elder v. Maclean*, 3 Jur. N.S. 283; *Swayne v. S.*, 11 Beav. 463; *Greening v. Beckford*, 5 Sim. 195; *Thomas v. Cross*, 2 Dr. & S. 423.

Accordingly an assignee who has obtained a stop order after the bankruptcy of his assignor, is entitled to priority over the trustee in bankruptcy: *Stuart v. Cokerell*, 8 Eq. 607; *Palmer v. Locke*, 18 Ch. Div. 381; or the trustees of a composition deed who have not: *Birm., &c. Co. v. Carter*, 20 W. R. 354.

An incumbrancer who has given due notice to the trustee before the fund was brought into Court will not be postponed to a subsequent incumbrancer who first obtains a stop order: *Livsey v. Harding*, 23 Beav. 141; *Brearcliff v. Dorrington*, 4 Dr. & S. 122; *Thomas v. Cross*, 2 Dr. & Sm. 423; nor can an incumbrancer, who has notice of a prior incumbrance at the time when he makes his advance, gain priority by obtaining a stop order: *Re Holmes*, 29 Ch. Div. 786; *Mutual Life Assurance Soc. v. Langley*, 32 Ch. Div. 460, 468; but the priority will not be prejudiced by notice of a prior incumbrance received after the date of the advance, and before the stop order: *Mutual Life Assurance Soc. v. Langley*, *sup.*

In *Thompson v. Tomkins*, 2 Dr. & S. 8, notice to the exor of a charge on the interest of a residuary legatee, after payment into Court of the fund (forming part of the estate), was held valid without a stop order, as against the legatee's subsequent assignees in bankruptcy: but see *Mutual Life Assurance Soc. v. Langley*, *sup.*

See also on this question *Bartlett v. B.*, 1 D. & J. 127 (deciding that the assignees in bankruptcy of A., who had obtained a stop order on a reversionary interest, were entitled in priority to A.'s mortgagee of the reversionary interest who did not obtain a stop order): *Grainge v. Warner*, 13 W. R. 883; *Day v. D.*, 1 D. & J. 144; 23 Beav. 391.

And see *Warburton v. Hill*, Kay, 470, *inf.* Sect. II., "CHARGING ORDERS"; and as to notice, *Lloyd v. Banks*, 4 Eq. 222; *Brown's Trusts*, 5 Eq. 88.

Where a fund has been carried over to a separate account it is released from the general questions in the cause, so that a stop order by a *bona fide* creditor of the person entitled to the fund may prevail over a liability of such person to the estate of the testator: *Re Eyton*, *Bartlett v. Charles*, 45 Ch. D. 458; *Re Jervoise*, 12 Beav. 209.

Equitable execution obtained by a receivership order does not require to be perfected by a stop order; and therefore where both A. and B., judgment creditors, had obtained receivership orders and stop orders, the priority obtained by A.'s prior equitable execution was not lost by B.'s stop order, second in date, having been the first formally lodged with the paymaster: *Re Galland*, W. N. (86) 96.

The priority obtained by a stop order is not affected by a subsequent distribution and carrying over the fund to a separate account: *Lister v. Tidd*, 4 Eq. 462; and see *Fish. Mort.* 609. But the restraint should be continued: see *Forms*, 7, 8, *sup.*

Such priority extends only to the charge in respect of which the stop order was obtained: *Macleod v. Buchanan*, 33 Beav. 234; 4 D. J. & S. 265.

A solr's lien on a fund in Court recovered by his exertions has priority over a stop order obtained by an assignee from the client: *Haymes v. Cooper*, 33 Beav. 431.

#### COSTS.

Parties are not entitled as a general rule and in all cases to the costs of obtaining a stop order: *Grimsby v. Webster*, 8 W. R. 725; though in that case the costs of obtaining it and of appearance were allowed.

A mortgagee is entitled to the costs of a stop order, out of the fund, where the mortgage deed authorizes him to apply to the Court, but they should be specially mentioned in the direction for taxation: *Waddilove v. Taylor*, 6 Ha. 307.

By O. XLVI. 12, the person by whom any order preventing the transfer or payment of money or securities without notice to the assignee of any person entitled in expectancy or otherwise is obtained, is to be liable, at the discretion of the Court or a Judge, to pay any costs, charges, and expenses which, by reason of such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in the particular moneys or securities.

SECTION II.—CHARGING ORDERS ON FUNDS OR SHARES, UNDER  
1 & 2 V. c. 110, AND 3 & 4 V. c. 82.1. *Order Nisi to charge Funds in Court—Interim Restraint—  
Service on Solicitor.*

LET the £— (New Cons.), in Court to the credit of &c., "The Sequestration Account," stand charged with the payment to the Petrs of the sum of £—, with interest at the rate of £4 p. c. per ann. from &c., until payment, unless the Deft W. shall, within one month after service of this order [*or, on or before &c.*] show unto this Court good cause to the contrary; And the Petrs by their counsel submitting to be bound by O. XLVI. 12, Let no part of the said New Cons. be transferred, sold out, or otherwise disposed of, without notice to the Petrs, until this order shall be made absolute or (shall be) discharged; And Let service of this order upon &c., the solrs for the Deft W., be deemed good service thereof upon the said Deft.—See *Westby v. W.*, V.-C. P., 29 April, 1852, B. 663; *S. C.*, 5 D. & S. 516.

2. *Order Absolute.*

LET the order dated &c. be made absolute; And Let the £— New Cons. in Court &c. [Form 1] stand charged with the payment to the Petrs [*names*] of the sum of £—, with interest at the rate of £4 p. c. per ann. from &c., until payment.—See *S. C.*, V.-C. S., 12 Feb. 1853, B. 441.

3. *Order Nisi as to Cash.*

UPON the application of &c. [*judgment creditors*]; And the applicants by their solr submitting to be bound &c. [Form 1], Let so much of the £—, cash in Court to the credit of &c., as may be payable to the said H. (after payment of the amounts due to the said incumbrancers) stand charged with the payment to the applicants of the said sums of £— (*judgment debt*) and £— (*costs*), payable to them by the said H. pursuant to the said judgment, and with interest thereon after the rate of £4 p. c. per ann. from the — day of —, unless &c.; And Let no part of the said sum of — cash be paid &c. (except for payment to such incumbrancers), without notice to the applicants &c., until &c.—*Re Prince, Hopewell v. Barnes*, V.-C. M., at Chambers, 19 Jan. 1876, B. 36; followed in *Brereton v. Edwards*, 21 Q. B. D. 226; 21 Q. B. Div. 488, see p. 496; *Carter v. Stadden*, 34 W. R. 363.

This order is made not under sect. 14 of 1 & 2 Vict. c. 110 (which does not apply to money), but by way of equitable execution in aid of the power given by sect. 12, to take money under *fi. fa.*; and having regard to *S. C. F. R.* 1886, r. 99, notice to the paymaster is sufficient, and a stop order is not requisite: *Brereton v. Edwards*, 21 Q. B. Div. 496, 498, 500.

4. *Order Nisi to charge Funds in Deft's Name with Plt's taxed Costs—Interim Restraint.*

LET the £— New £2 10s. p. c. Cons., standing in the books of the Bank of England, in the name of the Deft B., stand charged with the payment of the sum of £—, being the amount of the Plt's taxed costs of this action and of the action in the pleadings mentioned, by the judgment, dated &c., ordered to be paid by the Deft to the Plt, and certified by the taxing master's certificate dated &c., with interest on the said sum of £— &c. [Form 1], unless the said Deft shall, on or before &c., show unto this Court good cause to the contrary; And Let the Gov. and Co. of the Bank of England be restrained from permitting a transfer of the said New £2 10s. p. c. Consols, in the meantime, and until this order shall be made absolute or (shall be) discharged.—*Stanley v. Bond*, M. R., 12 March, 1844, B. 507; 7 Beav. 386.

The time mentioned in the order within which cause was to be shown was the 2nd November then next.

5. *Order discharged on showing Cause.*

Tax the Plt his costs of and consequent upon the application for the order dated &c., and this order; And Let the Deft B. pay to the Plt M. the amount of such costs when taxed; And upon such payment being made, Let the said order dated &c. be discharged.—*Stanley v. Bond*, M. R., 2 Nov. 1844, B. 41; 8 Beav. 50.

6. *Order Nisi charging Stock standing in Names of Defts' Trustees, with Costs—Interim Restraint.*

LET the £— New £2 10s. p. c. Cons., standing in the books of the Bank of England, in the names of &c., in trust for the Defts, stand charged with the payment of the sum of £—, being the amount of the Plt's taxed costs of this action, by the judgment dated &c. ordered to be paid by the Defts to the Plt, and certified by the taxing master's certificate dated &c., with interest at the rate of £4 p. c. per ann. on the said sum of £— from the date of the said certificate, unless the Defts shall, on or before the — day of —, show unto this Court good cause to the contrary; but this order is to be served on the said Defts at least two clear days before the said — day of —; And Let the Gov. and Co. of the Bank [Form 3, *sup.*].—See *A. G. v. Corp. Thetford*, V.-C. W., 25 April, 1860, A. 698, on motion. Order absolute, V.-C. W., 23 May, 1860, A. 1001.

7. *The Like—Charging Funds in one Cause with Sum due in another.*

LET the £— New Cons. in Court to the credit of &c. (second-mentioned) action, *S. v. B. &c.*, stand charged with the payment to H., the surviving Plt in this (the first-mentioned) action, of the sum of

£—, together with interest on the sum of £—, part thereof at the rate of £— p. c. per ann. from the — day of — to the time of payment, unless the Deft shall, within one month after service of this order [*or*, on or before the — day of —], show unto this Court good cause to the contrary; And the Plt H. by his counsel submitting &c.—Interim stop order [Form 1, *sup.*].—*L. Hastings v. Beavan*, V.-C. S., 27 March, 1855, A. 647.

For subsequent order *nisi* in the cause, charging the interest of stock in Court, in a matter under the Trustee Relief Act, which had been ordered to be paid to Deft, with the residue of the sum due to Plt, and for interim stop order, see *L. Hastings v. Beavan*, V.-C. S., 19 Dec. 1861, A. 2265; affirmed by L.JJ., 16 Jan. 1862, A. 53; 10 W. R. 206.

For order absolute charging funds in Court in one cause with costs in another, the order being entitled in both, see *Hill v. Fulbrook*, V.-C. K. in Chambers, 4 June, 1860, A. 1083.

For order *nisi* charging a share of fund in one cause with costs payable to petitioners in another, and service on the solr to be good, see *Van Spengler v. Graham*, V.-C. E., 7 May, 1847, B. 950; and for order absolute, *S. C.*, V.-C. E., 23 July, 1847, B. 1293.

For order charging shares of persons in fund in Court in one cause with costs in another, unless cause shown seven days after service, see *Wells v. Gibbs*, 22 Beav. 204.

#### 8. *The Like—and to show Cause in Chambers—and to stay Payment of Cheque.*

LET the sum of £— cash, the amount payable to W., pursuant to the order dated &c., and the chief clerk's certificate dated &c., forming part of the £— cash in Court &c., stand charged with the payment to the applicants of the sum of £—, payable to them by the said W., pursuant to the order dated &c., made in the cause of *W. v. W.* &c., unless the said W. shall on the — day of — &c., at — of the clock in the forenoon, attend at the Chambers of Mr. Justice —, situate &c., and show good cause to the contrary; but this order is to be served on the said W. at least seven clear days before the said — day of —; And the applicants by their solr submitting &c., Let no part of the said £— be paid out or otherwise disposed of until this order shall be made absolute or be discharged; And Let the note or cheque for the said £— drawn by the paymaster in favour of the said W., pursuant to the said order dated &c., be not delivered out by the paymaster until further order.—*Re Waldy, Bradshaw v. W.*, M. R. at Chambers, 9 June, 1876, B. 1566.

#### 9. *Charging Order on Shares in an Assurance Society.*

LET the eighteen shares in the U. Life Ass. Society, standing in the name of the said H., stand charged with the payment to the applicants of the sum of £— in the order dated &c., mentioned, and interest thereon at the rate of £5 p. c. per ann. from the — day of — (*date of order*), unless &c.; And Let the said U. Life Ass. Society be restrained from permitting a transfer of the said shares in the meantime, and

until this order be made absolute or be discharged.—*Re Imperial Mercantile Credit Association*, V.-C. W., 5 March, 1868, A. 566.

For charging order on shares in a building co. for costs of unsuccessful petition to wind up, see *Re Emerson, Re Planet Building Co.*, M. R. at Chambers, 30 April, 1873, A. 1051.

For order absolute charging the shares of a contributory in a joint stock bank with the amount of an unpaid call, see *Paragon and Spero Mining Co.*, V.-C. W., 14 Nov. 1861, B. 2222; 8 Jur. N.S. 11.

#### NOTES.

##### CHARGING ORDER—PROCEDURE.

By 1 & 2 V. c. 110, s. 14, as extended by 3 & 4 V. c. 82, s. 1; and by O. XLVI. 1, on the application of any judgment creditor, an order may be made by any Divisional Court, or by any Judge, charging with payment of the amount for which judgment has been recovered, and interest thereon, any Government stock, funds, or annuities, or any stock or shares in any public co. in England (whether incorporated or not) standing in the judgment debtor's name in his own right, or in the name of any person in trust for him, or (3 & 4 V. c. 82, s. 1) in the name of the Acc. Gen. (since 35 & 36 V. c. 44, s. 6, the Paymaster-General), or in which the judgment debtor has a vested or contingent interest, whether in possession, remainder, or reversion, and the dividends, interest, or annual produce of any such stock, &c. Such order entitles the judgment creditor to all such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor; but no proceedings can be taken to have the benefit of the charge until after the expiration of six calendar months from the date of the order. As to stock, &c. standing in the name of the paymaster it is provided, by 3 & 4 V. c. 82, s. 1, that no such order is to prevent the Bank of England or any other public co. from permitting any transfer of such stock, &c., or payment of the interest, &c. thereof in such manner as the Court (of Chancery) may direct, or have any greater effect than if such debtor had charged such stock, &c., or interest, &c., in favour of the judgment creditor with the amount to be mentioned in such order. The meaning of this enactment is that the charge is to be as effectual as if the debtor had power to charge, and had charged, his interest on the stock, and therefore a charging order may be valid although the judgment debtor is a lunatic: *Re Leavesley*, (1891) 2 Ch. 1.

By 1 & 2 V. c. 110, s. 15, the charging order is to be made in the first instance *ex parte* and without any notice to the judgment debtor, and should be an order to show cause only; and such order, if any Government stock, funds, or annuities, or any stock or shares in any public co. standing in the name of the judgment creditor in his own right or in the name of any person in trust for him, are to be affected by such order, shall restrain the Bank of England or the public co. from permitting a transfer thereof in the meantime and until such order shall be made absolute or be discharged. If after notice of such order to the persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the order shall be discharged or made absolute, such corporation or person shall permit any such transfer to be made, then and in such case the corporation or person so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment. No disposition of the judgment debtor in the meantime shall be valid as against the judgment creditor; and unless the debtor shall within a time to be mentioned in such order show cause to the contrary, the order shall, after proof of notice thereof to the debtor, his attorney, or agent, be made absolute; provided that the Judge shall, on application of the judgment debtor, or any person interested, have full power to discharge or vary such order and to award such costs upon such application as he may think fit.

By O. XLVI. 1, an order charging stock or shares may be made by any Divisional Court, or by any Judge, and the proceedings for obtaining such

order shall be such as are directed, and the effect such as is provided by the above Acts, 1 & 2 V. c. 110, ss. 14, 15, and 3 & 4 V. c. 82, s. 1.

By r. 2, the writ of *distringas* under 5 V. c. 5, s. 5, is no longer to issue; and rr. 4—11 contain provisions substituting for such writ, and with the same force and effect, service by any person claiming to be interested in any stock (including shares, securities, and dividends thereon: rr. 3, 3a), standing in the books of a co. (including the Bank of England, and any other public co., whether incorporated or not: r. 3), of an office copy of the affidavit and duplicate of the notice made in form therein prescribed (R. S. C., Appx. B., Forms, 22, 27), and filed as therein directed.

By 1 & 2 V. c. 110, s. 18, the effect of judgments was extended to all decrees or orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the L. C. or of the Court of review in Chancery, and orders of the L. C. in Lunacy, whereby any sum of money, or any costs, charges, or expenses should be payable to any person; and by 27 & 28 V. c. 112, s. 2 (which enables the creditor to whom any land of his debtor shall have been actually delivered in execution to obtain upon petition a summary order for sale) the term "judgment" includes registered decrees and orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment (sect. 2); but the Act is not retrospective: *Re Isle of Wight Ferry Co.*, 11 Jur. N.S. 279.

For an order to operate as a judgment, so as to give the right to a charging order, it must be an order for payment of a specific sum of money to some person: *Dan.* 936; *Fisher on Mortgage*, 135; and a mere order for an account of what is due in respect of an annuity and payment is not, pending the account, and until the amount has been ascertained, an order for payment so as to entitle the party to a charging order: *Widgery v. Tepper*, 6 Ch. Div. 364; *Chadwick v. Holt*, 8 D. M. & G. 584; nor is the chief clerk's certificate finding money to be due, though (according to former practice) adopted by the Judge: *E. Mansfield v. Ogle*, 4 D. & J. 38; nor an order for payment of money to the credit of an action: *Ward v. Shakeshaft*, 1 Dr. & S. 269.

But a charging order may be presently made though the judgment is for payment on or before a future day named: *Bagnall v. Carlton*, 6 Ch. D. 130; *Younghusband v. Gisborne*, 1 D. & S. 209.

In order to give effect to a decree or order of the Court of Chancery a charging order might be made by a Chancery Judge: *Stanley v. Bond*, 7 Beav. 386; but in order to give effect to a judgment at law upon a fund in the Court of Chancery, the practice was first to obtain a charging order from a Common Law Judge in Chambers, and then to apply in Chancery for a stop order as ancillary to the charging order: *Miles v. Prestland*, 4 M. & Cr. 431; *Hulkes v. Day*, 10 Sim. 41; and see *Re Nowell*, 11 W. R. 897.

Under the new procedure a preliminary charging order need not be obtained by a person who has obtained judgment in another Division of the High Court before application for a stop order in the Ch. Div.: *Hopewell v. Barnes*, 1 Ch. D. 630; *Shaw v. Hudson*, 48 L. J. Ch. 689.

Sect. 14 of 1 & 2 V. c. 110, does not extend to money, and O. XLVI. 3, whereby the expression "stock" was defined as including "shares, securities, and money," has been altered (August, 1888) by substituting the words "the dividends thereon" for "money."

But by way of equitable execution, and in aid of the power conferred by sect. 12 of 1 & 2 V. c. 110, of taking money, &c. under a *fi. fa.*, a charging order can be made by a Judge of the Q. B. Div. upon cash standing to the credit of the debtor in the Ch. Div.: *Brereton v. Edwards*, 21 Q. B. Div. 488. Such an order may, in a fit case, be made *ex parte*, and notice to the paymaster is sufficient without obtaining a stop order or the appointment of a receiver: *Ib.*; and *v. sup.* Form 3.

Applications for charging orders are now usually made by summons.

A charging order need not have been intitled in any cause or matter, but was sufficiently intitled "In the matter of the Act 1 & 2 V. c. 110, and of the Act 3 & 4 V. c. 82": *L. Hastings v. Beavan*, 10 W. R. 206; but a charging order made in the Ch. Div. on a fund in Court is intitled either in the action or matter to the credit of which the fund stands.

By O. LIV. 12, applications by summons for charging orders are excepted

from the jurisdiction exercised by a master in the Q. B. Div., and by a registrar in the Probate, Divorce, and Admiralty Division.

The six months' proviso in sect. 14 does not prevent the creditor from obtaining a stop order against receipt by the debtor within the six months of dividends on the stock charged: *Watts v. Jefferyes*, 3 Mac. & G. 372.

And within this period the judgment creditor might, it seems, file a bill for protection of his interest in the fund: *Bristed v. Wilkins*, 3 Ha. 235; but payment to the judgment creditor who has obtained a charging order would not, without consent of the debtor, be ordered on petition: *Whitfield v. Prickett*, 13 Sim. 259.

By the Partnership Act, 1890, s. 23 (*v. sup.* p. 372) a judgment creditor of a partner may obtain a charging order on the interest of the partner in the partnership property and profits. The procedure under the section is now regulated by O. XLVI. 1a, 1b (June, 1891).

#### EFFECT OF CHARGING ORDER.

After the charging order has been made absolute the Court has no jurisdiction to rescind or vary it: *Drew v. Lewis*, 60 L. J. Q. B. 264; 39 W. R. 310; *Jeffreyes v. Reynolds*, 52 L. J. Q. B. 55.

A charging order, when made absolute, operates from the date of the order *nisi*, and can only be defeated by some prior charge, showing that it ought not to have been made; and a subsequent admon judgment, or order on a summons in an admon action directing payment out of a fund affected by the previous order *nisi*, will not have this effect: *Haly v. Barry*, 3 Ch. 452 (explaining *Warburton v. Hill*, Kay, 470); *Brereton v. Edwards*, 21 Q. B. Div. 488, 495; *Re Womersley*, *Etheridge v. W.*, 29 Ch. D. 557; *Re Bell*, *Carter v. Stadden*, 54 L. T. N.S. 370.

But when an assignment has been perfected by notice to the trustees before paying the fund into Court, a subsequent judgment creditor does not, by obtaining a charging order on the fund in Court, get priority over the assignee who has not obtained such order: *Re Bell*, 34 W. R. 363; 54 L. T. N.S. 370; *Brearclyff v. Dorrington*, 4 D. & S. 122.

A charging order under sect. 14 creates such an incumbrance as will determine a life interest, limited to A. until he executes some assignment or act whereby the interest may be incumbered: *Montefiore v. Behrens*, 1 Eq. 171; or "until he should do or suffer any act" whereby the dividends shall become payable to another person: *Roffey v. Bent*, 3 Eq. 759; and see *Hurst v. Hurst*, 21 Ch. D. 278; but it is an involuntary alienation: *Re Kelly's Settlement*, *West v. Turner*, 59 L. T. N.S. 494; not a contract; and therefore the incumbrancer desiring to enforce it cannot obtain leave for service out of the jurisdiction: *Moritz v. Stephen*, 36 W. R. 779.

An order *nisi* charging shares under 1 & 2 V. c. 110, s. 14, is not, as between the creditor and the debtor's trustee in bankruptcy, an "execution against the goods of a debtor" within the Bankruptcy Act, 1883, s. 45: *Re Hutchinson*, 16 Q. B. D. 515.

And a charging order against the debtor will not affect property assigned by the debtor between the date of the judgment on which the charging order was obtained and the charging order: *Scott v. L. Hastings*, 4 K. & J. 633.

And see Fish. Mort. 632; and *inf.* Chap. XLVII., "MORTGAGES."

Mere notice of the charging order, though left and entered in the pay office (formerly office of the Acc. Gen.), did not operate as a stop order to prevent a transfer of the fund; and was of no avail against a stop order on the fund afterwards obtained: *Warburton v. Hill*, Kay, 470; but now under the Jud. Acts, and S. C. F. R. 1886, r. 99, notice is sufficient, and a stop order is no longer necessary: *Brereton v. Edwards*, 21 Q. B. Div. 488.

On the question whether a charging order on stock standing in the name of a trustee in trust for the judgment debtor, gives the judgment creditor priority over a prior assignment without notice to the trustee, see *Watts v. Porter*, 3 E. & B. 743.

The opinion of the majority of the Q. B. that the assignment without notice was inoperative as against the subsequent charging order, has been



disapproved, and that of Erle, J., followed, in *Beavan v. L. Oxford*, 6 D. M. & G. 492; *Kinderley v. Jervis*, 22 Beav. 1; *Scott v. L. Hastings*, 4 K. & J. 633; *Pickering v. Ilfracombe Ry.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, *Id.* 264; *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332; *Punchard v. Tomkins*, 31 W. R. 286; *Re Bell, Carter v. Stadden*, 54 L. T. N.S. 370; *Re Leavesley*, (1891) 2 Ch. 1.

It has been held that a charging order may be made on shares standing in the name of a mere trustee: *Cragg v. Taylor*, L. R. 1 Ex. 148; *Fuller v. Earle*, 7 Ex. 796; and where the judgment debtor is not the only person beneficially interested: *S. W. Loan Co. v. Robertson*, 8 Q. B. D. 17; *Fowler v. Churchill*, 11 M. & W. 57, 323.

But it has been also held that if the judgment debtor in whose name the shares stand has no beneficial interest in them, the charging order *nisi* will not prevent a transfer: *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332.

As stated by Erle, J., in *Watts v. Porter*, 3 Ell. & Bl. 758, a judgment creditor with a charging order gets all such remedies as (and no more than) he would have been entitled to if such charge had been made in his favour by the judgment debtor; and see *Robinson, Law of Priority*, 14, 102; *Fish. on Mort.* 631; *Re Blakely Ordnance Co.*, 25 W. R. 111; *Onslow's Trusts*, 20 Eq. 677; *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332, 338; and the Court has no jurisdiction to order a sale, which can only be obtained in separate proceedings: *Leggott v. Western*, 12 Q. B. D. 287.

The interest of a legatee in the residuary produce of stocks and shares bequeathed to him, subject to a trust for payment of debts and legacies and conversion, is not an interest which can be charged by him with his judgment debt, under 1 & 2 V. c. 110, s. 14, and 3 & 4 V. c. 82, s. 1: *Dixon v. Wrench*, L. R. 4 Ex. 154. And see *Cragg v. Taylor*, L. R. 2 Ex. 131.

A charging order on a fund standing to the credit of a lunatic ought to be in form unconditional, and as to a specified amount, and not leaving the amount to be charged to be determined by the Lords Justices: *Horne v. Pountain*, 23 Q. B. D. 264.

Charging orders on stock in Court to the credit of a lunatic, worded so as not to be enforceable until his death, prevail over any claim by his administratrix: *Re Leavesley*, (1891) 2 Ch. (C. A.) 1.

A charging order upon the next accruing dividends of property settled to the separate use of a married woman with restraint on anticipation is inoperative: *Stanley v. S.*, 7 Ch. D. 589; as also a charging order in respect of a debt which is void by reason of the contractor's infancy: *Onslow's Trusts*, 20 Eq. 677; or upon a pension granted to the judgment debtor by the E. I. Co.: *Morris v. Manesty*, 7 Q. B. 674; or Government life annuities and the arrears: *Taylor v. Turnbull*, 4 H. & N. 495.

The order *nisi* could not be made absolute where the judgment debtor was dead when it was obtained: *Finney v. Hinde*, 4 Q. B. D. 102.

A bankruptcy notice was not set aside, because during the seven days of pendency the creditor had obtained a charging order on shares of the debtor, as the shares could be sold subject to notice to the creditor: *Re Sedgwick, Exp. McMurdo*, 60 L. T. N.S. 9; 37 W. R. 72.

A judgment creditor could not, by analogy to an attachment of a legal debt under the O. L. P. Act, 1854, ss. 60—67, obtain a charging order in Equity on property which, from being in the name of trustees, was a mere equitable debt to the judgment debtor: *Horsley v. Cox*, 4 Ch. 92.

Service of a charging order *nisi* on shares upon the solicitor and the broker, and also at the last address of the contributory, was held sufficient service before applying to draw up the order absolute: *The Paragon and Spero Mining Co.*, 8 Jur. N.S. 11.

And as to charging orders, see *Dan.* 934—941; *Lewin*, 806 *et seq.*; *Fish. Mort.* 130—134.

## SECTION III.—ATTACHMENT OF DEBTS.

1. *Garnishee Order Nisi.*

UPON the application of the Plts (*creditors*), and upon hearing the solrs for the applicants, and upon reading an affidavit of &c., Let all debts due and owing or accruing due from the Deft C. A. and J. S., of &c., as trustees of the will of L., late of &c. (*the garnishees*), to the said Deft C. A. (*debtor*) in respect of her share of the annual income of the estate of the said testator, be attached to answer the sum of £—, being the amount of a judgment recovered against the said Deft C. A. by the said Plts on the — day of —, under the judgment dated &c.; And Let the said Deft C. A., and the said J. S., their solrs or agents, attend before Mr. Justice —, at his Chambers in &c., on the — day of —, at 11 o'clock in the forenoon, to show cause why they should not pay to the said Plts the debt due to them from the said Deft C. A., or so much thereof as may be sufficient to satisfy the said judgment.—*Birch v. Anderton*, M. R., at Chambers, 11 Dec. 1875, A. 1822.

For like order, that “all debts due and owing or accruing due from — (*the garnishees*) to the Deft be attached to answer the sum of &c., ordered to be paid to the Plt by the said Deft,” &c., see *Gillot v. Ker*; M. R., in Chambers, 5 May, 1876, A. 743.

2. *Garnishee Order Absolute for Attachment of Debts.*

WHEREAS by an order dated &c. (*Recite former order*, Form 1)—And the applicants by their solrs attending this day, and the said C. A. and J. S. not appearing in person nor by their solr, though they have been duly served with the said order as by the affidavit of &c. appears, and upon reading &c.; It is ordered that the Deft C. A. and the said J. S., the garnishees, do pay any sum or sums of money now in their hands as trustees of the will of L., the testator &c., in respect of the interest which the said C. A. takes under the said will, to the Plts B. &c., not exceeding the said sum of £—, being the (amount of the) judgment recovered by the said Plts against the said Deft C. A., together with interest thereon at the rate of £4 p. c. per ann. until payment.

3. *Attachment of Moneys in the Hands of a Receiver on Application of a Judgment Creditor.*

UPON the application &c., It is ordered that any sum or sums of money now in the hands of the receiver payable or accruing due to the Deft E. G. be (subject to any prior incumbrances thereon) attached to answer the sum of £—, being the amount of the judgment recovered against the said Deft E. G. by the applicant on the — day of —, with interest at £4 p. c. per ann. from the date of the said judgment; And it is ordered that the said receiver do after payment of any prior incumbrances thereon pay any sum or sums of money in his hands, pay-

able or accruing due to the said Deft E. G., to the applicant, not exceeding the amount of the said judgment debt with interest.

## NOTES.

By O. XLII. 32, the party entitled to enforce a judgment or order for the recovery or payment of money may apply to the Court or a Judge for an order that the debtor liable under such judgment or order, or, in the case of a corporation, that any officer thereof be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a Judge or an officer of the Court, as the Court or a Judge shall appoint; and the Court or Judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

The examination under this rule is intended to be of the most stringent character: *Republic of Costa Rica v. Strousberg*, 16 Ch. Div. 8; *et v. sup.* p. 374.

By O. XLV. 1, "the Court or a Judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solr stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court as such Court or Judge shall appoint, to show cause why he should not pay the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order."

By r. 2, "service of an order that debts due or accruing to a debtor liable under a judgment or order shall be attached, or notice thereof to the garnishee in such manner as the Court or Judge shall direct, shall bind such debts in his hands."

By r. 3, "if the garnishee does not forthwith pay into Court the amount due from him to the debtor liable under a judgment or order, or an amount equal to the judgment or order, and does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment or order."

By r. 4, "if the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined."

By r. 5, "whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt."

By r. 6, "after hearing the allegations of any third person under such order as in r. 5 mentioned, and of any other person whom by the same or any subsequent order the Court or Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable."

By r. 7, "payment made by or execution levied upon the garnishee under

any such proceeding as aforesaid shall be a valid discharge to him as against the debtor, to the amount paid or levied, although such proceedings may be set aside, or the judgment or order reversed."

By r. 8, "there shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer."

By r. 9, "the costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge."

By O. XLVIII. (June, 1891), r. 9, debts owing from a firm carrying on business within the jurisdiction may be attached under O. XLV., although one or more members of such firm may be resident abroad: provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

With the exception of r. 4, which is varied from s. 64, these rules are in substance identical with the garnishee clauses which were introduced as a new remedy against the property of the judgment debtor by the C. L. P. Acts, 1854 (17 & 18 V. c. 125), ss. 60—67; 1860 (23 & 24 V. c. 126), ss. 29, 30; both repealed by 46 & 47 V. c. 49.

The object of sect. 61 (corresponding with r. 1), was to give a judgment creditor, who cannot levy upon the chattels of his debtor, a remedy against his debts by attaching both existing and accruing debts, and by enforcing the attachment by order for payment of debts as and when they become payable, making a fresh order for payment when each debt has become actually payable: *Tapp v. Jones*, L. R. 10 Q. B. 591; and see *Sampson v. Seaton Ry. Co.*, *ib.* 28.

Under the former procedure the power of attaching debts was only exercised in favour of persons who had obtained judgment in a superior Court of Common Law, and not a mere order for payment in Equity: see *Exp. Financial Corp.*, L. R. 4 C. P. 155.

But this distinction has been abolished by the Jud. Acts, and any person who has obtained a judgment or order in any Division of the High Court, for the recovery or payment of money, may apply for a garnishee order, as provided by O. XLV. 1, 2.

The assignee of a judgment debt is a person who has "obtained" a judgment within O. XLV. 1, and entitled as such to a garnishee order: *Goodman v. Robinson*, 18 Q. B. D. 332.

An affidavit of information and belief is sufficient on an application for a garnishee order: *Coren v. Barne*, 22 Q. B. D. 249; *De Pass v. Capital and Industries Corporation*, (1891) 1 Q. B. (C. A.) 216, and though the affidavit specifies a particular debt the inquiry is not limited to that, but the garnishee may be called upon to deny that he owes any debt to the judgment debtor, and if he refuses to do so, an order absolute will go.

#### DEBTS CAPABLE OF BEING ATTACHED.

A debt, in order to be capable of attachment, under O. XLV. 1, 2, must be one in which the judgment debtor is beneficially interested, and for which he is in a position to sue: *Chatterton v. Watney*, 16 Ch. D. 378; and only so much of the debt can be affected as the judgment debtor can honestly deal with at the time when the garnishee order is obtained: *Davis v. Freethy*, 24 Q. B. Div. 519; *Re General Horticultural Co.*, *Exp. Whitehouse*, 32 Ch. D. 512; *Badeley v. Consolidated Bank*, 38 Ch. Div. 238; and see *Hancock v. Smith*, 41 Ch. Div. 456.

A merely conditional debt, which may or may not become due, cannot be attached, e.g., a claim for compensation money under a notice to treat: *Richardson v. Elmit*, 2 C. P. D. 9; *Howell v. Met. Dist. Rail. Co.*, 19 Ch. D. 508; or income arising from a trust fund which has not come to the hands of the trustee: *Webb v. Stenton*, 11 Q. B. Div. 518; and per Brett, L. J., "accruing debt" means no more than *debitum in presenti solvendum in futuro*: *S. C.*; or a legacy settled by the legatee before the garnishee order, though the

settlement be impeachable: *Vyse v. Brown*, 13 Q. B. D. 199; and see *Re Hayson*, *Booth v. Trail*, 12 Q. B. D. 8, 10.

Salary accruing is not a "debt owing or accruing" capable of being attached: *Hall v. Pritchett*, 3 Q. B. D. 215; *Jones v. Thompson*, E. B. & E. 63; *secus*, a sum already accrued due in respect of a superannuation pension to a retired police constable: *Booth v. Trail*, *sup.*

As to the effect of the Wages Attachment Abolition Act, 1870 (33 & 34 V. c. 30), see *Gordon v. Jennings*, 9 Q. B. D. 45; *Booth v. Trail*, *sup.*; and that the pay of an officer on service in the army or navy cannot be attached, see *Apthorpe v. A.*, 12 P. D. 192; 35 W. R. 728; citing *Flarty v. Odum*, 3 T. R. 681; and that an assignment of the salary of the chaplain to a workhouse and workhouse infirmary is not void as against public policy, see *Re Miram*, (1891) 1 Q. B. 594.

A debt due to A. and B. jointly cannot be attached to answer the judgment debt of A. alone: *Macdonald v. Tacquah Co.*, 13 Q. B. D. 535; questioning *Nash v. Pease*, 47 L. J. Exch. 766, where an annuity to which a widow was entitled for the maintenance of herself and her infant son was held attachable in the hands of trustees, subject to inquiry what ought to be allowed for the son's maintenance.

And proceeds of a judgment paid into a County Court are not attachable as a "debt" due from the registrar of the Court: *Dolphin v. Layton*, 4 C. P. D. 130.

Arrears of income which have accrued due to a married woman restrained from anticipation, and suing under the Married Women's Property Act, 1882, may be retained by trustees to answer costs which she has been ordered personally to pay to them: *Cox v. Bennett*, (1891) 1 Ch. (O. A.) 617, distinguishing *Re Glanville*, 31 Ch. Div. 532. A judgment against a married woman, though limited to her separate estate, is still a judgment under O. XLV. 1: *Holtby v. Hodgson*, 24 Q. B. Div. 103.

And money recovered by a married woman in an action, as damages, could be garnished, although the judgment in such action was not in fact entered until after the commencement of the garnishee proceedings: *S. C.*

As to the right to attach surplus proceeds of mortgaged property in the hands of a mortgagee, and that there can be no such right where the sale has taken place after the garnishee order, see *Chatterton v. Watney*, *sup.*; and for particular instances of debts which could or could not be attached, see *Dan.* 943—945; *Day*, C. L. P. Acts, 315; *Chitty*, Archbold, 928—933.

An equitable as well as a legal debt can now be attached: *Wilson v. Dundas*, W. N. (75) 232; also money in the hands of a receiver and payable under order of the Court to the debtor: *Cowan's Estate*, *Rapier v. Wright*, 14 Ch. D. 638.

In *Cremetti v. Crom*, 4 Q. B. D. 225, it was held that an order of dismissal with costs for want of prosecution could not be enforced by attachment of debts due to Plt.

#### EFFECT OF GARNISHEE ORDER.

It has been held that a garnishee order nisi is a right much more specific than is created by the mere delivery of a writ of execution to the sheriff: *Emanuel v. Bridger*, L. R. 9 Q. B. 286; and see *Holmes v. Tutton*, 5 E. & B. 65; but until served on the garnishee it does not create a charge: *Hamer v. Giles*, 11 Ch. D. 942.

A garnishee order has not the effect of transferring the debt, nor does it give to the person obtaining the order any right to the securities for it, or any claim to the land comprised therein: *Chatterton v. Watney*, 17 Ch. Div. 259; nor convert him into a creditor who can present a winding-up petition: *Re Combined Weighing Co.*, 43 Ch. Div. 99; nor is notice necessary to complete the title of a previous incumbrancer as against the garnishor: *Re General Horticultural Co.*, 32 Ch. D. 512; *Arden v. A.*, 29 Ch. D. 702; *Badeley v. Consolidated Bank*, 38 Ch. Div. 238.

A Scotch arrestment, being equivalent to assignment with notice, may give the arrester of calls due from Scotch shareholders priority over debenture holders who have not given notice to such shareholders: *Re Queensland Mercantile Co.*, (1891) 1 Ch. 536.

A judgment creditor who had obtained and served on the garnishee a

garnishee order *nisi* under the C. L. P. Act, 1854, s. 61, before a liquidation petition had been presented, was a creditor "holding a security" upon the property of the bankrupt within the Bankruptcy Act, 1869, s. 12: *Lowe v. Blakemore*, L. R. 10 Q. B. 485; *Emanuel v. Bridger*, L. R. 9 Q. B. 286; *Slater v. Pinder*, L. R. 6 Ex. 228; 7 Ex. 95; *Exp. Roche*, 6 Ch. 795; and see *Stevens v. Phelps*, 10 Ch. 417, 422.

A garnishee order *nisi* ought not to be made absolute if there is a reasonable suggestion that the judgment debtor is a trustee of the debt sought to be attached, but the money should be paid into Court to abide the event of inquiry: *Roberts v. Death*, 8 Q. B. Div. 319.

An order attaching a debt due from exors should show on its face that they are charged in their representative capacity: *Burton v. Roberts*, 29 L. J. Ex. 484; and see *Stevens v. Phelps*, 10 Ch. 417.

Bankers on whom a garnishee order is served, are justified in declining to honour their customers' cheques until the order is discharged: *Rogers v. Whiteley*, 23 Q. B. D. 236.

Notwithstanding O. XLII. 22, a garnishee may be ordered to pay although more than six years have elapsed since the judgment: *Fellows v. Thornton*, 14 Q. B. D. 335.

Where the debt attached is the subject of an action, the judgment creditor is entitled to be added as co-Plt, but not necessarily to the conduct of the action: *Wallis v. Smith*, 51 L. J. Ch. 577; 46 L. T. N.S. 473.

Execution was allowed to issue under a garnishee order, though there was in fact no attachable debt at the time when the order was made: *Randall v. Lithgow*, 12 Q. B. D. 525.

A foreign attachment, being merely a personal process to compel appearance in an action of debt (under the custom of London in the Mayor's Court: see *London Joint Stock Bank v. London Corporation*, 5 C. P. Div. 494; *Mayor of London v. London Joint Stock Bank*, 6 App. Ca. 393; at Bristol in the Tolsey Court: see *Exp. Sear, Re Price*, 17 Ch. Div. 74), did not, when not perfected by judgment in the action before the commencement of the Debt's bankruptcy, give the creditor a charge or security on the bankrupt's property within sect. 12 of the Bankruptcy Act, 1869: *Levy v. Lovell*, 14 Ch. Div. 234, 238 (reversing 11 Ch. D. 220); *Richter v. Laxton*, 27 W. R. 214; not following *London Cotton Mills Co.*, 25 W. R. 109; and see as to the effect under this section of the issue and service of a writ of sequestration, *Exp. Nelson, Re Hoare*, 14 Ch. D. 41.

By the Bankruptcy Act, 1883, s. 45, a garnishee order or attachment of debt will not be valid as against the trustee in bankruptcy of the judgment debtor, unless completed by the receipt of the debt before the date of the receiving order: see on this section, Robson, p. 301; Yate Lee, p. 409; *Re Trehearne, Exp. Ealing Local Board*, 39 W. R. 116; 60 L. J. Q. B. 50. Actual receipt is necessary; mere payment into Court is not sufficient: *Butler v. Wearing*, 17 Q. B. D. 182; and that a garnishee order absolute is not a "final judgment" against the garnishee within sect. 4, sub-sect. 1 (g), of this Act, see *Exp. Chinery*, 12 Q. B. Div. 342.

The duties of the garnishee as to paying over the fund to the judgment creditor, where there has been an intervening adjudication in bankruptcy or registration of a deed of arrangement, are discussed in *Wood v. Dunn*, L. R. 2 Q. B. 73 (reversing L. R. 1 Q. B. 77), from which it appears that he will be protected if the payment has been made without notice of the adjudication, &c., or if with notice, under such circumstances that he was unable to get the order set aside, and payment was made to avoid levy of execution.

Payment into Court under a Judge's order operates as a discharge to the garnishee under sect. 65 of the C. L. P. Act, 1854 (corresponding with r. 7), and the subsequent execution of a composition deed will not affect the right of the judgment creditor to the fund in Court: *Culverhouse v. Wickens*, L. R. 3 C. P. 295; but if the order is not filed, the judgment creditor may have to refund to a trustee in bankruptcy of the debtor: *Exp. Smith, Re Brown*, 20 Q. B. Div. 321.

A person compelled by process to pay to the sheriff could not be called upon to pay a second time to the garnishor: *Turnbull v. Robertson*, 47 L. J. C. P. 294.

In the absence of fraud, payment by the garnishee discharges him, though the judgment is afterwards set aside: *Exp. Smith, sup.*

The effect of a garnishee order *nisi* on debts due to a co., obtained before presentation of a winding-up petition, is, upon service of the order, to bind the property in the hands of the garnishee, so as to prevent it from being handed over to the co., or, after the winding-up, to the official liquidator: *Exp. Hawkins*, 3 Ch. 787; *Re Great Ship Co.*, 4 D. J. & S. 63.

If a petition to wind up has been presented before service of a garnishee order *nisi*, the creditors' inchoate charge is defeated by the winding-up: *Stanhope, dec. Collieries Co.*, 11 Ch. Div. 160.

Sums set apart by a co. for payment of guaranteed interest to preference stockholders of another co. may, before payment, be attached by a judgment creditor of the latter: *Bouch v. Sevenoaks Rail. Co.*, 4 Ex. D. 133; and the proceeds of a call to provide for payment of a debt due by the co. may be attached in the hands of the liquidator to answer a judgment obtained against the creditor of the co.: *Exp. Turner*, 2 D. F. & J. 354.

A creditor of a testator who has, before an admon decree, obtained a garnishee order *nisi* will not be restrained from proceeding to issue execution: *Fowler v. Roberts*, 2 Giff. 226.

And see *Burton v. Roberts*, 29 L. J. Ex. 484, giving the judgment creditor in that case a rule absolute for payment of the debt by the exor, the garnishee.

But when the assets available for testator's debts have been removed out of the hands of the exors by an admon decree, a garnishee order *nisi* obtained after such decree will not be enforced against them: *Stevens v. Phelps*, 10 Ch. 417.

The attachment of a judgment debt overrides the general lien, or control, of an attorney over the judgment in respect of general costs due to him from the garnishee: *Hough v. Edwards*, 1 H. & N. 171. But the lien given to a solr by 23 & 24 V. c. 127, s. 28, upon property recovered or preserved through his instrumentality, is not prejudiced by a garnishee order attaching an amount agreed to be paid: *The Jeff. Davis*, L. R. 2 A. & E. 1; *The Leader*, *Ib.* 314; and see *Sympson v. Prothero*, 5 W. R. 814; 26 L. J. Ch. 671; *Shippey v. Grey*, 49 L. J. C. P. 524; 28 W. R. 877.

A charging order in favour of Plt's solr gave priority over a previous attachment of proceeds of a *fi. fa.* in the hands of the sheriff: *Dallow v. Garrold*, 14 Q. B. Div. 543.

A garnishee order which has been improperly obtained will not be enforced: *Leese v. Martin*, 17 Eq. 224.

And for practice as to attachment of debts, see Chitty, Archbold, 927—940.

## CHAPTER XXIX.

## INTERPLEADER.

SECTION I.—INTERPLEADER AT THE INSTANCE OF  
PRIVATE PERSON.1. *Issue directed*—O. LVII. 7.

UPON the application &c., and upon reading an affidavit of — [*enter evidence*], and upon hearing &c., Let all further proceedings in this action against the Deft be stayed; And Let the Plt and the said C. be restrained from proceeding against the said Deft to recover the &c. [*mention the property or sum in question*], for which this action is brought, or any damages for or in respect of the same; And Let the said Deft retain possession of the said &c. until further order [*or on or before &c. lodge in Court to the credit of &c. the said sum of £—*]; And Let the following issue be tried &c. [*see Forms 1 and 2, sup. p. 322*) whether the said &c. for which this action is brought is the property of the Plt [*add, if so, Adjourn &c.*].—Liberty to apply [*add Lodgment Schedule, Form No. 1*].

2. *Interpleader Order in Chambers in the First Instance—Issue directed without Jury*—O. LVII. 8.

DIRECTIONS that the Defts (*stakeholders*) lodge the sum of £—, being the subject-matter of the action, in Court, and for taxation and payment of their costs thereout, and for the investment of the residue—“And Let, upon such lodgment in Court as aforesaid being made, all further proceedings in this action be stayed as against the Defts; And Let C. (*the claimant*) be restrained from commencing any proceedings against the Defts in respect of the subject-matter of this action; And Let the following question of fact between the Plt and the said C. be tried before this Court without a jury, that is to say, ‘Whether the said sum of £— belongs to the Plt or the said C.’”—Question of costs reserved [*add Lodgment Schedule, Form No. 1*].—See *Buckmaster v. Lockhart*, M. R., at Chambers, 26 May, 1876, A. 1633.

In the Ch. Div., if the parties, on being served with a summons, appear, the order will be made in the first instance.

For like order at the instance of an assurance co., with directions for the trial of an issue before the Court without a jury between the Plt and the claimant, whether the Plt has any interest in moneys secured by policies, see *Cutler v. Reliance, &c. Assurance Co.*, M. R. in Chambers, 1 Aug. 1876, A. 2244.



3. *Order staying Proceedings against the Original Deft, and substituting the Claimant—O. LVII. 7.*

LET all further proceedings in this action against the Deft B. be stayed; And Let the said C. (*claimant*) be substituted as Deft in this action instead of the present Deft B.—Directions for bringing money into Court or for otherwise dealing with the property in question, and as to costs [see Form 2, *sup.*].

4. *Order barring Claim against the Claimant not appearing—O. LVII. 10.*

AND C. the party named in the said order dated &c., not appearing thereon to maintain or relinquish his claim as thereby directed, and having been duly served with the said orders, Let the said C. and all persons claiming from or under him be, and they are hereby, for ever barred from prosecuting the claim mentioned and referred to in the said order and the affidavit of &c. against the said Deft — his exors or admors, hereby saving nevertheless the said C.'s right or claim against the Plt. [*Add consequent directions, if any.*]

For the forms of the affidavit of Deft to obtain a rule or order for the claimant to appear at law; of the affidavit of the claimant in support of his claim; and of the affidavit of service of the rule where the third party does not appear, see Chit. Forms, 664—672.

And for the forms of orders in the Q. B. Div., see B. S. C., Appx. K., Forms 50—56a.

5. *In Case of Adverse Claims to Ship, Freight, and Earnings—Accounts and Inquiries—Costs.*

(Defts R. & Co. and S. were co-owners of the ship; S. was also ship's master; Plt chartered the ship in Dec. 1858, to take troops to India; Defts K. &c., advanced sums to R. & Co. on security of consignment of ship to their agent, and powers of attorney from R. & Co. and S. to receive freight and earnings payable on the ship's arrival; R. & Co. stopped payment and were made bankrupts; Defts F. & Co. took possession as mortgagees for supplies and outfit for the voyage, and repairs and disbursements during the voyage, paid by them for S., who had assigned his claim and shares to them, and they alleged misrepresentation; K. &c. sued Plts at law for the freight.)

“And C., the official assignee of R. & Co., by his counsel appearing and consenting to be bound by the proceedings in this action, Let the judgment dated &c. be discharged; And the Defts by their counsel respectively consenting that their respective claims to the freight and earnings in question in this action shall be dealt with and be subject to adjudication in the first-mentioned action, as between or among them, upon the evidence now before the Court, but without prejudice to their respective rights of appeal to the House of Lords on the merits, Declare, that before the bankruptcy of R. & Co. in the

pleadings mentioned, the freight and earnings in question became and was and were, as between them and the Deft S., subject to pay and discharge the costs of the outfit of the ship B. in the pleadings mentioned, for the voyage mentioned in the articles of charterparty of the — day of —, and of the repairs during the said voyage, and of the disbursements properly incurred for the said ship during the said voyage, in and for the purposes thereof, which are in the pleadings mentioned; And that such their respective rights continued down to and at the time of the said bankruptcy, and are not as against the Deft S. varied by the powers of attorney dated &c., in the pleadings mentioned, or by any dealings between R. & Co. and the Defts K. &c.; And Let the following accounts and inquiries be taken and made, that is to say,—1. An account of the whole freight and earnings of the said ship B., for the said outward voyage, including the proceeds of the sale of goods and stores, and by whom the same have been received, and how the same have been applied; 2. An inquiry, what expenditure was incurred for outfit in respect of the said voyage, and for repairs during the said voyage, and for disbursements properly incurred in or for the said ship during the said voyage for the purposes thereof; and whether any and what part of such expenditure has been defrayed, and when, and by whom, and out of what moneys, and by whom and under what circumstances provided; 3. An inquiry, whether any and what part of the costs of the said outfit, and of the said repairs and disbursements remain unpaid, and who is liable for such part thereof (if any) as remains unpaid, and to whom; 4. An inquiry, what, if anything, is due to F. & Co. on their respective mortgage securities in the pleadings mentioned; 5. An inquiry, whether F. & Co. had notice of the claim in the pleadings mentioned of the Defts K. &c. at the date of their respective securities in the pleadings also mentioned, and if so, when they first had such notice.”—Direction for taxation of Plt’s costs out of fund in Court, without prejudice to the question how the same are to be ultimately borne; Other costs to be costs in the action, and question which Defts are ultimately to bear Plt’s costs reserved.—Adjourn &c. [*add Payment Schedule*, Forms 32 and 71].—See *Sec. of State, &c. for India v. Kelson*, L. JJ., 6 Aug. 1861, B. 2011, on appeal.

For form of decree where the bill was dismissed as to one policy of insurance, with costs as to the trustee to whom it ought to have been paid without question; and as to a mortgagee whose claim was not disputed; the bill to be retained as to another policy, a valid claim to which had been made, but withdrawn, Plts to have the costs relating thereto up to such withdrawal, with special directions as to such costs, see *Glynn v. Locke*, 3 D. & War. 25.

For decree in interpleader suit in Chancery by the exor of a judgment debtor making injunction for stay of execution for the judgment debt and costs perpetual, and for payment of the Plt’s costs out of the fund (judgment debt) in Court, and then the costs of the Defts, or rateably, if found insufficient, and any residue to one of the Defts, see *Jones v. Thomas*, V.-C. S., 9 Feb. 1854, A. 575; S. C., 2 Sm. & G. 186.

For order dismissing bill in Chancery suit with costs against one of three Defts, and directing payment out of money paid in on his behalf, and dissolving injunction as to that Deft, but continuing it as to the others, and

payment of Plt's other costs from fund in Court, without prejudice, and for one of the remaining Defts to prosecute the suit, see *Hoggart v. Cutts*, Cr. & P. 206.

NOTES.

INTERPLEADER GENERALLY.

The former practice in interpleader in Chancery was as follows: Where several persons claimed the same debt, duty, or property under different titles or in separate interests, and the person owing the debt or duty, or holding the property, claimed no interest himself, and was in fact a mere stakeholder, he might, if proceedings at Law or in Equity (*Prud. Assoe. Co. v. Thomas*, 3 Ch. 74), were taken by any of the claimants, or if he were harassed by conflicting claims, file a bill of interpleader against the several claimants, calling upon them to interplead (*Story, Eq. J. § 806*), and then, upon an affidavit of no collusion, and (in the case of a debt or sum of money) payment into Court of the amount due, all actions and suits, if any, were stayed by injunction, and the rights of the claimants decided, or put in course of decision: see *Sec. of State for India v. Kelson, sup.*, Form 5, and notes.

The stakeholder was entitled to an order of interpleader though no action had been brought, if conflicting claims had been made: *Langston v. Boyleston*, 2 Ves. jun. 101, 107, and cases cited in note thereto: *Jones v. Thomas*, 2 Sm. & G. 186; *Mealor v. E. Talbot*, 27 L. J. Ch. 165.

By Jud. Act, 1873, s. 25 (6), any absolute assignment, by writing (not by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, is to be and be deemed to have been effectual in law (subject to prior equities), to pass and transfer the legal right to and remedies for the same, and the power to give a good discharge without the concurrence of the assignor; but it is provided that if the debtor, trustee, or other person liable shall have had notice that such assignment is disputed, or of any other opposing or conflicting claims to such debt or chose in action, he may call upon the several claimants to interplead, or may pay the same into Court under the Trustee Relief Acts.

A cheque is not an assignment within this sub-section: *Schroeder v. Central Bank of London*, 24 W. R. 710.

As to the meaning of the expression "absolute assignment not purporting to be by way of charge," see *National Provincial Bank v. Harle*, 6 Q. B. D. 626; and that the existence of a resulting trust for the assignor does not prevent the assignment being absolute, *Burlinson v. Hall*, 12 Q. B. D. 347.

Notice of assignment of "all moneys now or hereafter" standing to the credit of the assignor at a bank could be effectually given after his death, and the bank could not set up the objection that the assignment was voluntary: *Walker v. Bradford Old Bank*, 12 Q. B. D. 511.

A written direction by c. q. tr. to trustees to pay a specified balance to a third person is a sufficient assignment in writing: *Harding v. H.*, 17 Q. B. D. 442.

The proviso was held inapplicable where there had been no assignment in writing, but money deposited with a bank was claimed by the exor of the depositor and her husband's administrator; but the money having been paid in under the Trustee Relief Act, claimant petitioning for payment out, thereby submitted to the jurisdiction: *Re Sutton's Trusts*, 12 Ch. D. 175.

Before the Jud. Act, 1873, an insurance co. could properly only pay in, under the Trustee Relief Act, policy moneys which were subject to a trust: *Re Haycock's Policy*, 1 Ch. D. 611; *Matthew v. Northern Assoe. Co.*, 9 Ch. D. 80.

By 30 & 31 V. c. 144, any assignee of a policy of life assurance may sue in his own name if written notice of the assignment has been given to the office, the date of such notice determining the priorities.

By 31 & 32 V. c. 86, the assignee of a marine policy may sue in his own name: see *N. of E. Oilcake Co. v. Archangel Ins. Co.*, 24 W. R. 162; 44 L. J. Q. B. 121.

As to the procedure in an action where a Deft claims to be entitled to contribution or indemnity over against a person not a party, and to the bringing in of such person as a third party, v. O. XVI. 48—54, *sup.*

Chap. XII., pp. 131—133; and as to procedure where Deft claims contribution or indemnity against co-Deft, O. xvi. 55.

The Interpleader Act (1 & 2 Will. 4, c. 58), and the C. L. P. Act, 1860 (except sect. 17), having been repealed, the general practice as to interpleader in all divisions of the Court is now regulated by O. LVII.

#### NEW PRACTICE—RIGHT TO RELIEF BY WAY OF INTERPLEADER.

By O. LVII. 1, "Relief by way of interpleader may be granted,—

"(a) Where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto:

"(b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued."

As to interpleader by the sheriff, *v. inf.* Sect. II., p. 447.

Under the former practice, the Plt in interpleader was entitled to protection not only from double liability, but from double vexation; so that it was sufficient that a *bonâ fide* claim had been made, and he was not required to show that it had any substantial foundation: *E. & W. India Dock Co. v. Littledale*, 7 Ha. 59, 60; and see *Angell v. Hadden*, 15 Ves. 244.

But there must have been more than a mere pretext of a claim: *Cochrane v. O'Brien*, 2 J. & Lat. 380; *Re New Hamburg & Brazilian Ry.*, W. N. (75) 239; and mere refusal to assent to the payment of the fund to another claimant was not enough: *Desborough v. Harris*, 5 D. M. & G. 439, 459, overruling *Fenn v. Edmonds*, 5 Ha. 314.

Where a sum of money had been deposited with a stakeholder to abide the result of a bet, he was bound to repay to either of the parties the amount received from him unless it had been paid to the other before any demand: *Hampden v. Walsh*, 1 Q. B. D. 189; *Batson v. Newman*, 25 W. R. (C. A.) 85; and see *Diggle v. Higge*, 2 Ex. D. 422; *Trimble v. Hill*, 5 App. Cas. 342.

An insurance co. might be entitled to interpleader after the sum due had been ascertained by judgment in favour of one of the claimants: *Hamilton v. Marks*, 5 D. & S. 638; but not after award: *Myers v. U. Guar. Co.*, 7 D. M. & G. 112, 123.

On an issue as to the right to furniture claimed by an execution creditor and a c. q. tr., in whose possession it was, the trustees were not required to be parties: *Schroeder v. Hanrott*, 28 L. T. N.S. 704.

Interpleader lay against Defts out of the jurisdiction, the fund being within it: *Stevenson v. Anderson*, 2 V. & B. 407; *Martinius v. Helmuth*, G. Coop. 245; and against a judgment creditor and his solr claiming a lien for costs on the debt: — *v. Bolton*, 18 Ves. 292; but whether the Crown could be made to interplead, *quære*: *Candy v. Maughan*, 1 D. & L. 745; *Reid v. Stearn*, 6 Jur. N.S. 267.

Interpleader would not lie where the stakeholder disputed the amount payable: *Diplock v. Hammond*, 2 Sm. & G. 141; 5 D. M. & G. 320; nor where he had handed over the property to one claimant on an indemnity: *Burnett v. Anderson*, 1 Mer. 405; and see *Sablicich v. Russell*, 2 Eq. 441; nor where the Plt claimed an interest in the fund: *Mitchell v. Hayne*, 2 S. & S. 63; nor against the claimants to two separate independent funds, *e.g.*, by an auctioneer who, having sold A.'s property to B., and resold it to C., and received a deposit from each of them, made A., B., and C. Defts: *Hoggart v. Cutts*, Cr. & P. 197; nor where the claims were not conflicting: *Myers v. United, &c. Co.*, 7 D. M. & G. 112; *Glynn v. Locke*, 3 D. & War. 11, where policy moneys were claimed by a trustee with power to give receipts, and also by the c. q. tra. *Secus*, where the trust fund had not been validly transferred to the trustee: *S. C.* But where Plt had pleaded a lien on the goods in defence to an action at law, the order was made on his withdrawing the plea and paying costs at Law and in Equity up to that time: *Jacobson v. Blackhurst*, 2 J. & H. 486.

For references to various decisions as to interpleader under the former practice, see Seton, 4th edit., pp. 366, 367.

Where a debtor, sued for the debt, has received notice of assignment, he may interplead as to part and dispute the residue, and his application may be either under r. 1, or by separate proceedings under Jud. Act, 1873, s. 25 (sub-s. 6): *sup.* p. 439. If an interpleader order is made in separate proceedings, there is no power to stay proceedings in an action already commenced against the debtor: *Reading v. London School Board*, 16 Q. B. D. 686.

Warehouse keepers were held entitled to relief in respect of goods, though one of the rival claimants also claimed damages for detention: *Attenborough v. St. Katharine Docks Co.*, 3 C. P. D. 450; and that the existence of the contract of bailment does not prevent interpleader proceedings by the bailee, see *Rogers v. Lambert*, 39 W. R. 114.

Interpleader was refused where the question was substantially as to priorities of bills of lading: *Victor Söhne v. British, &c. Steam. Co.*, W. N. (88) 84.

Certificates of shares and, *semble*, a chose in action may be the subject of interpleader: *Robinson v. Jenkins*, 24 Q. B. Div. 275.

By r. 2, "the applicant must satisfy the Court or a Judge, by affidavit or otherwise, (a) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and (b) that the applicant does not collude with any of the claimants; and (c) that the applicant is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a Judge may direct."

Under the former practice the affidavit had in general to be made by the applicant himself: *Wood v. Lyne*, 4 D. & S. 16; but an affidavit by two only out of four Plts has been accepted: *Glover v. Reynolds*, W. N. (67) 97; and under special circumstances leave was given to the solr to make it *quantum valeat*: *Larabrie v. Brown*, 1 D. & J. 204. In *Nelson v. Barter*, 2 H. & M. 334, an interim injunction for a fortnight was granted on the affidavit of the agent of the Plts, to be extended to the hearing on Plts filing their affidavit before then. If not, Defts to be at liberty to proceed.

In the case of a co. suing by its registered public officer, he should make the affidavit, stating that, to the best of his knowledge and belief, the co. does not collude: *Bignold v. Audland*, 11 Sim. 23.

Where the affidavit was met by evidence charging collusion, the Plt had to give an undertaking as to damages: *Manby v. Robinson*, 4 Ch. 347; and Deft could at the hearing show that there was collusion, or that it was not a proper case for interpleader: *Toulmin v. Reid*, 14 Beav. 499.

The affidavit need not state the facts: *Walbanke v. Sparks*, 1 Sim. 385; nor will the claimants be allowed the costs of affidavits which go solely into the merits as between themselves: *Poland v. Coall*, Ir. Rep. 7 C. L. 108.

A bill by the owner of land subject to a charge to which conflicting claims were made, but no proceedings taken, was held not to be an interpleader bill, nor to require an affidavit of no collusion: *Vyvyan v. V.*, 4 D. F. & J. 183.

On paying into Court the deposit, an auctioneer was allowed to have interpleader, and to deduct his charges without prejudice: *Annesley v. Muggridge*, 1 Madd. 593; but in *Mitchell v. Hayne*, 2 S. & S. 63, the auctioneer's interest in the deposit was held an objection to the suit. In *Farebrother v. Prattent*, 5 Pri. 303, the auction duty alone was deducted.

The word "charges" in r. 2 is not confined to the charges of the sheriff, but includes those of a wharfinger: *De Rothschilds v. Morrison, Kekewich & Co.*, 24 Q. B. Div. 750.

Where a stakeholder takes an indemnity from one of two rival claimants, an objection on the score of collusion cannot be taken by that claimant: *Thompson v. Wright*, 13 Q. B. D. 632; distinguishing *Tucker v. Morris*, 1 Cr. & M. 73; and *Belcher v. Smith*, 9 Bing. 82.

By r. 3, "the applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another."

Formerly interpleader did not lie in Equity, except for the same debt claimed by several persons in privity of contract or tenure as mortgagor and mortgagee, trustee and *cestui que trust*: *Dungey v. Angove*, 2 Ves. jun. 310; *Story*, Eq. J. § 812.

And the debt must have been the same in amount: *Bignold v. Audland*, 11 Sim. 23; and also the same in fact: *Glyn v. Duesbury*, 11 Sim. 139; *Dun-gey v. Angove*, 2 Ves. jun. 307; *Cochrane v. O'Brien*, 2 J. & Lat. 380.

But interpleader would lie in a case where the debtor had notice of claims and liens of various amounts on the debt: *Hamilton v. Marks*, 5 D. & S. 638.

An agent or tenant, being unable to dispute the title of his principal or landlord, was not entitled to interpleader on claims by his principal or by his landlord for rent, another claiming it under an adverse or paramount title: *Dungey v. Angove*, 2 Ves. jun. 304, 310; *Cook v. E. Rosslyn*, 1 Gif. 167, 170; 7 W. R. 537; *Crawford v. Fisher*, 1 Ha. 436; *Crawshay v. Thornton*, 2 My. & C. 1, 20; except where the principal or landlord had created a subsequent interest in another: *Ib.* 21; *Clarke v. Byne*, 13 Ves. 383 b; *Pearson v. Cardon*, 2 Russ. & M. 606; *Smith v. Hammond*, 6 Sim. 10; or where the agent did not know whom he ought to treat as his principal: *Suart v. Welch*, 4 My. & C. 305.

But any estoppel binding the execution debtor will not bind the execution creditor, who may set up the right of a third person even though superior to his own, *e.g.*, that hired goods in the possession of the debtor, and claimed by the letter, were in fact vested in the letter's trustee in bankruptcy: *Richards v. Jenkins*, 18 Q. B. Div. 451; and see *Robinson v. Jenkins*, 24 Q. B. Div. 275, where stockbrokers, though precluded from setting up the *jus tertii* against their principal, were nevertheless allowed to interplead; and *Rogers v. Lambert*, 39 W. R. 114, pointing out that the provision in sect. 12 of the C. L. P. Act, 1860, has materially modified the principle on which *Crawshay v. Thornton*, *sup.*, was decided.

#### PROCEDURE IN INTERPLEADER.

By r. 4, where the applicant is a Deft, application for relief may be made at any time after service of the writ of summons.

By r. 5, the applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

As to form of interpleader summons, see D. C. F., p. 678; and as to service out of jurisdiction, *v. sup.* Chap. II., p. 17.

By r. 6, if the application is made by a Deft in an action, the Court or a Judge may stay all further proceedings in the action.

By r. 7, if the claimants appear in pursuance of the summons, the Court or a Judge may order either that any claimant be made a Deft in any action already commenced, in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be Plt, and which Deft.

There is no jurisdiction to limit the defences of the substituted Deft to those available to the original Deft: *Gerhard v. Montague & Co.*, 61 L. T. N.S. 564; 38 W. R. 76.

Having regard to r. 13, an issue must apparently be tried before a Judge alone unless trial by jury is expressly ordered: *Hamlyn v. Betteley*, 6 Q. B. Div. 63, being in effect overruled.

For forms of order, see Appx. K., Nos. 50 to 56; and for forms of issue, *v. sup.* pp. 330—335.

Where the claimant is a receiver, he may be directed to hold the goods instead of paying the value into Court: *Purkiss v. Holland*, 31 S. J. 702.

By r. 8, "the Court or a Judge may, with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just."

That such summary decision cannot be appealed from even by consent, see *Dodds v. Shepherd*, 24 W. R. 322; *Lyon v. Morris*, 19 Q. B. Div. 139.

As to the limit of £50 being adopted in the absence of consent, see *Topham v. Greenside, &c. Co.*, 37 Ch. D. 294.

By r. 9, "where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion

of the Court. If a special case is stated, O. XXXIV. shall, as far as applicable, apply thereto."

As to special case under O. XXXIV., *v. sup.* Chap. XXI.

By r. 10, "if a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a Judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves."

It will be thus seen that the Court, when making the order for interpleader, may adopt any of the following courses:—

1. It may make any claimant a Deft in any action commenced in respect of the subject-matter: O. LVII. 7.
2. It may direct an issue: O. LVII. 7.
3. It may dispose of the merits summarily: (a) by consent; or (b) where the amount is small: O. LVII. 8; or (c) where the question is one of law, and the facts are not in dispute: O. LVII. 9.
4. Where a claimant does not appear, or appears and refuses to comply with any order, it may make an order barring his claim: O. LVII. 10.
5. Where the question is one of law only, it may order a special case to be stated: O. LVII. 9.

By r. 14, "where in any interpleader proceeding it is necessary or expedient to make one order in several causes or matters pending in several divisions, or before different Judges of the same division, such order may be made by the Court or Judge before whom the interpleader proceeding may be taken, and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters."

#### APPEALS.

By r. 11, "except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way, under r. 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or Judge, as the case may be, or of the Court of Appeal."

Rules 8 and 11 must be read in connection with sect. 17 of the C. L. P. Act, 1860, which enacts that "the judgment in any such action or issue as may be directed by the Court or a Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them"; and with the provision of sect. 20 of the Appellate Jurisdiction Act, 1876, enacting that where by Act of Parliament it is provided that the decision of any Court or Judge whose jurisdiction is transferred to the High Court of Justice is to be final, an appeal shall not lie from that Court or a Judge thereof to the Court of Appeal. Thus no appeal lies to the Court of Appeal, nor is there power to give leave to appeal, in the case of judgments and decisions falling within the operation of sect. 17: *Waterhouse v. Gilbert*, 15 Q. B. Div. 569; *Lyon v. Morris*, 19 Q. B. Div. 139; *Turner v. Bridgett*, 9 Q. B. Div. 55; *Bryant v. Reading*, 17 Q. B. Div. 128. But the word "parties," in sect. 17 of the Act of 1860, does not include the sheriff, who can therefore appeal: *Smith v. Darlow*, 26 Ch. Div. 605.

The words "except where otherwise provided by statute," in r. 11, extend to the Jud. Acts, and after trial of an interpleader issue there is, under s. 19 of the Jud. Act, 1873, the same right of appeal from the judgment with respect to the finding of the facts or ruling of the law (as distinguished from the final disposal of the whole matter of interpleader) as in the case of any other judgment or order: *Dawson v. Fox*, 14 Q. B. Div. 377; but when the Judge has pronounced judgment disposing of the whole matter, there is an appeal only by leave: *Robinson v. Tucker*, 14 Q. B. Div. 371, questioning *Burstell v. Bryant*, 12 Q. B. D. 103. Where an issue is tried by a jury, any motion for a new trial, or to set aside a verdict, finding, or judgment, is now

to be heard and determined by the Court of Appeal, and not by a Divisional Court: Jud. Act, 1890 (53 & 54 V. c. 44), s. 1.

By r. 13, "O. xxxi. and O. xxxvi. shall, with the necessary modifications, apply to an interpleader issue; and the Court or a Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for."

#### COSTS.

By r. 15, the Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable.

Under the former practice, Plt, if in the right, was held entitled to his costs, and out of the fund in Court, if any: *Glynn v. Locke*, 3 D. & War. 11, 24; *Hale v. Saloon, &c. Co.*, 4 Drew. 492; and see *Clench v. Dooley*, 56 L. T. N.S. 122; or to a lien upon it: *Aldridge v. Meener*, 6 Ves. 418; *Campbell v. Solomons*, 1 S. & S. 462; and (inquiries being sent) to be paid out of it at once without prejudice: *Sec. for India v. Kelson*, L.J.J., Form 5, *sup.* p. 437.

Plt could obtain his costs at once on motion, unless his right to interplead was disputed, in which case he had to set down the cause: *Jones v. Gilham*, G. Coop. 49.

A stakeholder litigating the claims separately lost his right to costs against the successful claimant: *Laing v. Zeden*, 9 Ch. 736; 17 Eq. 107.

Where the conflicting claim was withdrawn after suit brought, Plt had his costs up to that time: *Glynn v. Locke*, 3 D. & War. 11; *sup.* p. 438; *Symes v. Magnay*, 20 Beav. 47.

And see *Mason v. Hamilton*, 5 Sim. 19; and as to payment by Plt of costs needlessly incurred or increased, *Crawford v. Fisher*, 1 Ha. 436; *E. & W. India Dock Co. v. Littledale*, 7 Ha. 51; *Jones v. Farrell*, 1 D. & J. 208.

When an interpleader summons is taken out by a Deft in an action, he is entitled, on bringing into Court the amount claimed, to deduct his taxed costs to date, the question which of the parties are to be ultimately liable for such costs being reserved: *Searle v. Matthews*, 19 Q. B. D. 77, n.; and see *Goodman v. Blake*, 19 Q. B. D. 77; *C. v. D.*, W. N. (83) 207; *Aplin v. Cates*, 30 L. J. Ch. 6.

A master can only deal with the costs of the interpleader proceedings, not with the costs of the action, and any order by him as to such last-mentioned costs may be appealed from: *Hansen v. Maddox*, 12 Q. B. D. 100.

As to giving security for costs in interpleader proceedings, *v. sup.* Chap. IV., p. 28.

Sect. 49 of the Jud. Act, 1873, preventing appeals as to costs only, applies to interpleader: *Hartmont v. Foster*, 8 Q. B. Div. 82.

## SECTION II.—INTERPLEADER AT THE INSTANCE OF THE SHERIFF.

### 1. Order for Sheriff to sell Goods seized, and pay Proceeds into Court—Issue as to Claims.

LET the said sheriff proceed to sell the goods and chattels seized by him under the writ of *fi. fa.* issued in this action, and lodge the net proceeds of the sale after deducting the expenses thereof [*If so*, and the possession money from the — day of —] in Court as directed in the schedule hereto; And Let the following issue be tried &c. [see Forms 1 and 2, *sup.* p. 330], that is to say, whether at the time of the seizure by the sheriff the goods &c. were the property of the said O.



(*the claimant*) or of the said D. (*the execution creditor*); And Let no action be brought against the said sheriff for the seizure of the said goods [*If so, Adjourn &c.*].—Liberty to apply [*add Lodgment Schedule, Form No. 1*].

2. *Sheriff to withdraw on Claimant paying into Court, or giving Security for the Amount, and Payment of Possession Money—In default, Sheriff to sell—Issue directed.*

LET W., on or before &c., lodge in Court, as directed in the schedule hereto, Three hundred pounds; And Let, upon lodgment of the sum of Three hundred pounds in Court on or before &c., and upon payment to the said sheriff of the possession money from &c., the said sheriff withdraw from the possession of the goods seized by him under the writ of *fi. fa.* herein; And Let, unless such first-mentioned payment be made within the time aforesaid, the said sheriff proceed to sell the said goods, and within ten days from the receipt thereof pay the proceeds of the sale, after deducting the expenses thereof and the possession money, into Court as directed in the schedule hereto, subject to further order; And Let the parties proceed to the trial of an issue in this Court whether at the time of the seizure by the sheriff the goods seized were the property of W. as against the said co., and W. is forthwith to furnish to the sheriff's agents a copy of the inventory exhibited to her affidavit; And Let the issue be prepared and delivered by the Plt therein within twenty-two days from this date, and be returned by the Deft therein within four days after delivery thereof, and be tried at Leeds in the county of York; And the question of costs and all further questions are reserved to be dealt with at the trial of the said issue, and no action is to be brought against the said sheriff for the seizure of the said goods [*add Lodgment Schedule, Form 1*].—See *Re The Newmarket Collieries, Brickworks, and Pottery Co., Lim.*, Pearson, J., at Chambers, 26 March, 1885, B. 927.

3. *Sheriff to remain in Possession on default of Payment or giving Security.*

LET upon payment of the sum of £— into Court &c., or upon the said C. giving security to be approved by the Judge, the said sheriff withdraw &c. [*Form 2, sup.*]; And Let in the meantime, and until such payment shall be made, or security given, the said sheriff continue in possession of the said goods and chattels; And Let the said C. (*claimant*) pay possession money for the time he shall so continue, unless the said C. (*claimant*) shall desire the said goods and chattels to be sold by the sheriff, in which case the sheriff is to sell the same, and lodge the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, in Court &c., to abide further order herein; Let the following issue &c. [*Form 2, sup. p. 322; Add Lodgment Schedule, Form 1*].

4. *Summary Order by Consent for Sheriff to withdraw*—O. LVII. 8.

AND C., the claimant, and E., the execution creditor, having, by their solrs, consented that the claim made by the said C. should be disposed of on the merits, and determined in a summary manner, and the Judge being of opinion that the goods in question were at the time of their seizure by the sheriff the property of the said C.; Let the sheriff withdraw from the possession of the said goods; And Let no action be brought against the sheriff; And Let the said E. pay the said C. his costs, to be taxed &c.

5. *Sheriff to proceed to sell, and to raise and pay Claim and Expenses*—O. LVII. 12.

LET the said sheriff proceed to sell so much of the goods and chattels seized under the writ of *fi. fa.*, issued in this action as will satisfy the expenses of the said sale; the rent (if any) due, the claim of the said C. the claimant, and the said execution; And Let out of the proceeds of the said sale (after deducting the expenses thereof, and rent, if any), the said sheriff pay to the said C. the amount of his said claim, and to the said E., the execution creditor, the amount of his execution, and the residue (if any) to the Deft; And Let no action be brought against the said sheriff.

6. *Order barring Claim in favour of Execution Creditor.*

LET C., the claimant, be barred from &c. [*either as to the whole or part of the subject-matter of his claim*], and pay to the said E. the execution creditor's costs of &c., occasioned by the claim, to be taxed &c.

7. *Interpleader Order in Chancery Action by Sheriff, where the Trustee in Bankruptcy and Execution Creditor disputed the Right to the Proceeds under Writ of Fieri Facias.*

"TAX the Plt's costs of the action; And Let the £— New Cons. (*proceeds of execution*) in Court to the credit of this cause &c. be sold; And Let out of the money to arise by such sale, and £— cash in Court to the credit &c., the said costs when taxed be paid to &c.;"—But if the money to arise by the sale and the cash shall be insufficient, the whole to be paid on account, and the residue, if any, to be paid to the Plt by the Defts Myatt (*bankrupt's trustee*) and Mann (*execution creditor*), and any residue of the fund after payment of the Plt's costs to be paid to the Deft Myatt without prejudice to his right to be repaid by Deft Mann what he shall pay in respect of the Plt's costs;—"And Let the Deft Mann pay to the Deft Myatt what shall be paid to the Plt out of the money to arise by the said sale and the said cash, and Let him also repay to the Deft Myatt what, if anything, he shall so

pay as aforesaid."—Liberty to apply.—*Child v. Mann*, V.-C. S., 26 Feb. 1867, A. 849; *S. C.*, 3 Eq. 806.

The Payment Schedule to this order would contain directions for carrying out the above terms: see Payment Schedule, Forms Nos. 32 and 35.

For decree, in interpleader suit by the sheriff, adjudicating on the rights of the Defts to the goods taken in execution, and providing for the payment of the Plt's costs of the suit by the Defts in the wrong, see *Hale v. Met. Saloon Omnibus Co.*, V.-C. K., 4 March, 1859, A. 1183; *S. C.*, 4 Drew. 492.

## NOTES.

## INTERPLEADER AT INSTANCE OF SHERIFF.

By O. LVII. 1, relief by way of interpleader may be granted where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued.

Where the sheriff was paid out under protest by a third person, the money so paid is "proceeds or value" of goods taken in execution within this rule: *Smith v. Critchfield*, 14 Q. B. Div. 873.

By r. 12, "when goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just."

The rule does not enable the sheriff to seize equities, and if goods are claimed by a mortgagee under a bill of sale, the sheriff is not bound to interplead, but may withdraw: *Scarlett v. Hanson*, 12 Q. B. Div. 213.

Where an interpleader issue is directed instead of a sale by the sheriff, the appointment of a receiver and manager may be ordered under Jud. Act, 1873, s. 25 (8): *Howell v. Dawson*, 13 Q. B. D. 67.

Where an order is made for sale and satisfaction of a claim out of the proceeds, the claimant is not entitled to demand from the sheriff any sum not included in his particulars of claim under r. 5: *Hockey v. Evans*, 18 Q. B. Div. 390.

By r. 16, "where a claim is made to or in respect of any goods or chattels taken in execution under the process of the Court it shall be in writing, and upon the receipt of the claim the sheriff or his officer shall forthwith give notice thereof to the execution creditor according to Form 28 in Appendix B. or to the like effect, and the execution creditor shall, within four days after receiving the notice, give notice to the sheriff or his officer that he admits or disputes the claim, according to Form 29 in Appendix B., or to the like effect. If the execution creditor admits the title of the claimant, and gives notice as directed by this rule, he shall only be liable to such sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim."

Unless protected by this rule, the execution creditor is primarily liable for the charges of the sheriff, who is entitled to an order against him, leaving him a remedy over against the claimant, if unsuccessful: *Smith v. Darlow*, 26 Ch. Div. 605.

The other rules cited above (pp. 440—443) also apply to interpleader by sheriffs.

As to the duty of the sheriff to apply immediately, see *Tufton v. Harding*, 6 Jur. N.S. 116; 8 W. R. 122; and that he must show that he did not get into the difficulty by his own wrong, as by seizing goods without good reason to suppose they were the debtor's: *S. C.*; and see *Slingsby v. Boulton*, 1 V. & B. 334.

Where after the proceeds of sale had been paid into Court, notice of a bankruptcy petition against the debtor was served on the sheriff, and bankruptcy followed, the trustee in bankruptcy was entitled to the money against the execution creditor: *Heathcote v. Livesley*, 19 Q. B. D. 285.

Where an interpleader order has been made under which the sheriff withdraws, execution has been stayed under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g), and the judgment creditor cannot issue a bankruptcy notice: *Exp. Ford*, 18 Q. B. D. 369.

By the Bankruptcy Act, 1890 (53 & 54 V. c. 71), s. 1, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been either sold or held by the sheriff for twenty-one days, "provided that where an interpleader summons has been taken out with regard to the goods seized, the time elapsing between the date at which such summons has been taken out, and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days." Any person who is for the time being entitled to enforce a final judgment is to be deemed to be a creditor who has obtained a final judgment within sect. 4 of the Bankruptcy Act, 1883.

Where the goods had been sold, the sheriff might deduct his costs from the money paid into Court; but where the goods had not been, and were not to be sold, he was entitled to his costs from the parties putting him in motion, but not, in the interpleader suit, to costs of possession: *Hale v. Saloon, &c. Co.*, 4 Drew. 492.

As to the sheriff's duty on a *fiery facias* where there is a partnership account, and his right to interpleader, see *Anon.*, W. N. (75) 204.

A sheriff who has taken out, in respect of goods taken in execution and claimed as separate estate of the debtor's wife, an interpleader summons on which an order for sale in default of payment has been obtained, will not be restrained by injunction in the Ch. Div. from selling the goods: *Wright v. Redgrave*, 11 Ch. Div. 24.

A party to interpleader proceedings who brought an action and obtained an injunction against the sheriff without waiting for the result of the interpleader had to bear his own costs of the proceedings against the sheriff: *Hilliard v. Hanson*, 21 Ch. Div. 69.

The claimant, if successful, is entitled to recover from the execution creditor the sheriff's charges subsequent to the interpleader order: *Goodman v. Blake*, 19 Q. B. D. 77.

Any special damage to the claimant may be adjudicated on, and whether it is or not, no other action can be maintained by him for damages: *Death v. Harrison*, L. B. 6 Ex. 15; and see *Cramer v. Mathew*, 7 Q. B. D. 425.

The Judge has power to adjudicate as to damages, although the goods, having been sold, are no longer in the control of the Court: *Mills v. Renney*, 5 Ex. Div. 313.

By r. 17 (made in 1889), "where the execution creditor does not in due time, as directed by the last preceding rule, admit or dispute the title of the claimant to the goods or chattels, and the claimant does not withdraw his claim thereto by notice in writing to the sheriff or his officer, the sheriff may apply for an interpleader summons to be issued, and should the claimant withdraw his claim by notice in writing to the sheriff or his officer, or the execution creditor in like manner serve an admission of the title of the claimant prior to the return day of such summons, and at the same time give notice of such admission to the claimant, the Judge or master may, in and for the purposes of the interpleader proceedings, make all such orders as to costs, fees, charges, and expenses, as may be just and reasonable."

By 51 & 52 V. c. 43, s. 157, where claims are made to goods taken in execution under the process of a County Court, the registrar may, on the application of the high bailiff, issue a summons calling the party issuing the process and the claimant before the Court, and the Judge may adjudicate upon such claim, and as to any damages arising out of the execution.

For practice under this section, see County Court Orders, 1889.

As to appeal in interpleader from County Court, see sect. 157; and *Lumb v. Teal*, 22 Q. B. D. 675; *Collis v. Lewis*, 20 Q. B. D. 202; *Thomas v. Kelly*, 13 App. Cas. 506; Chit. Arch. 1528; and as to interpleader generally, *Ib.* 1366, 1377.

## CHAPTER XXX.

## NE EXEAT REGNO.

1. *Order for Writ to Issue.*

UPON motion &c., and upon reading an affidavit of &c., filed &c. [*Enter evidence, and if before appearance*, and the writ of summons issued in this action on the — day of —]; and the Plt by his counsel undertaking &c. [see Form 1, p. 452, as to damages], This Court doth order, that a writ [*or one or more writ or writs*] of *ne exeat regno* do issue against the said Deft A., until this Court make other order to the contrary; And the said writ [*or writs*] is [*or are*] to be marked for security in the sum of £— in words at length, and not in figures.

For like order on affidavit, certificate and terms as above, see *Close v. C.*, V.-C. K. B., 24 July, 1851, A. 1169; and see *Beverley v. Crowe*, V.-C. K. B., 13 June, 1850, A. 1088; *Stanley v. Plevins*, V.-C. K. B., 27 March, 1849, A. 753.

For order for the writ after decree, see *Evezard v. Burke*, M. B., 20 July, 1876, A. 1274.

After decree for accounts, and sum certified to be due from Deft, see *Henry v. Walden*, L. C., 1 May, 1766, A. 234.

For order for the writ as between co-Defts before the time fixed by the decree for payment of an amount admitted to be due, and before the decree had been drawn up, see *Sobey v. S.*, V.-C. B., 14 Dec. 1872, B. 3099.

And for form of writ of *ne exeat*, see Braith. 229; Beames, *Ne Exeat*, 23.

2. *Writ Discharged on Deft giving Security.*

UPON appeal from order dismissing Deft's motion, and for leave to go out of the jurisdiction for twelve months, he undertaking then to return—"Let, upon the Deft M. giving security to the amount of £1,000, with two sureties, such security to be approved by the (Judge), to answer such sum as may be found due from him in this cause, the writ of *ne exeat regno* issued in this action be discharged; And Let the order dated &c., be also discharged, except so much thereof as ordered that the Deft M. should pay to the Plt his costs of that application, to be taxed &c."—See *Lee v. Melendez*, L. C., 11 Jan. 1849, B. 360.

For order, that on Deft giving security, to be approved of by the Master, for the amount certified due from him under decree, and paying costs, to be taxed, he be discharged out of custody, see *Henry v. Walden*, L. C., 30 June, 1766, A. 299.

For order, that upon Deft, while in gaol, executing a security, approved by the Court, and identified by the registrar, for the balance due from him,

he be discharged from custody, and that he pay the costs of the writ of *ne exeat* and assignment, and of his application to discharge the writ, or in default that the costs be added to the security, see *Sobey v. S.*, V.-C. B., 11 Jan. 1873, B. 5; 15 Eq. 200.

### 3. *Ne Exeat Discharged—Inquiry as to Damages and Payment according to Undertaking.*

LET the writ of *ne exeat regno* issued against the Deft M. pursuant to the order dated &c., and the said order, be respectively discharged with costs, including the costs of this application, such costs to be taxed &c., and paid by the Plts S. &c., to the said Deft M.; And Let an inquiry be made what damages have been sustained by the said Deft M., by reason of the said order dated &c. having been made; And Let the Plts S. &c., pursuant to their undertaking contained in the said order, within one month after the date of the chief clerk's certificate of the result of the said inquiry, pay what shall be certified in respect of such damages to the said Deft M.—Liberty to apply.—*Sichell v. Raphael*, V.-C. W., 22 March, 1861, B. 815; 4 L. T. N.S. 114.

For order discharging the writ, and order for it with costs, and, by consent, for Plt within one month to pay to the Deft the sum of £100 for the damage sustained by the Deft by reason of the order (for *ne exeat*) having been made, see *Stoffell v. Whitworth*, V.-C. M., in Chambers, 31 Oct. 1871, B. 2706.

#### NOTES.

The writ of *ne exeat regno* is granted in cases of equitable claims: *Drover v. Beyer*, 13 Ch. Div. 242; it is in the nature of *mesne process* until final judgment, to prevent a person from leaving the realm, to the damage of the person to whom he is indebted, unless he has given security for the amount of the debt.

Where the claim made in the action is such as could not before the Judicature Acts have been brought forward in Chancery the writ will not be granted: *Drover v. Beyer*, 13 Ch. Div. 242.

In cases of claims at common law, whether in contract or tort, the Plt may, on proof of cause of action to the amount of 50*l.*, and that there is probable cause for believing that the Deft is about to leave England, and that his absence will prejudice the Plt in his claim, obtain an order for the arrest of the Deft under sect. 6 of the Debtors Act, 1869.

For the practice under this section, see O. LXIX.

In order to obtain the writ the demand must be pecuniary, must be for an ascertained amount actually due and payable *in presenti*, and is subject to the provisions of the Debtors Act, 1869, s. 6 (in substitution for arrest by *mesne process*).

A proof that there is probable cause for believing that the Deft is about to quit England unless he be apprehended, and that his absence will materially prejudice the Plt in the prosecution of his action, must have been given: *Drover v. Beyer*, 13 Ch. Div. 242; *Colverson v. Bloomfield*, 29 Ch. D. 341.

Where the debt, though certain, is payable *in futuro*, the writ cannot, it seems, be granted: see Dan. 1650, and cases there cited; Beames, on *Ne Exeat*, 27.

But the writ may be obtained before the time fixed by the order for payment, if the Court is satisfied that the debtor is going abroad to evade payment: *Sobey v. S.*, 15 Eq. 200; *Whitehouse v. Partridge*, 3 Sw. 365; but not before service of an order directing payment within seven days after service: *Colverson v. Bloomfield*, 29 Ch. D. 341.

The evidence as to the debt must be positive and clear: *Thompson v. Smith*, 13 W. R. 422; *Jackson v. Petrie*, 10 Ves. 165; and the writ will not be

granted in the case of a contested and unsettled account: *Anon.*, 5 N. R. 358; *Flack v. Holm*, 1 J. & W. 405; or unless, omitting disputed items, the Plt can swear that according to his belief a particular sum at the least is due for which the writ can be marked: *Dan.* 1651.

The Deft's intention to leave the country must be clearly shown by the affidavits: mere general belief, without stating the grounds for such belief, not being sufficient: *Perry v. Dorset*, 19 W. R. 1048; and also that the Plt will be materially prejudiced in the prosecution of his claim by the Deft's leaving the kingdom: *Drover v. Beyer*, 13 Ch. D. 242; *Vanzeller v. V.*, 15 Jur. 115; *Boehm v. Wood*, T. & R. 332; and when the writ has been obtained upon a case not borne out by Plt's affidavits, or which has been displaced by Deft, it will be discharged with costs: *Anderson v. Stamp*, 2 H. & M. 576; see also *Vanzeller v. V.*, 15 Jur. 115; and an inquiry as to damages may also be directed: *Sichell v. Raphael*, 4 L. T. N.S. 114, *sup.*, Form 3; but if a Deft against whom the writ has been granted has not moved to discharge it, he cannot at the hearing claim damages in respect thereof under the Plt's undertaking: *Lees v. Patterson*, 7 Ch. D. 866.

The undertaking as to damages, and also to accept short notice of motion to discharge, is now usually required.

Copies of the affidavits upon which the writ is granted must be furnished by the party applying for the writ *ex parte*, upon payment of the proper charges, immediately upon the receipt of a written request, and undertaking to pay the proper charges, or within such time as may be specified in such request, or may have been directed by the Court or a Judge: O. LXVI. 7 (j).

A present vested interest liable to be divested will support the writ: *Howkins v. H.*, 1 Dr. & S. 75.

The writ may be obtained by Defts against the Plt: *Whitehouse v. Part-ridge*, 3 Sw. 365; and in matters of account by Defts (exors) against their co-Deft: *Sobey v. S.*, 15 Eq. 200; and see *Done's case*, 1 P. Wms. 263.

It might issue against a contributory in default without bill filed: *Mawer's case*, 4 D. & S. 349; and see Companies Act, 1862 (25 & 26 V. c. 89), ss. 118, 119; and need not have been prayed by the bill: *Howkins v. H.*, 8 W. R. 403 (in which case it was granted against a Deft, in contempt for not answering, who, residing abroad, had come to this country temporarily, and was about to return).

The Court uses its discretion as to the order to be made on the motion discharging the writ, but is usually satisfied with security: Beames, 97.

As against a Deft who had obtained protection under the Insolvent Debtors Act, and was therefore no longer personally answerable for the debt, the writ was discharged on terms: see *James v. North*, 7 W. R. 150.

For the practice as to discharging the writ, see *Dan.* 1658.

## CHAPTER XXXI.

## INJUNCTIONS.



## SECTION I.—INTERLOCUTORY INJUNCTIONS AND INTERIM ORDERS.

1. *Injunction on Notice, or Ex parte, on Undertaking as to Damages.*

UPON motion &c., by counsel for the Plt, and upon hearing counsel for the Deft [or reading an affidavit of service of notice of this motion on the Deft, or if moved *ex parte* before the Deft has appeared, the writ of summons issued in this action on the — day of —] [*Enter affidavits in support and in opposition, if any*]; And the Plt, by his counsel, undertaking to abide by any order this Court may make as to damages, in case this Court should hereafter be of opinion that the Defts shall have sustained any, by reason of this order, which the Plt ought to pay [*If so*, and also undertaking to accept short notice of motion to dissolve the injunction hereby awarded], This Court doth order, that the Deft A. [his servants, workmen, and agents], be restrained by injunction from &c., until judgment in this action, or until further order from &c.

The writ of injunction is no longer issued, the judgment or order having the effect of a writ: O. L. 11.

2. *Ex parte Interim Order.*

USUAL undertaking as to damages [Form 1, *If so*, And also undertaking to accept short notice of motion to discharge this order]; Let the Deft, his servants, workmen, and agents, be restrained from &c., until after the — day of —, or until further order [*If so*, And Let the Plt be at liberty to serve the Deft with notice of motion for the — day of —, for an injunction in this action].

3. *Ex parte Injunction, on Application in Vacation, without Counsel.*

UPON the application of the Plts, and upon reading an affidavit of &c. [*Enter evidence*]; and the Plts, by their solrs, having undertaken &c. [Form 1], and having signed the registrar's book to that effect accordingly, this Court doth order that the Defts be restrained by injunction from &c.



4. *Extending Interim Order, on like Undertakings.*

LET this motion stand over until &c., and the Plts, by their counsel, undertaking to abide &c. [Form 1]; Let the Defts — be further restrained until after the said — day of —, from &c. [*Follow terms of interim order.*]

5. *Motion to Stand Over on Mutual Undertakings.*

AND the Deft, by his counsel, undertaking to stay the sale of the property in the indorsement of the writ mentioned until after the — day of —; and the Plt, by his counsel, undertaking to abide by any order this Court may make as to damages &c. [Form 1], by reason of such sale being so stayed &c., Let this motion stand over until the said — day of —.

6. *Motion treated as the Trial, and Action stayed on Deft's Undertaking and Paying Costs.*

AND the Plt and the Defts by their counsel consenting that the hearing of this motion should be treated as the trial of this action, and consenting to this order; and the Defts by their counsel undertaking not to (*in terms of the injunction claimed by the writ*), This Court doth order that the Defts do pay to the Plt his costs of this action, to be taxed &c.; and that all further proceedings in this action, except for the purpose of giving effect to this order, be stayed.

7. *Inquiry as to Damages after Judgment for Deft—Payment—Costs.*

LET an inquiry be made whether the Deft E. has sustained any and what damages by reason of the injunction awarded by the order dated &c., having been granted, and which the Plt ought to pay according to his undertaking contained in the said order; And in case it shall appear that any such damage has been sustained, Let the Plt B. pay to the Deft E., within one month from the date of the chief clerk's certificate to be made pursuant to this order, the amount which shall be thereby certified for such damages, and also pay to the said Deft his costs of the said inquiry, to be taxed by the taxing master; And in case it shall appear that no such damage has been sustained, Let the Deft E. pay to the Plt his costs of the said inquiry, to be taxed as aforesaid.—*Burdett v. Hay*, M. R., 28 April, 1864, A. 1298; S. C., 4 D. J. & S. 41.

This form was approved by V.-C. H. in *Christie v. C.*, 19 Feb. 1875, A. 161, where, at the joint request of Plts and Defts, an issue was directed under 25 & 26 V. c. 42, s. 2 (repealed by 46 & 47 V. c. 49), whether Defts had sustained any damage by reason of the order, and if so, what was the amount of it.

8. *Dismissal—Sum certain to be paid for Damages, or Inquiry.*

DISMISS Plt's (action) with costs.—“And the Deft by his counsel offering to accept the sum of £— for damages under the undertaking of the Plt contained in the said order dated &c.; Let the Plt be at liberty to pay the said sum of £— to the Deft; And in default of the Plt paying to the Deft the said sum of £— within &c.,” Inquiry what damages have been sustained by the Deft by reason of the said order dated &c., having been made.—Plt to pay what shall be certified, and Deft's costs of the inquiry.—Liberty to apply.—*Fuller v. Taylor*, V.-C. W., 19 Feb. 1864, A. 327.

For dismissal of action (to restrain an apprehended nuisance) without prejudice to any further proceedings on the part of the Plt, in case the operations of the Deft's works should occasion a nuisance, or in case the Plt should apprehend an immediate nuisance or damage if the operations of the Defts were continued, see *Fletcher v. Bealey*, Pearson, J., 15 May, 1885, A. 776; 33 W. R. 745, 748.

For declaration that the Plt is not entitled to relief, and on the Plt's undertaking, contained in the former order, to pay damages, inquiry as to damages, and Plt to pay the amount certified, and thereupon the recognizance which had been required in the case to answer damage to be vacated, and further proceedings to be stayed; Plt to pay costs of suit and of motion for injunction, see *Napier v. Routledge*, V.-C. W., 18 Jan. 1859, B. 746.

For subsequent order to vacate the recognizance to answer damages, and to deliver up the bond given as security for costs, both having been paid, see *Napier v. Routledge*, V.-C. W. at Chambers, 15 April, 1859, B. 1373.

For order for inquiry as to damage sustained by Deft by interim orders, Plt's bill being dismissed on motion for decree, see *Hughes v. Lloyd*, V.-C. W., 14 Feb. 1862, A. 360; and see order in *Newby v. Harrison*, 3 D. F. & J. 287.

For order on motion for injunction, treated as hearing of cause on mutual undertakings by consent, see *Nicholson v. Marsh*, V.-C. W., 3 Mar. 1858, B. 718.

## NOTES.

## FORM OF ORDER.

In granting an injunction the Court should see that the language of the order is not ambiguous, but such as to make what it permits, and what it prohibits, quite plain: *Low v. Innes*, 4 D. J. & S. 286; e.g., in a case of breach of covenant, the injunction “ought not in general terms to restrain the Deft from committing any breach of covenant, but the order should contain an adjudication on the particular thing which is said to be a breach of the covenant, so as to restrain him by injunction from doing that particular thing, and in that way to limit the generality of the injunction”: per Cotton, L. J., *Parker v. First Avenue Hotel Co.*, 24 Ch. Div. 282, 286; and see *Dalglish v. Jarvie*, 2 Mac. & G. 231.

It must be founded on, and consistent with, the relief claimed: *Burdett v. Hay*, 4 D. J. & S. 41.

The writ of injunction formerly issued (see Dan. Ch. Pr. 1525, 5th edit.) was abolished by O. L. 11, which provides:—“No writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had.”

After 15 & 16 V. c. 86, the form usually adopted in granting interlocutory injunctions was “until the hearing of the cause,” and now it is “until judgment in this action or further order,” so as to show that the injunction is not to extend beyond judgment, unless then continued by leave of the Court, nor until that time if previously dissolved by “further order”: see *Bolton v. London School Board*, 7 Ch. D. 766, 771.

Though an injunction restraining the act complained of is claimed against the Deft alone, the order will, if necessary, be extended to his workmen, servants, and agents (and it is of course to insert these words: *Humphreys v. Roberts*, V.-C. 1828, A. 674); but not to his tenants: *Hodson v. Coppard*, 29 Beav. 4; 9 W. R. 9. And when the order restrains the Deft only, his agents, though not in terms enjoined, may be punished for contempt, if they knowingly assist in a breach of the injunction: *L. Wellesley v. Mornington*, 11 Beav. 180: see *inf.*, "BREACH OF INJUNCTION."

Otherwise an injunction does not bind a person not a party: *Iveson v. Harris*, 7 Ves. 256; Kerr, 646; and on a bill by persons "on behalf of all others, &c.," an injunction staying proceedings against persons not named parties to the record was held irregular, but continued by arrangement in favour of those who complied with the decree: *Armitstead v. Durham*, 11 Beav. 556—561, n.

If the motion stands until the trial, the costs will not, as a rule, be specially reserved, but will be disposed of together with the motion at the trial; the right course being to make the costs of the motion costs in the action; and the dismissal of the action with costs carries with it the costs of a motion for injunction, which stood over until the trial, and was not then brought on: see *Gosnell v. Bishop*, 38 Ch. D. 385. If, however, the question on the motion is different from that involved in the action, e.g., whether it was right to make the motion at all, whatever the rights of the parties may be, the proper order is, that the motion do stand over until the trial: *per Chitty, J., Bournemouth Commrs. v. Holden*, W. N. (88) p. 205. In order to entitle a Plt to costs, he is not bound, before moving for an injunction in assertion of his legal right, to give any notice to the Deft: *Cooper v. Whittingham*, 15 Ch. D. 501; *Upmann v. Forester*, 24 Ch. D. 231; *Witmann v. Oppenheim*, 27 Ch. D. 260.

#### UNDERTAKING AS TO DAMAGES.

Except in cases where the Plt's right is perfectly clear, or damage from granting it is unlikely to accrue (*Adamson v. Wilson*, 3 N. R. 368), the Court will not (unless under special circumstances) grant an interlocutory injunction either *ex parte* or on notice, without an undertaking as to damages, and the registrars are instructed always to insert it: *Graham v. Campbell*, 7 Ch. Div. 490, 494; *Chappell v. Davidson*, 8 D. M. & G. 1; 2 K. & J. 123; *Tuck v. Silver*, Joh. 218; *Wakefield v. D. Buccleuch*, 13 W. R. 856; 11 Jur. N.S. 523; *Worms v. Smith*, 18 W. R. 91; and it will be required, even when the injunction is continued by the Court of Appeal after hearing both sides: *Teign Valley Co. v. Southwood*, 19 W. R. 690; *De Mattos v. Gibson*, 7 W. R. 152; and will not be dispensed with where the Crown is Plt: *H. M. War Secretary v. Chubb*, 43 L. T. N.S. 83.

The undertaking is not confined to damages sustained by the party against whom the injunction is granted, but extends to damages sustained by all the Defts: *Tucker v. New Brunswick Trading Co.*, 44 Ch. Div. 249. The Court has no jurisdiction to compel a party to give an undertaking: *S. C.*

Where an *ex parte* injunction was granted on an undertaking to amend the writ which was not complied with until the opposite party moved to dissolve the injunction, the Court dissolved the injunction: *Spanish General Agency v. Spanish Corporation*, 63 L. T. N.S. 161; W. N. (90) 158.

Where the injunction is granted in vacation, without attendance of counsel, the undertaking is usually signed either by Plt or by his solr in the registrar's minute book: see Form 3, p. 452.

Where the application for an injunction is by a co., the Court has required the undertaking to be given, and the registrar's book to be signed by a director, or some person satisfactory to the Court, and his signature to be witnessed by the solr of the co.: *Southampton, &c. Co. v. Hollis*, V.-C. B., 20 Jan. 1871, B. 110; *Anglo-Danubian Co. v. Rogerson*, 10 Jur. N.S. 87.

Where no officer of the co. is resident in London, the undertaking may be sent by post to the registrar, and filed instead of signing the book: *Pacific Steam Co. v. Gibbs*, 14 W. R. 218.

In *Re Tecorna Co.*, V.-C. H., 21 Nov. 1874, Reg. Min., f. 142, the under-

taking of counsel on behalf of the co. was accepted as sufficient; and see *Manchester & L. Bkg. Co. v. Parkinson*, 60 L. T. N.S. 47.

If Plt is out of the jurisdiction, an undertaking must be given by his London agents or some responsible person: *Hamilton v. Board*, 1 N. R. 379; *Solignac v. Durden*, M. R., 29 Oct. 1859, B. 2698.

It will be required from a married woman suing in respect of her separate estate: *Holden v. Waterlow*, 15 W. R. 139; and her sole undertaking is now, it seems, sufficient: *Re Prynnes*, 53 L. T. N.S. 465.

The undertaking remains in force although the action is dismissed: *Newby v. Harrison*, 3 D. F. & J. 287 (and see memorandum by Jessel, M. R., W. N. (79) 74); or the Plt has discontinued his action: *Newcomen v. Coulson*, 7 Ch. D. 764.

Notwithstanding the dictum of Jessel, M. R., in *Smith v. Day*, 21 Ch. D. 421, a Deft is entitled to the benefit of the undertaking in damages, though the injunction may have been wrongly granted by mistake of law, and not through any misrepresentation, suppression, or other default of the Plt: *Hunt v. H.*, 54 L. J. Ch. 289; *Griffith v. Blake*, 27 Ch. Div. 474, 477; the rule being (*per Cotton, L. J.*) that wherever the Plt fails on the merits, an inquiry as to damages will be granted, unless there are special circumstances to the contrary: and see *Sheppard v. Gilmore*, W. N. (87) 242; *Ross v. Buxton*, W. N. (88) 55.

And see, as to the time of reference and mode of assessing damages upon the undertaking, *Southworth v. Taylor*, 28 Beav. 616; *Mold v. Wheatcroft*, 30 L. J. Ch. 598; *Christie v. C.*, *sup.* p. 453; *Hunt v. H.*, 54 L. J. Ch. 289.

An inquiry will not be granted when the Court can satisfy itself as to the amount of damage: *Graham v. Campbell*, 7 Ch. D. 490, 494.

The Court will not enforce the undertaking where there has been unreasonable delay in applying, *e.g.*, four years after it was ascertained that the injunction had been improperly granted: *Exp. Hall, Re Wood*, 23 Ch. Div. 644.

As to breach of undertaking, *v. inf.* sect. xxii.

#### SERVICE OF ORDER FOR INJUNCTION.

By O. L. 11, the writ of injunction has been abolished; and service of the minutes of the order, signed by the registrar, or even notice in writing, if fully proved, is sufficient, but should be followed by service of the order as soon as it can be obtained: see *Heywood v. Wait*, 18 W. R. 205; Dan. Ch. Fr. 1623; Kerr, 630.

A judgment or order for an injunction is to be dated and take effect from the day on which it is pronounced: O. XLI. 3; O. LII. 13; and a party having notice of the order is bound by it, from that time, and not merely from the drawing up of the order.

A party in Court when the order is made against him, or only leaving just as it was about to be pronounced, has notice of it so as to be bound: *Hearn v. Tennant*, 14 Ves. 136; *James v. Downes*, 18 Ves. 522; and, generally, it is sufficient if it appears beyond doubt and dispute that he has notice, however given (even by telegram, especially if through a solr: *Exp. Langley*, 13 Ch. Div. 110; *The Seraglio*, 10 P. D. 120; *Re Bryant*, 4 Ch. D. 98), of the order, and that the Plt intends to proceed with it, though it has not been served: *United Telephone Co. v. Dale*, 25 Ch. D. 778; *Heywood v. Wait*, 18 W. R. 205. But the order should be drawn up, passed, and entered without delay: *Van Sandau v. Rose*, 2 Jac. & W. 264; O. LXII. 4—6; *Avory v. Andrews*, 51 L. J. Ch. 414.

Unless substituted service was directed (*Kirkman v. Honnor*, 6 Beav. 400; *Heald v. Hay*, 9 W. R. 369; and see *Anderson v. Lewis*, 3 B. C. C. 429), service of the writ of injunction must have been personal, by showing the original, and leaving a copy with the person served: *Woodward v. King*, 2 Dick. 797; 3 Sw. 626; and this rule applies to the order which by the new practice has been substituted for the abolished writ: O. L. 11.

As to the indorsement to be made, under O. XLI. 5, on all copies of judgments or orders which shall be served requiring any person to do an act, and as to service generally, *v. sup.* pp. 386, 387.

NOTICE OF MOTION.

According to the former practice, personal service of notice of motion for injunction and receiver could only be made before appearance by leave of the Court, and such leave must have been stated in the notice: *Ramsbottom v. Freeman*, 4 Beav. 145; *Hill v. Rimell*, 2 M. & C. 641.

And now, by O. LII. 8, the Plt may, without any special leave, serve any notice of motion on any Deft who, having been served with a writ of summons, has not appeared within the time limited for the purpose.

And by r. 9, by leave of the Court or Judge obtained *ex parte*, the Plt may serve any notice of motion with the writ of summons, or at any time after service thereof, and before appearance. In such case the notice must state that it is by leave.

As an application to add or strike out the names of any parties, whether as Plts or as Defts, may now be made at any stage of the proceedings (O. XVI. 11), such application will not, it is presumed, prevent Plt from moving for an injunction. And even under the former practice the allowance or pendency of a demurrer for want of parties (now abolished, O. XXV. 1), did not, it seems, prevent an application for an injunction or receiver: *Hamp v. Robinson*, 3 D. J. & S. 97; *Const v. Harris*, T. & R. 514; and see *Re Thorniley*, *Woolley v. T.*, 32 W. R. 539.

Under the old practice an amendment of the bill after notice of motion for an injunction operated as a waiver of the notice of motion, and the Plt had to pay the costs occasioned by the notice of motion: *L. & Blackwall Ry. v. Limehouse Bd.*, 3 K. & J. 123; *Smith v. Dixon*, 12 W. R. 934; *Monypenny v. M.*, 1 W. R. 99.

It was irregular to move on notice of motion given before the amendment; the proper course being to apply for leave to amend, without prejudice to the notice of motion: *Rawlings v. Lambert*, 1 J. & H. 458; *Gouthwaite v. Rippon*, 1 Beav. 54.

And although under the new practice an injunction may be applied for upon the writ of summons (see O. XIX. 2, O. XX. 1 (b)), it is conceived that the old rule of practice ought, in strictness, still to be followed; and see *Caldwell v. Pagham Harbour Reclamation Co.*, 2 Ch. D. 221, where an action was by leave turned into an information and action, without prejudice to a pending motion for an injunction; and see *Kerr*, 622.

INTERLOCUTORY APPLICATIONS AND INTERIM RESTRAINING ORDERS—  
JURISDICTION.

The term "interim" is technically applied only to an order granted over the next or some early motion day, but often extended.

The term "interlocutory" is used in a more comprehensive sense, and applies to any order or injunction that is granted only up to judgment in the action.

By the Jud. Act, 1873, s. 25 (8), an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient, and such order may be made either unconditionally, or upon such terms and conditions as the Court shall think just; and see O. L. 6, 12.

The extensive jurisdiction of granting injunctions given to the Courts of Common Law by the C. L. P. Act, 1854, ss. 79, 82, has been transferred to the High Court, so that injunctions will now be granted in the Ch. Div. in cases where under the old practice there was no jurisdiction in that division: see *Beddow v. B.*, 9 Ch. D. 89; *Aslatt v. Southampton Corp.*, 16 Ch. D. 143; *Cooper v. Whittingham*, 15 Ch. D. 501; especially in cases of libel: see *Thorley, &c. Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, 14 Ch. D. 864; *Quartz Hill Co. v. Beall*, 20 Ch. Div. 501; *Hill v. Hart-Davis*, 21 Ch. D. 798; *Bonnard v. Perryman*, (1891) 2 Ch. 269.

The principles, however, have not been altered, but only the procedure, and an injunction should only be granted where it is just as well as convenient: *Day v. Brownrigg*, 10 Ch. D. 294; *Gaskin v. Balls*, 13 Ch. Div. 324; *Fletcher v. Rodgers*, 27 W. R. 97; and the jurisdiction has not, it seems, been extended to cases where, independently of the Jud. Act, the party applying had no legal right, nor any remedy in any Court: *N. L. Ry. Co. v. G. N. Ry. Co.*, 11 Q. B. Div. 30; e.g., restraining proceedings before an arbitrator under the L. C. Act, alleged to have been taken without the authority of the

person whose name was used: *London and Blackwall Ry. Co. v. Cross*, 31 Ch. Div. 354; but the Court will not refuse to protect by injunction a right which is merely statutory: see *Hayward v. East London Waterworks Co.*, 28 Ch. D. 138.

An interlocutory injunction to restrain a gross libel was refused where no danger to the Plts in person or property was shown: *Salomons v. Knight*, (1891) 2 Ch. (C.A.) 294.

By O. L. 6, an application for an order under sect. 25 (8) may be made to the Court or a Judge by any party; if by Plt, either *ex parte* or with notice; and if by any other party, then on notice to Plt, and at any time after appearance by the party applying.

Under this rule, a Deft may, before judgment, but after appearance, and on notice to Plt, apply for an injunction and receiver: *Sargant v. Read*, 1 Ch. D. 600; but under Jud. Act, 1873, s. 25 (8), Deft may apply *ex parte*: *Hick v. Lockwood*, W. N. (83) 48.

As to application for and delivery of copies of affidavits on *ex parte* applications for an injunction, see O. LXVI. 7 (i, j).

By O. LII. 3, the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way, would or might cause irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs, and subject to such undertaking, if any, as the Court or Judge shall think fit.

Under this rule, in order to avoid delay, the order for service out of the jurisdiction, obtained *ex parte* under O. II. 4, before issuing the writ, has provided for the issuing of an injunction from and after issue of the writ of summons: *Young v. Brassey*, 1 Ch. D. 277.

Under the new practice injunctions have been granted by Judges of the Common Law Divisions personally in Chambers on *ex parte* applications (see *Fenner v. Bedford*, W. N. (75) 230, to restrain pulling down a house: *Tozer v. Walford*, W. N. (75) 250, to restrain the use of a steam engine: *Anon.*, W. N. (76) 21, to restrain parting with a bill of exchange).

But this has not hitherto been the practice in Chancery, and will probably not be encouraged in that division: see *English v. Camberwell Vestry*, W. N. (75) 256; and that injunctions ought not to be granted *ex parte* except in cases of emergency, see *Anon.*, W. N. (76) 12, *per* Lindley, J.

For injunction in the Probate Division, after issue of the writ, but before service, to restrain any dealing with an intestate's estate, see *Brand v. Mitson*, 24 W. R. 524.

In actions within its jurisdiction a County Court has power, under Jud. Act, 1873, s. 89, to grant an injunction, and to commit for disobedience to the order: *Martin v. Bannister*, 4 Q. B. D. 212, 491; but not to stay an action commenced in the High Court (having no power to do what the High Court, since sect. 89, cannot): *Cobbold v. Pryke*, 4 Ex. D. 315.

Applications for injunctions, mandamus, or the appointment of a receiver, under the Jud. Act, 1873, s. 25 (8), or for the interim preservation of property, &c., under O. L. 1, 2, 3, are, by O. LIV. 12, excepted from the jurisdiction of the masters of the Q. B. Div., and of the registrars in the Probate, Divorce, and Admiralty Division.

In cases of urgency, interim restraining orders are granted, and receivers appointed, on affidavit of the facts before appearance of the Deft or service of the writ (or, under the former practice, bill filed): *Carr v. Morice*, 16 Eq. 125; *Thorneloe v. Skoines*, *ib.* 126; *Campana v. Webb*, 22 W. R. 622; and even before affidavit filed, Plt undertaking to file it: *Newman v. Harris*, W. N. (70) 6; *Shimell v. Tucker*, V.-C. W., 13 Ap. 1872, B. 821; *Young v. Brassey*, 1 Ch. D. 277 (see, however, *Exp. M'Phail*, 12 Ch. D. 632); *H.'s Estate, Colebourne v. C.*, 1 Ch. D. 276; O. xxxviii. 19.

By O. LXVI. 7 (j), on *ex parte* applications for injunctions, or *ne exeat*, the party making such application is to furnish copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of the usual request and undertaking, or within such time as may be specified in such request, or may have been directed by the Court or a Judge.

After the motion is opened no new evidence can be adduced, except with the leave of the Court: *Bird v. Lake*, 1 H. & M. 118, 119; *East Lancashire Ry. Co. v. Hattersley*, 8 Ha. 72, 86; and see *Munro v. Wivenhoe Ry. Co.*, 4 D. J. & S. 726; which seems to extend the rule to the use by counsel of any evidence in existence when they are called upon to address the Court.

Applications for injunctions *ex parte* are strictly dealt with: there must have been *uberrima fides*; the case must be fully and fairly stated; and the suppression or misrepresentation of any material fact will disentitle Plt to relief, or at least make him liable for costs at the hearing: *Dalglish v. Jarvie*, 2 Mac. & G. 231; *A.-G. v. Liverpool Corp.*, 1 My. & Cr. 171; *Maclaren v. Stainton*, 16 Beav. 279; *Edelsten v. E.*, 1 D. J. & S. 185; *Fuller v. Taylor*, 11 W. R. 532; *Harbottle v. Pooley*, 20 L. T. N.S. 436; *Holden v. Waterlow*, 15 W. R. 139; *Wimbledon L. Board v. Croydon Sanitary Authority*, 32 Ch. Div. 421. If the Deft has appeared the Court ought to be informed of the fact: *Mexican Co. v. Maldonado*, W. N. (90) 8.

But the Plt so applying is not bound to state facts supposed to raise some point of law in reality untenable: *Weston v. Arnold*, 8 Ch. 1084. And see *Kerr*, 634.

A motion to discharge an *ex parte* order for an injunction, on the ground of its having been obtained by misrepresentation, is proper, though the injunction is about to expire: *Wimbledon L. Board v. Croydon Sanitary Authority*, 32 Ch. Div. 421; distinguishing *Bolton v. London School Board*, 7 Ch. D. 766.

Delay and acquiescence are very material (especially in patent cases: *Bovill v. Crate*, 1 Eq. 388; *Bacon v. Jones*, 4 M. & C. 439); and will more easily than at the hearing bar Plt's right to summary relief: *Hogg v. Scott*, 18 Eq. 444; *Johnson v. Wyatt*, 2 D. J. & S. 18; *Wood v. Sutcliffe*, 2 Sim. N.S. 163; *Gordon v. Cheltenham Ry. Co.*, 5 Beav. 233; *Ware v. Regent's Canal Co.*, 3 D. & J. 212; *Wintle v. Bristol and S. W. Ry. Co.*, 10 W. R. 210; *Salisbury v. Met. Ry. Co.*, 18 W. R. 484; *Isaacson v. Thompson*, 41 L. J. Ch. 101; but mere delay short of the statutory period of limitations will not affect the right to an injunction in aid of a legal right: *Fullwood v. F.*, 9 Ch. D. 176.

And see, upon the equitable doctrine of acquiescence as applied to injunctions, *Kerr*, 18—21, 189; *Wilmott v. Barber*, 15 Ch. D. 96.

The balance of convenience and inconvenience from granting or refusing the order is also very material on interlocutory applications, especially where it is sought to stop carrying on a trade: *Plimpton v. Spiller*, 4 Ch. D. 286; *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476; *A.-G. v. Charles*, 11 W. R. 253; or a public undertaking: *Shrewsbury and Chester Ry. v. Shrewsbury and Birmingham Ry.*, 1 Sim. N.S. 410; *Greenhalgh v. Manchester Ry. Co.*, 3 M. & Cr. 784; *Hadley v. London, &c. Bank*, 3 D. J. & S. 63; or to stop the working of a mine: *Hilton v. Granville*, C. & Ph. 297; or to restrain interference with light: *Newson v. Pender*, 27 Ch. Div. 43; *McManus v. Cooke*, 35 Ch. D. 681; or alleged infringement of trade mark: *Mitchell v. Henry*, 15 Ch. Div. 181;

—as also the power of the Court completely to enforce its order, *e.g.*, by compelling a Plt to carry out the contract an interference with which he seeks to restrain: *Garrett v. Banstead Ry. Co.*, 4 D. J. & S. 462; *Munro v. Wivenhoe Ry. Co.*, 4 D. J. & S. 723;

—as also the fact that the Plt can be adequately and more conveniently compensated by an inquiry as to damages—and these considerations are also applicable to relief by injunction at the hearing, and to cases of specific performance: see *Elwes v. Payne*, 12 Ch. Div. 468; *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476; *McManus v. Cooke*, 35 Ch. D. 681; *Holland v. Worley*, 26 Ch. D. 578; *Ienberg v. E. I. Ho. Co.*, 3 D. J. & S. 263; *Jackson v. D. Newcastle*, *Id.* 275; *Eastwood v. Lever*, 4 D. J. & S. 114; *Senior v. Pawson*, 3 Eq. 330; *Master v. Hansard*, 34 L. T. N.S. 719; *Wilson v. Northampton and Banbury Ry. Co.*, 9 Ch. 279.

The interlocutory order does not conclude the right; the object and effect being merely to keep things *in statu quo* where the Plt shows a *prima facie* case for relief at the hearing, so that the relief shall not be ineffectual: see *Preston v. Luck*, 27 Ch. D. 506, 508. In very special cases only will any positive act be enforced by interlocutory injunction: *G. W. Ry. v. Birm., &c. Ry.*, 2 Ph. 597; *Blakemore v. Glamorgan Canal*, 1 M. & K. 154; *Shrewsbury and Chester Ry. v. Shrewsbury and Birmingham Ry.*, 1 Sim. N.S. 410; *Kerr*, 12.

And, generally, this summary relief will not be granted where there is a

serious question to be tried: *e.g.*, the construction of a doubtful clause in an Act of Parliament: *Dover Harbour v. L. C. & D. Ry.*, 3 D. F. & J. 559;

- alleged interference with a franchise in respect of market tolls: *Elwes v. Payne*, 12 Ch. Div. 468;
- the validity of a patent: *Plimpton v. Malcolmson*, 20 Eq. 37;
- where the Plt claims as c. q. tr., but the trust is not admitted, and the right to the money or property in question is matter to be decided at the hearing: *Bank of Turkey v. Ottoman Bank*, 2 Eq. 366;
- or upon a mere *quia timet* where there is no sufficient threatened or intended legal injury: *L. Cowley v. Byas*, 5 Ch. D. 944; *Fletcher v. Bealey*, 28 Ch. D. 688; *A. G. v. Vestry of Bermondsey*, 23 Ch. Div. 60; *Newton v. N.*, 11 P. D. 11; *secus*, where the subject-matter of litigation is in danger of being parted with or destroyed: *London and County Bg. Co. v. Lewis*, 21 Ch. D. 490; *Brand v. Mitson*, 24 W. R. 524;
- or to restrain shipowners from conspiring to drive ships of other traders off a certain line of trade, unless a case of irreparable damage is made out: *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476.

The usual course in such cases is to order the motion to stand until the trial, Deft undertaking to keep accounts, or being put upon terms: see *Coleman v. West Hartlepool Ry.*, 3 L. T. N.S. 847; *Kerr*, 626; *Elwes v. Payne*, 12 Ch. Div. 468; *Mitchell v. Henry*, 15 Ch. Div. 181.

It is not unusual, by consent of parties, to treat the motion for an injunction as a motion for judgment, or to treat the hearing of the interlocutory application as the trial of the action.

The right to an injunction at the hearing is not lost by an interlocutory motion not having been made: *Davies v. Marshall*, 1 Dr. & Sm. 557.

Under the old practice injunctions have been granted at the hearing under special circumstances, though not prayed by the bill: *Blomfield v. Eyre*; *Goodman v. Kine*, 8 Beav. 250, 379; *Reynell v. Sprye*, 1 D. M. & G. 660.

And see *inf.*, Chap. XXXII., "RECEIVERS," for decisions in the analogous case of an application for a receiver not claimed by the writ.

Under the present practice, and the large powers of amendment at any stage of the proceedings (see O. XXVIII.), although where an injunction (or the appointment of a receiver) is a substantial object of the action the writ should be so indorsed, an interim order, though not claimed by the writ, may be obtained on amending the indorsement: *Colebourne v. C.*, V.-C. H., 15 Jan. 1876, A. 19; 1 Ch. D. 690; or without such amendment if incidental to the principal relief claimed.

Injunctions have been granted at the instance of one Deft against his co-Deft: *Edgcumbe v. Carpenter*, 1 Beav. 171; but not, it seems, upon interlocutory application before decree: *Russell v. L. C. D. Ry.*, 4 Giff. 403.

But under O. L. 6, a Deft may before judgment apply for an injunction (and receiver), and in a proper case the Court has jurisdiction to make the order: *Sargant v. Read*, 1 Ch. D. 600.

It has been said that an interim order, if nothing is said to the contrary, remains in force until the case is disposed of: see *Carrow v. Ferrier*, 3 Ch. 719; but in practice such orders are invariably expressed to be granted until after or over a day fixed: see Form 2, p. 452; and if necessary may be continued until a further day, or until judgment: see Form 4, p. 453; and if an interim injunction has been obtained on notice, until a certain day, the Plt is not entitled, after the period for which it was granted has expired, to obtain *ex parte* a further injunction: *Graham v. Campbell*, 7 Ch. D. 491.

The pendency of a motion for an injunction did not prevent Plt from obtaining an order to dismiss his own bill: *Markwick v. Pawson*, 33 L. J. Ch. 703.

#### INJUNCTIONS MANDATORY—DAMAGES IN LIEU OF INJUNCTION.

The jurisdiction to grant a mandatory injunction, that is, to compel the Deft not only to desist from unlawful acts for the future, but to restore matters to their original position, is exercised, like that of specific performance, in cases where the injury to the Plt, active or passive, cannot be estimated and sufficiently compensated by damages, and has not been condoned by acquiescence.



By an interlocutory injunction the continuance of the act complained of is stopped until the right is tried between the parties; by a perpetual injunction such act, when decided to be unlawful, is permanently restrained; and by a mandatory injunction the Deft is ordered to undo the wrong he has done, and give the Plt complete relief by putting him in the position in which he was before the injury was committed.

A mandatory injunction is seldom granted until the Plt has completely established his right: *Child v. Douglas*, Kay, 578; *Gale v. Abbot*, 10 W. R. 748; unless

—the injury will be irreparable if allowed to continue until the hearing; e.g., the flow of water into a mine caused by removing the barrier of an adjoining working: *Westminster Brymbo Co. v. Clayton*, 36 L. J. Ch. 476;

—or the Deft, after express notice or pending litigation, seeks to anticipate the action of the Court by hurrying on an obstructive building: *Daniel v. Ferguson*, (1891) 2 Ch. (C. A.) 27; *Beadel v. Perry*, 3 Eq. 465; *Staight v. Burn*, 5 Ch. 163; *Morris v. Grant*, 24 W. R. 55; and see *Smith v. Day*, 13 Ch. D. 651.

Delay and acquiescence are most material: *Gaskin v. Balls*, 13 Ch. Div. 324 (five years' acquiescence held fatal); *Wicks v. Hunt*, Joh. 373; especially in cases of obstructive building: *Mott v. Shoolbred*, 20 Eq. 22; unless there has been clear violation of an express agreement entered into by Deft after notice that the act will not be sanctioned: *Morris v. Grant*, 24 W. R. 55; or the buildings were such as could be easily altered, and their effect on Plt could not be known till they were finished: *Baxter v. Bower*, 23 W. R. 805.

The power to grant a mandatory injunction was not taken away by Lord Cairns' Act (21 & 22 V. c. 27), providing relief in damages in addition to, or in substitution for, relief by injunction (since repealed, 46 & 47 V. c. 49), and was exercised where the Court was satisfied that a wrong, i.e., substantial annoyance or injury (*Bowes v. Law*, L. R. 9 Eq. 636), had been wilfully done, and that there had been neither delay nor acquiescence on the part of Plt: *Smith v. S.*, L. R. 20 Eq. 500; although the obstruction was completed before writ issued: *Lawrence v. Horton*, 38 W. R. 555; 59 L. J. Ch. 440; and that the repeal of Lord Cairns' Act has not affected the jurisdiction of either division to grant an injunction or damages, or both, see *Sayers v. Collyer*, 28 Ch. Div. 103; and, therefore, damages in lieu of injunction could be granted though notice of action under the Public Health Act, 1875, s. 264, had not been given: *Chapman v. Auckland Union*, 23 Q. B. Div. 299, 300.

But there is no jurisdiction to award damages where no wrongful act has been committed by the person against whom an injunction is sought: *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66; *S. C.*, on appeal, 43 Ch. Div. 316 (q. v. as to the principles to be adopted in working out an inquiry as to damages by unlawful detention, where the judgment is varied, but the inquiry allowed to stand).

The Palatine Court now has jurisdiction to give damages in lieu of an injunction under the Chancery of Lancaster Act, 1890 (53 & 54 V. c. 23), s. 3, which it had not previously: *Proctor v. Bayley*, 59 L. J. Ch. 12, 16.

Where the injury is such that if it is not stopped the Plt's property will be rendered useless, the Court will not compel the Plt to sell his property to the Deft, i.e., to accept damages in lieu of a perpetual injunction; but where the injury is less serious, and may be compensated by money, then the discretion given by the Act may be exercised: *Holland v. Worley*, 26 Ch. D. 578; and see *Donnell v. Bennett*, 22 Ch. D. 835.

For the principles on which mandatory injunctions are granted or refused, and the right to relief in damages, see also *Durell v. Pritchard*, 1 Ch. 24; *Isenberg v. E. I. Ho. Co.*, 3 D. J. & S. 263; *Curriers' Co. v. Corbet*, 2 Dr. & Sm. 355; 4 D. J. & S. 764; *A. G. v. Mid-Kent Co.*, 3 Ch. 100; *Kelk v. Pearson*, 6 Ch. 809; *Baxter v. Bower*, 23 W. R. 805; *City of London Brewery Co. v. Tennant*; *Goodson v. Richardson*, 9 Ch. 212, 221; *L. Stanley v. E. Shrewsbury*, 19 Eq. 616; *Kilbey v. Haviland*, 19 W. R. 698; *Musgrave v. Horner*, 23 W. R. 125; *Rock Portland Cement Co. v. Wilson*, 52 L. J. Ch. 214; 31 W. R. 193; and that where there is jurisdiction to grant an injunction, damages may be given in lieu thereof, not only for injury commenced before, and continued after, writ issued, and ceased before trial, but also for injury

which has occurred since the commencement of the action, see *Fritz v. Hobson*, 14 Ch. D. 542; *Chapman v. Auckland Union*, 23 Q. B. Div. 294, 298; and see *Warwick and Birmingham Canal v. Burman*, 63 L. T. N.S. 670; and that the maxim *actio personalis moritur cum personâ* does not apply to the equitable remedy by mandatory injunction to prevent obstruction of light, see *Jones v. Simes*, 43 Ch. D. 607.

As the Court has power to award damages in an action for an injunction, a consent order in such an action is a bar to an action for damages in respect of the same cause: *Serrao v. Noel*, 15 Q. B. D. 549. The right to damages for detention of property is not lost by the appointment of a receiver, or any other mode of placing the property *in medio*: *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66; 43 Ch. Div. 316.

The result of the cases appears to be that where the Plt, though entitled to relief, has not sustained serious or (pecuniarily) immeasurable injury; or where on other grounds, including that of the balance of convenience or inconvenience, the Court declines to grant him the extreme and summary relief of a mandatory injunction, an inquiry as to damages may be granted though not claimed.

The following are instances of mandatory injunctions:—

(a) Against allowing obstructive buildings to remain, and in effect ordering their removal: *Smith v. S.*, L. R. 20 Eq. 500; *Merchant Taylors' Co. v. Truscott*, 3 D. J. & S. 271; *Jessel v. Chaplin*, 4 W. R. 610; *Rankin v. Huskisson*, 4 Sim. 16; *Great Northern Railway v. Clarence Railway*, 1 Coll. 517; *Gaskin v. Balls*, 13 Ch. Div. 324; *Sellors v. Matlock Bath L. Board*, 14 Q. B. D. 928 (public urinal erected under authority of Public Health Act, 1875); *Myers v. Catterson*, 43 Ch. Div. 470 (hoarding obstructing light coming through railway arch); *McManus v. Cooke*, 35 Ch. D. 681 (mutual agreement as to erection of skylights).

(b) Compelling the removal of obstructions, as in *Hervey v. Smith*, 1 K. & J. 389; 22 Beav. 299 (to the use of flues); *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Robinson v. Ld. Byron*, 1 Bro. C. C. 588 (to the flow of water); *Lane v. Newdigate*, 10 Ves. 192 (to the right of navigating a canal); *Neath Canal Co. v. Ynisarwed Co.*, 10 Ch. 450 (to the use of an accommodation bridge); *Clegg v. Castleford L. B.*, W. N. (74) 229 (to the use of a drain); *Cannon v. Villars*, 8 Ch. D. 415 (to a right of way through a gateway and across a yard). And see *A. G. v. Furniss Ry. Co.*, 26 W. R. 650, for an order compelling a railway co. to construct a bridge of height and width prescribed by Railways Clauses Act, 1845, s. 49.

(c) Compelling the restitution of mining barriers: *E. Mexborough v. Bower*, 7 Beav. 129; *Westminster Brymbo Co. v. Clayton*, 36 L. J. Ch. 476.

(d) Compelling railway co. to restore junction between their line and a siding: *Woodruff v. Brecon Ry. Co.*, 28 Ch. Div. 190.

(e) Compelling the erection and maintenance of fences: *Bidwell v. Holden*, 63 L. T. N.S. 104.

(f) Against allowing pipes to remain on Plt's land, though under a highway: *Goodeon v. Richardson*, 9 Ch. 221.

(g) Against allowing a colliery to be flooded by ceasing to pump out the water: *Strelley v. Pearson*, 15 Ch. D. 113.

(h) Compelling removal from an upper floor of lithographic stones causing danger by excessive weight to the premises: *Cohen v. Poland*, W. N. (87) 159.

(i) Compelling the return of letters and other documents: *Evitt v. Price*, 1 Sim. 483; *Whittaker v. Howe* (R.), 25 Feb. 1841, B. 336.

(k) Compelling the withdrawal of a notice by a dismissed agent to the post office to forward all letters to his private address (thereby enabling him to obtain letters intended for his former employers): *Hermann Loog v. Bean*, 26 Ch. Div. 306.

## SECTION II.—BREACH OF CONTRACT.

1. *Injunction against practising in a Profession within specified Limits.*

LET the Deft W. be restrained by injunction from carrying on, either alone or in copartnership with any other person or persons whomsoever, the practice and profession of a solicitor, in W. or M., in the county of D., or at any place within fifty miles thereof respectively; and from continuing to describe himself by any public inscription on his premises at W. aforesaid as a solicitor.—Deft W. to pay the Plt's costs of suit to be taxed.—See *Howard v. Woodward*, V.-C. W., 8 Nov. 1864, A. 2082.

For injunction against practising in the London Court of Bankruptcy in breach of a covenant not directly or indirectly to practise the business of a solr within the city of London or the counties of Middlesex or Essex, see *May v. O'Neill*, 44 L. J. Ch. 660.

For injunction to restrain the Deft from carrying on or exercising the profession or business of a surgeon and apothecary or surgeon, or from acting as a physician in the town of —, in the county of —, or within the radius or compass of five miles thereof, until the hearing, &c., see *Giles v. Hart*, V.-C. S., 2 Dec. 1859, A. 224; 5 Jur. N.S. 1381.

For the like order, see *Gravelly v. Barnard*, 18 Eq. 518; and see *London and Yorkshire Bank v. Pritt*, 56 L. J. Ch. 987; 26 W. R. 135; where a condition in a bond was held to be evidence of an agreement by a bank manager, that he would not, after quitting the employ of the bank, enter into similar employ within a specified time and distance.

From practising as a dentist in Chester, or within sixteen miles by the nearest road from Chester Cross, or in any place within the boundaries of Birkenhead, see *Bullin v. Teece*, V.-C. G., 19 June, 1868, A. 1481.

2. *Injunction against exercising a Trade, with Account.*

LET the Deft E., the elder, be restrained by injunction from directly or indirectly setting up, exercising, or carrying on the trade or business of a gas-meter manufacturer and gas engineer, and matters connected therewith, including in particular the department of gas fitting as carried on on the Plt's premises in &c., and also from directly or indirectly setting up, exercising, or carrying on the trade or business of a gas-meter manufacturer and gas engineer, or matters connected therewith, within twenty miles of G— Street, W., until the further order of this Court.—So much of the Plt's (bill) as relates to the said Deft carrying on the business of a gas fitter within the twenty miles dismissed without costs, without prejudice to any action, in the name of himself and E., the younger, the Plt giving an indemnity to the said E., the younger, to be settled by the Judge.—1. Account of all moneys received by Deft E., the elder, belonging to the copartnership between the Plt and the Deft E., the younger, not already paid over or accounted for.—2. Account of what is due to the Deft E., the elder, from the copartnership in respect of salary or remuneration.—

Adjourn &c.—Liberty to apply.—*Clarkson v. Edge*, M. R., 18 Dec. 1863, A. 2531; S. C., 33 Beav. 227.

For a similar injunction against “directly or indirectly buying and selling manufactured horsehair, or otherwise carrying on the trade or business of a horsehair manufacturer at B., or at any other place in the United Kingdom within a distance of 200 miles from the town of B.,” see *Harms v. Parsons*, M. R., 17 Dec. 1862, A. 2437; 32 Beav. 328. (In this case the bill, so far as it sought to restrain Deft from carrying on the business of horsehair dealer, as distinct from the purchase and sale of manufactured horsehair, was, on construction of the covenant, dismissed.)

—against carrying on the trade of telegraphic agent within a limited area, see *The Oriental and Amer. Telegram Co. v. Dodwell*, Fry, J., 7 Nov. 1877.

From continuing to carry on or recommencing business as a glove manufacturer at Woodstock or its neighbourhood, and from acting as assistant or agent to any one there, other than the Plt, his exors, admors, and assigns, see *Duggett v. Ryman*, M. R., 14 Jan. 1868, A. 85; 16 W. R. 302.

From carrying on, or continuing to permit to be carried on in the messuage, &c., No. —, at Brighton, or any part thereof, the trade or business of a baker or confectioner, see *Hodson v. Coppard*, M. R., 8 Nov. 1860, A. 2123; 29 Beav. 4.

For injunction to restrain Deft from breach of covenant by advertising himself as having been formerly connected in trade as partner, manager, or servant with the Plt, see *Wolmershausen v. O'Connor*, V.-C. B., 3 May, 1877, B. 853; 36 L. T. N.S. 921.

For injunction to restrain purchaser of business from using name of vendor in such a way as to expose him to any liability by holding him out as a person with whom contracts were made, which might impose liability on him, see *Thynne v. Shove*, Stirling, J., 16 May, 1890, B. 588; 45 Ch. D. 577; and see *Chatteris v. Isaacson*, 57 L. T. N.S. 177.

### 3. Injunction against use of Premises for Trade or Business Purposes.

By consent, Let the Defts, the L. Co., Lim., their servants and agents, be perpetually restrained by injunction from using the plot of land, and house, and premises thereon, called B. Lodge, situate in L., in the county of W., in the writ mentioned, or any part thereof, as a sanatorium, whether for pupils of the L— College or otherwise, and from carrying on any trade or business on the said property or any part thereof, and from doing on the said property or any part thereof anything which shall be a nuisance or annoyance to the neighbourhood.—Operation of order suspended for two months.—Defts to pay costs.—*Watson v. Leamington Coll. Co., Lim.*, M. R., 6 Nov. 1880, B. 2083.

### 4. Breach of Agreement, giving Plt, for valuable Consideration, the Sole and Exclusive Right of Sale of certain Articles in Deft Co.'s Premises, restrained.

LET the Defts, their servants &c., be restrained by injunction from permitting, or neglecting to prevent, the exhibition or sale of English and foreign china, glass, earthenware, chandeliers, and lamps (not being Venetian glass or Terra Cotta), by any other persons or person

than the Plts within the premises of the Defts; until &c.—*Altman v. Royal Aquarium Co.*, V.-C. B., 25 May, 1876, A. 941; 3 Ch. D. 228.

For injunction to stay Defts evicting Plts from bookstalls, for the sale of books at which Plts had obtained the sole and exclusive privilege, see *Holmes v. F. C. Ry.*, 3 K. & J. 675.

#### 5. *Breach of Publican's Agreement with Brewer restrained.*

AND the Plt by his counsel undertaking to supply to the orders from time to time of the Deft for consumption in the E. beerhouse &c., ale, beer, and porter, all of good quality, in requisite quantities, at market or fair and reasonable prices: Let the Deft T., his agents &c. be perpetually restrained by injunction from supplying, or causing or procuring to be supplied, from any other brewer than the Plt, any ale, beer, or porter which may be consumed in the said beerhouse, and from selling in, or from, or keeping in the said beerhouse any ale, beer, or porter, to be hereafter supplied by him or by any brewer other than the Plt for consumption therein.—Deft to pay costs of suit.—Liberty to apply.—*Catt v. Tourle*, V.-C. W., 15 Nov. 1871, A. 2789; S. C., 4 Ch. 654.

For injunction to restrain a yearly tenant, without express notice, from using his house as a beershop, contrary to a covenant entered into by the owner, who had afterwards sold the house to Deft's lessor, see *Wilson v. Hart*, 1 Ch. 463.

#### 6. *Breach of Farming Contract.*

UPON usual undertaking as to damages and to accept short notice of motion to discharge this order &c., Let the Deft, his agents &c., be restrained from assigning over, underletting, or parting with the possession of N. farm &c., or any part thereof, without the licence in writing of the Plt until the — day of —, or until further order; And Let the Deft, his auctioneers, or agents &c., be restrained until the said — day of —, or further order, from putting up for sale by public auction at N. in the (bill) mentioned, or at any other place, the right to depasture the grass and pasture lands specified in the notice and handbill of sale in the (bill) set out or any part of such lands without the licence in writing of the Plt.—*Cubitt v. Heyward*, V.-C. M., 7 May, 1875, A. 685.

For form of order for injunction to stay selling, assigning, or underletting a farm contrary to the covenants in Deft's lease, see *Dyke v. Taylor*, 3 D. F. & J. 470; but on appeal this order was reversed on the merits, *Ib.* 472.

#### 7. *Injunction against removal of Hay and Straw.*

USUAL undertaking.—“Let the Deft S., his agents &c., be restrained by injunction from removing, or suffering to be removed, from off the demised premises in the (bill) mentioned, any of the hay, straw, and other vestures which have arisen upon the said demised premises or upon any part thereof, and from spending or consuming, or suffering

to be spent or consumed, in any other place than on the demised premises, or on some part thereof, the hay, straw, and other vestures which have arisen upon the said demised premises or upon any part thereof until &c., or further order."—*Burrow v. Sharp*, V.-C. S., 6 March, 1871, A. 483.

For like injunction against assignee of bankrupt tenant (under 56 Geo. 3, c. 50, s. 11), notwithstanding disclaimer of lease, see *Lybbe v. Hart*, 29 Ch. Div. 8.

For like order to stay removal from the farm occupied by the Deft, as tenant of the Plt, any hay or straw (except the reed of wheat), ashes, dung, compost or manure growing or produced or brought on the farm during the tenancy, see *Williams v. Robbins*, V.-C. H., 20 July, 1876, B. 1336.

— from selling and carrying off, or permitting to be sold or carried off, a farm any straw or chaff "grown or bred thereon," see *Hoare v. Herrington*, V.-C. B., 31 July, 1876, A. 1372.

— to restrain trustee in liquidation of mortgagor from cutting and removing crops, after demand for possession by mortgagee, *Bagnall v. Villar*, 12 Ch. D. 812.

For order restraining Deft from using, or authorizing any person to use, a gun or firearms for the purpose of killing game, and from killing, or authorizing to be killed, hares on the land, and from killing with a gun rabbits on same land, see *Allhusen v. Brooking*, 26 Ch. D. 559.

#### NOTES.

##### BREACH OF CONTRACT GENERALLY.

For the principles on which the Court acts in cases of breach of covenant, viz., that if the contract and breach are clear, or if, without actual breach, the right to act in breach is claimed, an injunction will be granted, see *Tipping v. Eckersley*, 2 K. & J. 264; *Wilkinson v. Rogers*, 2 D. J. & S. 62; *Lloyd v. L. C. & D. Ry. Co.*, 2 D. J. & S. 568; *Shafto v. Bolckow*, 34 Ch. D. 725; and see *A. G. v. Acton Local Board*, 22 Ch. D. 221.

The same importance will not be attached to the amount of damage as in other cases; and it is not essential for the Plt to show serious injury from the breach: *A. G. v. Mid-Kent Ry. Co.*, 3 Ch. 100; *Western v. M'Dermott*, 1 Eq. 499; 2 Ch. 72; *Leech v. Schweder*, 9 Ch. 463; *Dickenson v. Grand Junc. Can.*, 15 Beav. 260.

So, also, inconvenience to the public from granting the injunction is no ground for refusing it: *Raphael v. Thames Valley Ry.*, 2 Ch. 147; and see *Grahame v. Swan*, 7 App. Ca. 547, 565, 569.

Statutory provisions, *inter partes*, may be regarded as a contract, and enforced accordingly: *Countess of Rothes v. Kirkcaldy Waterworks*, 7 App. Ca. 694; and that a covenant may be repealed by a subsequent Act of Parliament, see *Newington Local Bd. v. Cottingham Local Bd.*, 12 Ch. D. 725.

But although the balance of convenience and actual injury are less strictly material in cases of breach of contract, the conduct of the Plt will be taken into consideration; e.g., if he has himself broken the agreement, he cannot obtain an injunction to restrain Deft from breach in any other respect: *Telegraph Despatch Co. v. M'Lean*, 8 Ch. 658.

For instances of delay, acquiescence, active or passive, want of fairness, &c., which have disintitled the party in whose favour the contract is made to relief, see *Kerr*, 429, &c.

As to restraining by injunction the breach of an agreement which cannot be specifically enforced, the authorities are not easily reconciled.

Cases in which the Court has refused to give effect to such an agreement by restraining that which would be a breach of it, are:—*Clarke v. Price*, 2 Wils. C. O. 157; *Kemble v. Kean*, *Kimberley v. Jennings*, 6 Sim. 333, 340; *Hills v. Croll*, 2 Ph. 60; *Stocker v. Wedderburn*, 3 K. & J. 393; *Adamson v. Gill*, 16 W. R. 639; *Wheatley v. Westminster, &c. Co.*, 9 Eq. 538; *Phipps v. Jackson*, 35 W. R. 378; 56 L. J. Ch. 550.

And see *Peto v. Brighton, &c. Ry.*, 1 H. & M. 468; *Merchants' Co. v. Banner*, 12 Eq. 18; *Fothergill v. Rowland*, 17 Eq. 132, that the Court will not by injunction restrain the breach of an agreement which it cannot specifically

enforce; nor restrain a person from carrying out one part of such an agreement while another part remains unperformed: *L. Abinger v. Ashton*, 17 Eq. 358; *Pollard v. Clayton*, 1 K. & J. 462.

But if the agreement is separable, and contains a negative in addition to the positive part (*e.g.*, an agreement to sing at A.'s theatre, and not elsewhere without his authority, or to write for a particular publisher, and not for any other publication during the engagement), the Court has restrained a violation of the negative, though it could not compel performance of the positive portion: *Lumley v. Wagner*, 1 D. M. & G. 604; *Rolfe v. R.*, 15 Sim. 88; *Stiff v. Cassell*, 2 Jur. N.S. 348; *Daggett v. Ryman*, 16 W. R. 302; *Kernot v. Potter*, 3 D. F. & J. 459; *Ogden v. Fossick*, 11 W. R. 128; 4 D. F. & J. 426; *Whitwood Chemical Co. v. Hardman*, 64 L. T. N. S. 716.

But the tendency of recent decisions seems to negative the idea that the jurisdiction depends on the existence in the contract of a negative stipulation which can be enforced, though specific performance could not be granted of the entire contract, but to rest the question upon the nature and substance of the contract: whether it is a proper subject of equitable jurisdiction, or whether it is a case for damages only, see *Donnell v. Bennett*, 22 Ch. D. 835.

By thus restraining any act in breach, specific performance has been indirectly compelled, *e.g.*, by restraining railway cos. from running trains without stopping at a particular station: *Hood v. N. E. Ry. Co.*, 5 Ch. 525; *Rigby v. G. W. Ry. Co.*, 10 Jur. 488, 531; 2 Ph. 44; *Churchill v. Salisbury and Dorset Ry. Co.*, 23 W. R. 534, 894; *Phillips v. G. W. Ry. Co.*, 7 Ch. 409; *Wilson v. Northampton and Banbury Co.*, 9 Ch. 279.

A covenant, though positive in terms, may be in substance negative, so that a breach will be restrained by injunction: *Catt v. Tourle*, 4 Ch. 654. And a condition in a bond is evidence of an agreement not to engage in a specified employment: *London and Yorkshire Bank v. Pritt*, 56 L. J. Ch. 987; 26 W. R. 138; *National Provincial Bank v. Marshall*, 40 Ch. Div. 112; but a direct covenant to pump out water from a mine does not imply a covenant not to discontinue pumping: *Payne v. Rocher Colliery Co.*, W. N. (87) 37.

And in certain cases the negative term, though not expressed, is implied, and acts inconsistent with the agreement restrained: *e.g.*, an actor engaged at a particular theatre will be restrained from performing elsewhere during his engagement: see *Webster v. Dillon*, 3 Jur. N.S. 432; *Montague v. Flockton*, 16 Eq. 189.

But the manager (and probably the publisher) who has engaged the exclusive services of an actor (or author), unless he employs him loses his right to an injunction: *Fechter v. Montgomery*, 33 Beav. 22.

#### RESTRAINT OF TRADE.

Breaches of covenant or agreement relating to trade will be restrained; as in the case of a covenant not to practise or set up business, nor to carry on or be concerned or interested in a particular trade within certain limits, nor to solicit custom from the customers of the former employer, or of the purchaser: *Edmonds v. Plew*, 6 Jur. N.S. 1091 (solr); *Giles v. Hart*, 8 W. R. 74 (surgeon); *Fox v. Scard*, 33 Beav. 327 (business of a surgeon at Weymouth); *Rogers v. Drury*, 57 L. J. Ch. 504; 36 W. R. 496 (medical man soliciting former patients); *Benwell v. Inns*, 24 Beav. 307 (milk-walk); *Harms v. Parsons*, 32 Beav. 328 (horse-hair manufacturer within 200 miles of Birmingham); *Daggett v. Ryman*, 16 W. R. 302 (glove manufacturer in Woodstock or its neighbourhood); *Newling v. Dobell*, 19 L. T. N.S. 408; 38 L. J. Ch. 111 (business of a tailor, within five miles E. or two miles W. of High Holborn); *Jones v. Heavens*, 4 Ch. D. 636 (business of saddler within ten miles from Croydon; covenant broken by selling as journeyman); *Nicoll v. Beere*, 53 L. T. N.S. 659 (business of a tailor within ten miles from Charing Cross for three years); *Parsons v. Cotterill*, 56 L. T. N.S. 839 (wine and spirit merchant within fifty miles of Burton-on-Trent); *Vernon v. Hallam*, 34 Ch. D. 748 (covenant not to use particular style or name in trade); *Hill v. Hill*, 55 L. T. N.S. 76 (covenant not to engage or be concerned in a trade); and see *Watts v. Smith*, W. N. (90) 70; *Leather Cloth Co. v. Lonsont*, 9 Eq. 345 (manufacture of leather cloth in any part of Europe); and see cases collected, Pollock, Contr. 337; *Mineral, &c. Trade Protection Soc. v. Booth*, 36 Ch. Div. 465 (covenant by members of a trade society

against employment of any traveller, carman, or outdoor *employé* who had left service of another member).

Although it has been stated in the Court of Appeal that the old rule still prevails, that a covenant in general restraint of trade, without limit of time and space, is void (see *Davies v. D.*, 36 Ch. Div. 359), it has also been held that the limits within which such restraints are valid are elastic, and will be measured by what is reasonable for protection of the interests of the covenantee, having regard to the nature of the subject-matter; so that a covenant in restraint of trade is not in all cases invalid from being unlimited in area: *Rousillon v. R.*, 14 Ch. D. 351, 369; *Leather Cloth Co. v. Lorrson*, 9 Eq. 345; *Mills v. Dunham*, (1891) 1 Ch. (C. A.) 576; *Davies v. Lowen*, W. N. (91) 86. And, generally, the restraint must not be unreasonable, having regard to the subject-matter of the contract, nor grossly oppressive as against the covenantor, but such only as to give fair protection to the interests of the covenantee, and not so large as to interfere with the interests of the public: *Collins v. Locke*, 4 App. Ca. 674; *Allsopp v. Wheatcroft*, 15 Eq. 59; *Avery v. Langford*, Kay, 663; *Hitchcock v. Colier*, 6 Ad. & E. 438; *Ward v. Byrne*, 5 M. & W. 548; *Mullan v. May*, 11 M. & W. 667; 1 Sm. L. Ca. (notes to *Mitchel v. Reynolds*); Pollock, Contr. 337.

And as to the principles on which agreements in restraint of trade should be construed, and that the construction of them should not be approached with any *primâ facie* presumption against their validity, see *Mills v. Dunham*, *sup.*

For cases upon such covenants, and instances of a reasonable or unreasonable restriction, see Kerr, 444—454; 1 Smith, L. C. 444—457 (9th edition) (*Mitchel v. Reynolds*).

In some cases the covenant has been held divisible (*e.g.*, as regards area), and the good part enforced: *Baines v. Geary*, 35 Ch. D. 154; *Price v. Green*, 16 M. & W. 346; *Nicholls v. Stretton*, 7 Beav. 42 (as regards time); *Davies v. Lowen*, 64 L. T. N. S. 655. But if, looking at the covenant as a whole, the illegal cannot be severed from the legal part without creating a new covenant, the agreement is altogether void: *Baker v. Hedgedcock*, 39 Ch. D. 520 (where it was sought, ineffectually, to limit a general restriction against carrying on "any business whatsoever" to the business of the covenantee); and see *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 250.

A covenant not to trade within certain limits will pass to, and may be enforced by, a purchaser of the goodwill of the covenantee's business: *Jacoby v. Whitmore*, 32 W. R. 18; 49 L. T. N. S. 335.

A covenant not to carry on a business was held not broken by carrying on a particular part of such business: *Stuart v. Diplock*, 43 Ch. Div. 343, distinguishing *Feilden v. Slater*, 7 Eq. 523.

A contract by which members of a mineral water association bound themselves not to sell mineral waters below a specified price, was held to be in restraint of trade, and not enforceable: *Urmston v. Whitelegg*, 63 L. T. N. S. 455.

"Trade" has been distinguished from "profession"; and, accordingly, though a covenant by A. not to carry on a particular trade, either in his own name or that of any other person, was held not to have been broken by his acting as salaried clerk or assistant to B. carrying on that trade (*Allen v. Taylor*, 19 W. R. 35, 556; but see *Hill & Co. v. Hill*, 35 W. R. 137; *Jones v. Heavens*, 4 Ch. D. 636; *Dales v. Weaver*, 18 W. R. 993; *Newling v. Dobell*, 38 L. J. Ch. 111; *Rolfe v. R.*, 15 Sim. 88); A. who had covenanted "not at any time to set up or carry on the business or profession of a surgeon, &c.," was restrained from acting as a salaried assistant to a surgeon: *Palmer v. Mallet*, 36 Ch. Div. 411.

The mode of measuring the prescribed distance is by a straight line measured on the Ordnance map, and not by the nearest way of access: *Duignan v. Walker*, Joh. 446; *Mouffet v. Cole*, L. R. 7 Ex. 70; 8 Ex. 32 (and cases there cited).

As to the right of an assignee of the covenantee to sue, see *Baines v. Geary*, 35 Ch. D. 154, 159; *Benwell v. Inns*, 24 Beav. 307; 26 L. J. Ch. 663.

#### PENALTY OR LIQUIDATED DAMAGES.

The question often arises whether a sum named as payable upon the breach of the agreement is a penalty to secure performance, or liquidated



damages on breach, in which case the covenantor does not lose his right to an injunction—or is in the nature of an alternative for performance, in which case an injunction will not be granted.

But in general this question will not be determined upon interlocutory motion: *Coles v. Sims*, 5 D. M. & G. 1; *Kay*, 56.

For the numerous cases upon this distinction, see *Kerr*, 454 *et seq.*; *Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332; *National Provincial Bank of England v. Marshall*, 40 Ch. Div. 112.

#### ILLEGALITY.

A contract involving illegality (*Davies v. Makuna*, 29 Ch. Div. 596), as the stifling of a prosecution for not repairing a road (*Windhill L. B. v. Vint*, 45 Ch. Div. 351; and see *Jones v. Merionethshire Building Society*, (1891) 2 Ch. 587), or against the public policy of this country (*Rousillon v. R.*, 14 Ch. D. 351), will not be enforced; *secus*, a contract which is only void as being against the policy of a foreign country, and not immoral or forbidden by positive law: *Re Missouri Steamship Co.*, 42 Ch. Div. 321. And as to the effect of the Lottery Acts, see *Macnee v. Persian Investment Corporation*, 44 Ch. D. 306. And as to contracts of *cos. illegal* or *ultra vires*, *v. inf.* Sect. XIII.

An assignment for value of a pension for military service, being void under 47 Geo. 3, c. 25 (see now 44 & 45 V. c. 58, s. 141), could not be enforced by injunction: *Lloyd v. Cheetham*, 3 Giff. 171 (overruling *Knight v. Bulkeley*, 4 Jur. N.S. 527; 5 Jur. N.S. 817). But the Act did not apply to a pension by the late E. I. Co.: *Heald v. Hay*, 3 Giff. 467; and the assignment of a superannuation allowance from the Treasury has been enforced by injunction: *Lloyd v. Eagle*, 5 Jur. N.S. 187.

Covenants in a separation deed may be enforced against husband or wife, *e.g.*, by restraining proceedings for restitution of conjugal rights: *Besant v. Wood*, 12 Ch. D. 605; *Sanders v. Rodway*, 16 Beav. 207; *Hunt v. H.*, 4 D. F. & J. 221; *Flower v. F.*, 20 W. R. 231. And see further on this question, *inf.* Chap. XXXVII., "MARRIED WOMEN"; Chap. L., "SPECIFIC PERFORMANCE."

#### RESTRICTIVE COVENANTS.

Restrictive covenants (as distinguished from affirmative covenants involving expenditure of money, *e.g.*, to build or keep in repair: see *Haywood v. Brunswick Soc.*, 8 Q. B. Div. 403; *L. & S. W. Ry. v. Gomm*, 20 Ch. Div. 562; *Austerberry v. Oldham Corp.*, 29 Ch. Div. 750; *Hall v. Ewin*, 37 Ch. Div. 74), may be enforced by injunction against purchasers taking with notice of the covenants, though they do not run with the land at common law: *Tulk v. Moxhay*, 2 Ph. 774; *Keppell v. Bailey*, 2 M. & K. 517. Whether a covenant not to carry on a particular trade on premises can be so enforced, *quære*: *Stuart v. Diplock*, 43 Ch. Div. 343.

Upon the question what covenants run with the land, see *Haywood v. Brunswick Soc.*, *sup.*; *Fleetwood v. Hull*, 33 Q. B. D. 35; *Austerberry v. Oldham Corp.*, *sup.*; *Andrew v. Aitken*, 22 Ch. D. 218; *Gover v. Postmaster-General*, 57 L. T. N.S. 527; *Carter v. Williams*, 9 Eq. 678; *Cutt v. Tourle*, 4 Ch. 654; *Western v. McDermott*, 2 Ch. 72; 1 Eq. 499; *Wilson v. Hart*, 1 Ch. 463; 2 H. & M. 551; *Tulk v. Moxhay*, 2 Ph. 774; *Keppell v. Bailey*, 2 M. & K. 517. See also *Pollock*, Contr. 226; *Dart*, V. & P. 862, &c., for the former distinction between the rules of Equity and Common Law on this subject.

The right to enforce a restrictive covenant may be lost by acquiescence, though not by a change in the character of the neighbourhood beyond the control, and independent of, the action of Plt: *Sayers v. Collyer*, 28 Ch. Div. 103; 24 *Ib.* 180. And as to acquiescence generally, see *Willmott v. Barber*, 15 Ch. D. 96; *Kelsey v. Dodd*, 57 L. J. Ch. 34; *Duke of Northumberland v. Bowman*, 56 L. T. N.S. 773. To give the reversioner a right of action, permanent injury so as to affect the reversion must be shown: *Cooper v. Crabtree*, 20 Ch. Div. 589; 19 *Ib.* 193.

The effect of constructive notice of a title subject to a restrictive covenant is not done away with by express representation on the part of the lessor or vendor of the non-existence of such a covenant: *Patman v. Harland*, 17

Ch. D. 353; nor has sect. 2, sub-sect. 2, of the V. & P. Act, 1874, precluding investigation of the lessor's title, affected the law in this respect: *S. C.*; *Thornewell v. Johnson*, 50 L. J. Ch. 641; 29 W. R. 677.

As to the liability of an underlessee of one of two houses comprised in an original lease, see *Cresswell v. Davidson*, 56 L. T. N.S. 811.

And upon the question whether sub-purchasers or assignees are affected with notice of the restrictive covenant, see *Feilden v. Slater*, 7 Eq. 523; *Keates v. Lyon*, 4 Ch. 218; *Clements v. Welles*, 1 Eq. 200; *Hodson v. Coppard*, 29 Beav. 4; *Thornewell v. Johnson*, *sup.*; *Nicoll v. Fenning*, 19 Ch. D. 258. And that the assignee of a purchaser for value without notice is not affected by an agreement not running with the land, though he himself have notice of it, see *A. G. v. Biphosphated Guano Co.*, 49 L. J. Ch. 68.

Restrictive covenants, when part of a building scheme, and intended for the common advantage of purchasers, and not merely for the benefit and protection of the vendor, may be enforced by the purchaser of one lot against the vendors or the purchaser of another: *Spicer v. Martin*, 14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. D. 265; *Collins v. Custle*, 36 Ch. D. 242; *Nottingham, &c. Co. v. Butler*, 16 Q. B. Div. 778; and see *Taite v. Gosling*, 11 Ch. D. 273; *Sheppard v. Gilmore*, 57 L. J. Ch. 6; *Russell v. Watts*, 10 App. Cas. 598; but if a purchaser alienates part of his lot, there is no implied obligation as between him and the alienee: *King v. Dickeson*, 40 Ch. D. 596. But if the covenant is merely for the advantage of the vendor, a subsequent purchaser of land remaining in the vendor's hands has no right to sue on it: *Renals v. Cowlshaw*, 9 Ch. D. 129; 11 Ch. Div. 866.

On the general question when a restrictive covenant can be enforced by an assignee of the covenantee, see *Clegg v. Hands*, 44 Ch. Div. 503; *Davies v. D.*, 36 Ch. Div. 359; *Renals v. Cowlshaw*, *sup.*

The injunction should be to restrain the Deft from authorizing the breach of covenant, not from "permitting" it, as that word might render him liable if he did not prevent breaches by his tenants (which he is not bound to do: *Hall v. Ewin*, 37 Ch. Div. 74): *Martin v. Spicer*, 34 Ch. Div. 1; *Mackenzie v. Childers*, 43 Ch. D. 265.

As to the right of mortgagor to sue without joining mortgagee, see *Fairclough v. Marshall*, 4 Ex. Div. 37.

A restrictive covenant, not being a limitation of property, is not obnoxious to the rule against perpetuities: *Mackenzie v. Childers*, 43 Ch. D. 265.

See also the following cases upon the construction and enforcement of restrictive covenants and agreements relating to—

(a) Beerhouses and sale of liquors: *Allsopp v. Wheatcroft*, 15 Eq. 59; *L. & N. W. Ry. v. Garnett*; *Jones v. Bone*, 9 Eq. 26, 674; *Feilden v. Slater*, 7 Eq. 523; *Pease v. Coates*, 2 Eq. 688; *Luker v. Dennis*, 7 Ch. D. 227; *Bp. of St. Albans v. Battersby*, 3 Q. B. D. 359 (beer-shop); *Holt v. Collyer*, 16 Ch. D. 718 (grocer's licence); *Nicholl v. Fenning*, 19 Ch. D. 258 (off-licence); *London and Suburban Co. v. Field*, 10 Ch. Div. 645 ("beer-shop"); *Buckle v. Fredericks*, 44 Ch. Div. 244 ("retailer of wine, spirits, or beer"); *Fleetwood v. Hull*, 33 Q. B. D. 35 (convictions not endorsed on licence).

(b) Buildings: *Master v. Hansard*, 4 Ch. Div. 718; *L. Manners v. Johnson*, 1 Ch. D. 673; *Bowes v. Law*, 9 Eq. 636; *Peek v. Matthews*, 3 Eq. 515; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *A. G. v. Briggs*, 1 Jur. N.S. 1085; *Child v. Douglas*, Kay, 560; *D. Bedford v. British Museum*, 2 M. & K. 552; *Kilbey v. Haviland*, 19 W. R. 698.

(c) Offensive trades and nuisances: *Johnstone v. Hall*, 2 K. & J. 414; *Kemp v. Sober*, 1 Sim. N.S. 517; *Harrison v. Good*, 11 Eq. 338; *Todheadley v. Benham*, 40 Ch. Div. 80 (hospital for throat diseases).

(d) Farming covenants: *Fleming v. Snook*, 5 Beav. 250; *Drury v. Molins*, 6 Ves. 328; *Burrow v. Sharp*, *sup.* Form 6; *Crosse v. Duckers*, 21 W. R. 287; *Phipps v. Jackson*, 56 L. J. Ch. 550; 35 W. R. 378; *Lybbe v. Hart*, 29 Ch. Div. 8 (where assignee of bankrupt, notwithstanding disclaimer of lease, was restrained from selling hay, straw, &c.); and see *Schofield v. Hincks*, 68 L. J. Q. B. 147.

(e) Right of shooting: *Gearns v. Baker*, 10 Ch. 355; *Pattison v. Gilford*, 18 Eq. 259; and see *Jeffries v. Evans*, 19 C. B. N.S. 246; and (as to a covenant to keep down rabbits) *West v. Houghton*, 4 C. P. D. 197; *Erskine v. Adeane*, 8 Ch. 756.

(f) Covenants against assignment: *Dyke v. Taylor*, 3 D. F. & J. 467; *West v. Dobb*, L. R. 5 Q. B. (Ex. Ch.) 460; 4 Q. B. 634; *Lehmann v.*

*McArthur*, 3 Ch. 496; 3 Eq. 746; and as to the construction of covenant not to assign without lessor's consent, "such consent not to be unreasonably withheld," see *Sear v. House Property Co.*, 16 Ch. D. 387; *Lehmann v. McArthur*, 3 Ch. 496.

(g) Against use of private dwelling-house for business or trade purposes, or anything which should be a nuisance or annoyance to the neighbourhood: *Parker v. Whyte*, 1 H. & M. 167; *Wilkinson v. Rogers*, 2 D. J. & S. 62; *Kemp v. Sober*, 1 Sim. N.S. 517 (keeping a girls' school restrained as a breach of such a covenant); *Johnstone v. Hall*, 2 K. & J. 414 (injunction in like case refused on application of remainderman); *Rolls v. Miller*, 27 Ch. Div. 71 (free home for working girls); *German v. Chapman*, 7 Ch. D. 271 (school for education and lodging of missionaries' daughters); *Bramwell v. Lacy*, 10 Ch. D. 691 (throat and chest hospital supported mainly by voluntary contributions); *Portman v. Home Hospital Association*, 27 Ch. D. 81, n. (hospital with home comforts and advantages not carried on with a view to profit); *Watson v. Leamington Coll.*, M. R., 6 Nov. 1880, *sup.* Form 3 (sanatorium).

These cases show that, in order to constitute a breach of such a covenant, it is not material that the covenantee has not suffered actual pecuniary damage, or that the premises are not being used for purposes of profit, or even that payment is not required from the inmates; and *semble*, that such a covenant excludes all use beyond that of ordinary domestic life. A sale by auction on the premises of furniture of the house is no breach of such a covenant: *Reeves v. Cattell*, 24 W. R. 485. A covenant by a publican to purchase beer from his landlord is not broken by his buying such beer from an agent of the landlord without the landlord's knowledge: *Edwick v. Hawkes*, 18 Ch. D. 199.

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### SECTION III.—WASTE.

#### 1. *Injunction to stay felling Ornamental Timber and other Waste.*

LET the Deft D., her servants, workmen, and agents, be restrained by injunction from cutting down any timber or other trees growing on the estate in the statement of claim mentioned, which are planted or growing thereon for the protection or shelter of the several mansion-houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas, or otherwise, for the ornament of the said houses, or of the gardens, or parks, or pleasure grounds thereunto belonging; And also from cutting down any timber or other trees, except at seasonable times, and in a husbandlike manner; and likewise from cutting down saplings and young trees, not fit to be cut as and for the purposes of timber; until &c.—See *Chamberlayne v. Dummer*, L. O., 9 July, 1782, A. 421; 1 B. C. C. 166; 2 Dick. 600.

That this is the form which has been always used in cases of equitable waste, see *Eden*, Inj. 182; *L. Tamworth v. Ferrers*, 6 Ves. 420.

#### 2. *The Like, against the Tenant for Life where the Estate was limited to Trustees without Impeachment of Waste, if with his Privy.*

LET the Deft, Sir J. M. (*the father of Plt*), his servants &c., be restrained by injunction from felling or cutting down any timber or other trees now standing in and upon such parts of the lawns, gardens,

and pleasure-grounds of C. in the statement of claim mentioned, or the lands belonging or adjoining thereto, as were comprised in and were settled by the indenture dated &c., and which were planted or left standing or growing there by Sir John M., deceased (*Plt's grandfather*), for the ornament, protection, or shelter of the mansion-house in the statement of claim mentioned (*which Deft had since pulled down*), and the said lawn, gardens, or pleasure-grounds; and from felling or cutting down any other timber or other trees which have been planted and are now standing or growing in avenues, vistas, lines, or clumps, or separately or singly upon some parts of the said lawn, gardens, and pleasure-grounds of C. aforesaid, for the ornament, protection, or shelter of the said lawn, gardens, or pleasure-grounds, or the other grounds or lands thereto belonging or adjoining; until &c.—See *Morris v. M.*, V.-C. E., 13 Feb. 1847, B. 444; S. C., 15 Sim. 505; affirmed by L. C.

“Or which were planted for the purpose of intercepting the view of objects intended to be kept out of sight.” “And also from committing any other spoil or destruction on the said estate”: *Day v. Merry*, L. C., 15 Jan. 1810, A. 87.

“Standing or growing for ornament, shade, or shelter of the mansion and buildings at, &c., or any other houses or buildings on the settled estates”: *M. Downshire v. Sandys*, 6 Ves. 108.

### 3. Inquiry as to felling Timber—Life Tenant sans Waste.

LET the following &c., 1. “An inquiry whether the woods called &c., or any or either, and which of them, and the six elm trees, and one oak tree on L. farm, and the oak trees and elm trees on the pasture land in W. farm, which have been marked for cutting, or any or either and which of such trees, were or was, or have or has been, planted, or left standing, by any owner in fee or in tail of the H. estate or any parts thereof, for the ornament or shelter of the mansion-house on the said estate, or of the gardens, park, or pleasure-grounds thereto belonging, or of any road or roads, drive or drives, path or paths leading thereto, for the purpose of interrupting the view of any object or objects intended to be kept out of sight from the said mansion-house, gardens, park, or pleasure-grounds, or any part thereof.

“2. And in case it shall be so found as to the said woods or any or either of them—an inquiry whether the trees therein have ordinarily or otherwise, and under what circumstances, been cut for repairs or for sale; and what estate or interest the person or persons by whom, or by whose order or direction, the same were so cut, had in the said H. estate at the time of the cutting thereof; and whether the trees in the said woods, and the said other trees which have been marked for cutting, or any or either and which of such trees, injure or impede the growth of any other trees adjoining or near thereto, which are of so much importance to the purposes of ornament or shelter to the said mansion-house, gardens, park, or pleasure-grounds, that the

removal of the trees so marked for cutting is essential to such purposes of ornament or shelter." Reserve the question of the costs of this application to be dealt with by the V.-C.—*Ford v. Tynte*, L. JJ., 10th March, 1864, A. 570; 2 D. J. & S. 127 (penned by L. J. Turner).

For similar inquiries as to ornamental timber, see *Lushington v. Boldero*, M. R., 5 Aug. 1815. And for further inquiry in the same case whether any and which of the timber and other trees so cut and sold injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter intended by the deviser, that the removal of the timber and other trees so cut and sold was essential to such purposes of ornament and shelter, see *S. C.*, V.-C., 26 July, 1819, B. 765—767; on exceptions to report under the above inquiries, 6 Madd. 149, *S. C.*

For like inquiry, and also whether any and which of the trees cut were prejudicial to the health of the inmates, or interfered with the comfortable enjoyment of the mansion-house, or of any other building on the estate, see *Baker v. Sebright*, 13 Ch. D. 179, 181.

For declaration that the personal estate of the deceased life tenant is liable to account for all the benefit and profits received from acts of equitable waste, with interest at 4 p. c., and decree for an account of money received by the sale of the materials of the mansion and buildings pulled down, and inquiry as to the ornamental timber felled, and for account of the proceeds, with interest at 4 p. c. from the day of the life tenant's decease; and in case assets not admitted direction for the admon of his personal and real estate, see *Duke of Leeds v. Earl Amherst*, V.-C. E., 3 July, 1846, A. 1655; 14 Sim. 367; affirmed 2 Phil. 120.

For issue as to the right to cut ornamental timber, and the directions and declarations with which it should be guarded, see *Wombwell v. Bellasyee*, 6 Ves. 110 a.

For decree declaring Deft entitled to fell all such timber on the devised estate as is mature and fit to be cut, except such as is planted or left standing by way of ornament or shelter with reference to the occupation of the mansion, but not to fell any unripe timber, or timber planted or left for ornament or shelter, with inquiry as to timber cut or marked for cutting, and injunction pending it, Plt undertaking to answer damages, see *Turner v. Wright*, V.-C. W., 27 Mar. 1860, B. 1084; *S. C.*, Joh. 753; 2 D. F. & J. 234.

For injunction on bill by the patron of a living against the rector to stay his cutting timber on the glebe, or other lands of the rectory, except for repairs necessary on the buildings or lands, and from selling timber theretofore cut and remaining unsold, see *D. Marlborough v. St. John*, 5 D. & S. 181; against cutting timber in the churchyard, except for repairs of the parsonage or chancel, see *Strachy v. Francis*, 2 Atk. 217.

#### 4. *Life Tenant impeachable of Waste allowed such Wind-felled Timber as he might properly have cut—Inquiry.*

"*LET*, in carrying into effect the order dated &c., the Deft H. be allowed the benefit of the sale of all such trees felled by the wind which he would have been entitled to fell and cut himself, and to all proper thinnings, and all coppices which are periodically cut in the nature of crops, whether osiers, hazel, or oak; And Let an inquiry be made what portion of the sum of £—received by the Deft H., derived from timber or cuttings of that description contained in the account brought in by him under the said order, the said Deft H., is entitled to."—Costs of application to be costs in the cause.—

*Bateman v. Huccellin*, M. R. 13th Nov. 1842, A. 3109; S. C. 31 Beav. 446.

As to the meaning of the expression "number" in this Form, see observations of CHURCH, J., in *Quarles v. Morgan*, 40 L. J. Ch. 211; 64 L. T. N. 37.

5. *Injunctions against a Tenant for Life with a Security for  
Decease, with Inquiry as to Cutting without Impairing &c.*

LET the Deft. be restrained by injunction from falling 500 oak trees, or any other trees serving for ornament or shelter to the mansion-house &c.—Direction—"to approve of a proper security to be given by the Plt to the said Deft. for the value of the said 500 trees, and for any loss or damage which the said Deft. may incur or sustain by reason of his being prevented from completing the sale of the said 500 oak trees, or any of them, in case this Court shall hereafter be of opinion that this order ought not to have been made; And at the request of the said Deft., but without prejudice to his right to appeal. Let an inquiry be made whether any and which of the said 500 oak trees, or any and what other trees standing and growing in the said three woods, can be cut without impairing the beauty of the place, as it stood at the time of the execution of the settlement of &c."—Liberty to apply.—*Marker v. M.*, V.-C. T., 17th April, 1851; S. C., 9 Ha. 1; and see *Wombwell v. Bellasyse*, 6 Ven. 110 a.

6. *Inquiries as to Minerals as between Tenant for Life and Remainderman and consequent Accounts and Directions.*

LET the following &c. 1. An inquiry what coal and minerals were gotten and won from the settled estates by the said E. A. B. (*life tenant*), or any person or persons by his order or under his authority, from mines other than such as were in the course of being worked at the time of the decease of W. B. (*the infant Plt's grandfather and the original testator*), distinguishing such coal and minerals as were gotten and won prior, and such as were gotten and won subsequently, to the 21st day of Jan. 1847, the date of the birth of the Plt (*the infant tenant in tail in remainder*), and further distinguishing such coal and minerals as were gotten and won from old mines remaining dormant at the time of the decease of the said testator W. B., and such as were gotten and won from mines newly opened by the said E. A. B., and in making such inquiry it is to be ascertained and stated for how long, and under what circumstances, any such dormant mines had remained dormant or unworked, and also whether, with respect to any new pits or mining works sunk or opened upon the said settled estates by the said E. A. B., any and which were so sunk or opened for the purpose of facilitating any and what old workings; And whether any and which were so sunk or opened for the purpose of opening any and what fresh mines, and the circumstances under which all fresh workings were commenced during the life of the said E. A. B. are also to

be ascertained and stated. 2. An account of all moneys received by the said E. A. B., or by any person &c., in respect of coal and other minerals gotten and won from the said settled estates from mines, other than such as were in the course of being worked at the time of the decease of the said testator W. B., distinguishing the moneys so received in respect of coal and other minerals gotten and won from each particular mine or separate working, and distinguishing the dates of such receipts respectively, and the total amount of the moneys so received in respect of workings prior to the said 21st day of Jan. 1847, and the total amount of those received in respect of workings subsequently to that date. 3. An inquiry what mines and minerals and seams and veins of coal, other than mines and seams and veins of coal which were in course of being worked at the time of the decease of the testator W. B., are now in existence upon the said settled estates, and what is doing in respect of them, and whether it will be for the benefit of the inheritance that any and which of such mines and minerals and seams and veins of coal should be worked or that the working thereof should be continued. 4. An account of all moneys derived since the death of the said E. A. B. from the working of the said mines and seams of coal other than such as were in course of being worked at the time of the decease of the testator W. B., and by whom the same have been received, and how the same have been applied.—Adjourn &c.—*Bagot v. B.*, M. R., 8 June, 1863, A. 1479 (omitting the directions as to the fall and sale of timber, and the grant of leases), 32 Beav. 509.

For declaration of the right of widow and tenant for life to the rents, issues, and proceeds (in the proportion given by her husband's will) arising from a new seam of coal discovered by lessee since the death of lessor (husband), on the ground that the working of such new seam was not the opening of a new mine, see *Spencer v. Scurr*, M. R., 23 July, 1862, B. 1861; 31 Beav. 334.

For injunction by copyholder (though a reversioner only) and damages against the lord for digging coprolites under a copyhold tenement, see *A. G. v. Tomline*, 5 Ch. D. 750.

For injunction to restrain tenant for life from working mines pending an inquiry whether they were in course of working at the death of testator, see *Viner v. Vaughan*, 2 Beav. 466.

For declaration on bill by patron of a living that the working of mines by the incumbent under agreement with patron, but without the ordinary's consent, was unlawful; that the proceeds ought to be laid out for the permanent benefit or improvement of the rectory, with an inquiry what steps would be proper to be taken for enabling the incumbent, with the concurrence of the patron and all other necessary parties, to carry on such working, see *Holden v. Weekes*, 1 J. & H. 278, 287.

For injunction against removal of shingle from foreshore to injury of adjoining Crown land, see *A. G. v. Tomline*, 14 Ch. Div. 68.

### 7. Waste by Tenant—Interim Order.

USUAL undertaking as to damages—Let the Deft C., his agents and workmen, be restrained until the — day of —, or until further order, from making any alterations in the premises comprised in the lease of the — day of — in the writ mentioned, which may further interfere

with the stability of the house No. 1, at &c., comprised in the said lease, and from making any further alterations of the house No. 2, at &c., also comprised in the said lease.—See *Doggett v. Curnow*, V.-C. B., 21 Dec. 1874, A. 3060.

#### 8. *The Like—Mandatory Injunction at the Hearing.*

LET the Deft be restrained by injunction from making any further alterations in the premises &c.—“and from otherwise committing waste in the said premises, and from permitting to remain the openings made by him in the party walls, and in the main wall at the rear of the said premises in the statement of claim &c., and from permitting to remain the baker's oven and wooden shed at the rear of the said premises, and from permitting such parts of the said premises as have not been converted by him into a shop, as in the statement of claim mentioned, to remain in any state or condition other than the state or condition in which the same were at the date of the execution of the said indenture of lease, except that the Deft is not to be required to restore the dwarf wall and railings in front of the premises &c., nor to remove the bow window on the first floor of the house &c.”—Deft to pay Plt's costs of suit, to be taxed.—Liberty to apply.—*S. C.*, 8 March, 1876, A. 671.

And see *Smyth v. Carter*, 25 Nov. 1853, B. 449, 18 Beav. 78, for an injunction restraining a tenant from pulling down a house and building another.

For an injunction at suit of owners in fee restraining a contractor employed by the lessees to do certain works on the property from acts of spoliation, and in effect limiting him to the terms of his contract, see *Allen v. Martin*, 20 Eq. 462.

#### 9. *Interim Order staying Removal by Mortgagor of Fixtures from mortgaged Property, continued till Judgment in Foreclosure Action.*

USUAL undertaking—“Let the Defts the L— Co. continue to be restrained, until judgment in this action or until further order, from removing, disturbing, or injuring the fixtures belonging to the mortgaged property in the writ of summons mentioned, or committing any manner of waste whereby the Plt's security in the said writ also mentioned may be diminished.”—Appoint receiver of the rents and profits of the mines, collieries, and property, and to manage the same.—*Lloyd v. The Lloyd Co.*, V.-C. M., 8 Aug. 1876, B. 2435. For the interim order, see B. 1377.

#### 10. *Injunction at Suit of Bishop against Disturbance of Churchyard.*

“LET the Defts (the mayor &c.) restore the surface of the churchyard attached to the church of the perpetual curacy of &c., in the statement of claim mentioned, to its original state so far as practicable; And Let the Defts (the mayor &c.), their agents &c., be perpetually restrained by injunction from pulling up, destroying, damaging, or



disturbing the said churchyard, or the walls thereof, and from removing or disturbing the remains of bodies interred therein, and from using the said churchyard for any secular purpose until they be lawfully authorized so to do; And Let the Deft M. (*incumbent*) be restrained from permitting any such acts as aforesaid, and from completing the sale of the portion of the said churchyard comprised in the said indenture, dated &c."—Defts, the corporation, to pay the bishop's costs of suit.—See *B. of Durham v. Newcastle-upon-Tyne Corp.*, V.-C. W., 23 Jan. 1864, A. 322.

For injunction to restrain Deft from destroying family graves, and removing or defacing tombstones, or obliterating or defacing inscriptions thereon, in burial grounds attached to a chapel, see *Moreland v. Richardson*, 24 Beav. 33.

For a perpetual injunction, at the suit of one of the churchwardens on behalf of himself and the other parishioners, restraining the perpetual curate, and a builder employed by him, from altering the floor, walls or brickwork, or the internal arrangements or structure of the church, or any of the works, fixtures, or fittings pertaining thereto, in any other manner than should be sanctioned or directed by the Ordinary in any faculty to be obtained from the Chancellor of the diocese; Plt being ordered to take proceedings for obtaining a faculty from the bishop for repairing and restoring the church according to the scheme set out in the chief clerk's certificate, &c.; so much of the order as orders Defts to concur in and take proceedings for obtaining a faculty for repairing or restoring the church according to the scheme, &c., and that thereupon the scheme be carried into effect, being discharged: see *Cardinall v. Molyneux* L. C., 4 July, 1861, A. 2374; 4 D. F. & J. 117 (varying order of V.-C. S., 2 Giff. 536).

## NOTES.

## WASTE.

The law as to legal and equitable waste has been much simplified, and distinctions formerly taken have been removed, by the Jud. Act, 1873, s. 25 (3), which provides that an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such right.

At Law there was neither preventive nor compensative remedy against acts of waste, however excessive, committed by tenant for life *sans* waste: see *Lewis Bowles' Case*, 11 Co. 79 b; and notes to *Davis v. D. Marlborough*, 2 Swa. 146, &c.

But in Equity the jurisdiction to restrain the improper and unconscientious exercise of this legal power, to the detriment of those interested in remainder, has long been exercised, though first defined and settled in the leading case of *Garth v. Cotton*, 1 L. C. Eq. 697; and for a statement of the doctrine as to equitable waste, see *Baker v. Sebright*, 13 Ch. D. 179, 184, &c.

Equitable waste has been defined as "wilful and malicious," and also as "extravagant and humoursome" waste: *Garth v. Cotton*, *sup.*; *Abraham v. Bubb*, 2 Freem. 55; *Aston v. A.*, 1 Vez. 264, 265; and in more recent cases as "an excessive or unconscionable use" of a legal power: *Micklethwait v. M.*, 1 D. & J. 504; an "unconscientious" use: *Baker v. Sebright*, *sup.* at p. 185; or as aggravated acts of spoliation and destruction, which, apart from any malicious motive, "a prudent man would not do in the management of his own property:" *Turner v. Wright*, 2 D. F. & J. 234; *E. Talbot v. Hope Scott*, 4 K. & J. 96; and see *Kerr*, 94; *Joyce*, 134.

Acts of equitable waste which have been restrained are—

(a) Pulling down the mansion-house: *Vane v. L. Barnard* (Raby Castle Case), 2 Vern. 738; or other buildings on the estate: *Williams v. Day*, 2 Oh. Ca. 32; *Aston v. A.*, 1 Vez. 264.

(b) Cutting down timber planted or left standing for ornament and shelter : *Chamberlayne v. Dummer*, 1 Bro. C. C. 166 ; *Kekewich v. Marker*, 3 Mac. & G. 311 ; *Marker v. M.*, 9 Ha. 1 ; *Campbell v. Allgood*, 17 Beav. 623 ; *Morris v. M.*, 15 Sim. 205 ; *Wellesley v. W.*, 6 Sim. 497 ; *Ashby v. Hincks*, 58 L. T. N.S. 557.

(c) Cutting saplings or underwood at unseasonable times : *Hole v. Thomas*, 7 Ves. 589 ; *Dunn v. Bryan*, Ir. R. 7 Eq. 143 ; and generally any act of wanton destruction and spoliation of the property : see Kerr, 94.

As to the "intention to confer such right" (to commit waste), referred to in Jud. Act, 1873, sect. 25 (sub-sect. 3), the use of the words "in strict settlement," in executory trusts for a settlement, does not imply that the tenants for life are not to be punishable for waste : *Stanley v. Coulthurst*, 10 Eq. 259 ; *Davenport v. D.*, 1 H. & M. 775, and cases there cited ; except in cases where the trust is executed by cutting down words of inheritance to an estate for life in the first taker : *S. C.* ; and see *Banks v. Le Despencer*, 10 Sim. 576 ; 11 Sim. 508 ; *Woolmore v. Burrows*, 1 Sim. 512 ; *Vaizey on Settlements*, 166 ; Kerr, 97.

The power of a tenant in tail in possession to make the estate his own, and therefore to exercise full rights of ownership, i.e., to commit acts of legal and equitable waste, has been expressly recognized : *Turner v. Wright*, Joh. 752 ; *Saville's case* (see Mos. 224 ; 1 L. C. Eq. 13).

Tenant in fee subject to an executory devise over, like tenant for life *sans* waste, might cut timber, but not commit equitable waste : *Turner v. Wright*, Joh. 740 ; and see *Blake v. Peters*, 10 W. R. 826 ; 1 D. J. & S. 345.

As between tenants in common, acts of spoliation or destructive waste only will be restrained : *Hole v. Thomas*, 7 Ves. 589 ; *Arthur v. Lamb*, 2 Dr. & Sm. 428 ; *Bailey v. Hobson*, 5 Ch. 180 ; and see *Watson v. Gray*, 14 Ch. D. 192 (as to a party wall). And this rule applies to the rights of tenants in common in a mine : *Job v. Potton*, 20 Eq. 84.

The grant of a right of shooting does not entitle the grantee to restrain the grantor from cutting trees : *Gearns v. Baker*, 10 Ch. 355 ; nor from using the land in the ordinary and accustomed way, provided his acts are not for the express purpose of destroying or damaging what he has granted : *Jeffryes v. Evans*, 19 C. B. N.S. 246 ; *Pattisson v. Gilford*, 18 Eq. 262 ; and see *sup.* Sect. II., "BREACH OF CONTRACT."

Ordinary or legal, as distinguished from equitable, waste consists in the commission of acts which, from his limited interest in the property, the tenant has no authority to do, viz., acts which change without bettering the nature of the property, or which, though effecting a personal benefit, diminish the value of the inheritance : see Yool on "Waste," 1, &c. ; Kerr, 55, 56 ; *Vaizey*, 558.

Such acts are cutting timber, pulling down or even rebuilding houses, ploughing up meadow or ancient pasture, opening mines, &c.

For definitions of waste, see Com. Dig. "Waste" ; Co. Litt. 53 ; *Viner's Abr.* "Waste" ; Kerr, 55, 56.

For the distinction between acts of waste and bad husbandry, and that the Court will interfere in the former but not in the latter case, see Kerr, 69 (citing Bro. Ab. *Waste*, pl. 5 ; 2 Ro. Ab. 814).

Converting meadow or pasture into arable is *prima facie* an act of waste : *Simmons v. Norton*, 7 Bing. 648.

And see on this question, *D. St. Albans v. Skipwith*, 8 Beav. 354.

Deer in a park :—Their reclamation is an act of waste, as when reclaimed they cease to be part of the inheritance : *Ford v. Tynte*, 2 J. & H. 152 ; *Morgan v. Abergavenny*, 8 C. B. 768.

And see *Maynard v. Gibson*, V.-C. B., W. N. (76) 204, for a declaration that tenant for life was not entitled to deer and pigeons absolutely, but only to their reasonable enjoyment.

#### TIMBER.

On the question of the rights of tenant for life in trees, see *Honywood v. H.*, 18 Eq. 307 ; *Dashwood v. Magniac*, 60 L. J. Ch. 210 ; 64 L. T. N.S. 99 ; and *Craig on Trees*.

A very wide extension has been given to the term "ornamental timber," and the doctrine of the Court has been that everything planted, or left standing, for ornament by the settlor (whose intention is made the test :

*Coffin v. C.*, Jac. 70) will be protected: *M. Downshire v. L. Sandys*, 6 Ves. 107; *Wombwell v. Bellasyse*, 6 Ves. 110 a; *Ford v. Tynte*, 2 D. J. & S. 127; and though it has been held that tenant for life *sans* waste may deal with ornamental timber as a prudent owner in the proper or ordinary course of management would (*Halliwell v. Phillips*, 4 Jur. N.S. 607), this more liberal view has been dissented from in *Ford v. Tynte*, 2 D. J. & S. 127.

Although the mansion-house has been pulled down, tenant for life *sans* waste has been restrained from cutting the ornamental timber: *Morris v. M.*, 15 Sim. 505; *Wellesley v. W.*, 6 Sim. 497; on the principle, it seems, that tenant for life *sans* waste cannot, by pulling down the house, entitle himself to the ornamental timber. But thinning trees in a reasonable and husbandlike manner, according to the usage and due course of management of a timber estate, is not legal, nor, *a fortiori*, equitable waste: *Bagot v. B.*, 32 Beav. 509; *Honywood v. H.*, 18 Eq. 306; *Dashwood v. Magniac*, *sup.*; *Dunn v. Bryan*, L. R. 7 Eq. 143; *Kerr*, 57.

And generally tenant for life *sans* waste may cut all such timber (except ornamental) as the absolute owner, having due regard to his present interest, and to the permanent advantage of the estate, might properly cut: *Vincent v. Spicer*, 22 Beav. 380. (For the decree, see Reg. Lib. 1855, B. 1200; and see *Dunn v. Bryan*, *sup.*)

*Primâ facie*, the term "timber" is confined to hard woods, such as oak, elm, and ash, and does not, except by the custom of the particular county, include soft woods (larch, Scotch fir, or willow, &c.): *Honywood v. H.*, *sup.*; *Re Harrison*, 28 Ch. D. 220; *Phillips v. Smith*, 14 M. & W. 589; *Craig on Trees*, 11; and see *Dashwood v. Magniac*, 60 L. J. Ch. 210.

The term "timber-like trees" means, it seems, trees of the timber class which have not yet attained sufficient growth, and does not include other trees not of that class: *Lowndes v. Norton*, W. N. (76) 221.

#### MINES AND MINERALS.

Opening and working mines.—A tenant for life (subject to waste) cannot open, but may work mines already opened: *Whitfield v. Bewit*, 2 P. Wms. 240; *Clavering v. C.*, *Id.*, 388; and see *Knight v. Mooley*, Amb. 176.

But working new seams of coal by a new shaft is not opening a new colliery: *Spencer v. Scurr*, 31 Beav. 334; and the onus of showing when a quarry was first opened must depend on a consideration of all the circumstances: *Elias v. Snowdon Slate Quarries Co.*, 4 App. Ca. 454; 8 Ch. Div. 521.

Whether he may open a dormant or abandoned mine without committing waste is a question of evidence on which an inquiry will be directed: *Bagot v. B.*, 32 Beav. 509.

And see *Viner v. Vaughan*, 2 Beav. 460; *Spencer v. Scurr*, 31 Beav. 334.

Under a lease of land (without mentioning mines) the lessee may work open but not unopened mines: *Clegg v. Rowland*, 2 Eq. 160; Co. Litt. 54 b.

And as to the construction of a power to let an estate "with the mines and minerals," and the rights of lessee thereunder, see *Daly v. Beckett*, 24 Beav. 114.

Unless the nature and context be repugnant, stone will be included in a lease of mines and minerals: *Bell v. Wilson*, 1 Ch. 303; *Midland Ry. v. Checkley*, 4 Eq. 19.

As to the right of tenant for life or years to take reasonable estovers of gravel, clay, coal, and limestone, see *Kerr*, 65; citing 2 Ro. Abr. 816.

Copyholders of inheritance may by custom open and work new mines: *Bp. Winchester v. Knight*, 1 P. Wms. 406;

—or dig clay: *Marq. Salisbury v. Gladstone*, 9 H. L. C. 692;

—or dig and cart away sand within their tenements without licence from the lord: *Hanmer v. Chance*, 4 D. J. & S. 626.

But not without custom: *Gilb. Ten.* 327; and the onus of establishing such a custom lies upon the tenants: *D. Portland v. Hill*, 2 Eq. 765, in which case the lord obtained relief by account and injunction: see *inf.* Sect. IV., "TRESPASS" (III.), Form 1; and conversely, the lord, when not entitled by special custom will be restrained from digging coprolites under a copyhold tenement: *A. G. v. Tomline*, 5 Ch. D. 750.

## MORTGAGOR AND MORTGAGEE.

Mortgagor in possession will be restrained from cutting timber, if the security be insufficient: *Harper v. Aplin*, 54 L. T. N.S. 383; see also *Humphery v. Harrison*, 1 J. & W. 521; *King v. Smith*, 2 Ha. 239;

—or, if he has become bankrupt, until assignees are appointed: *Hampton v. Hodges*, 8 Ves. 105.

So also after decree for account in foreclosure suit: *Goodman v. Kine*, 8 Beav. 379.

And a person in possession under agreement to purchase will also be restrained from waste: *Crockford v. Alexander*, 15 Ves. 138.

Mortgagee in possession whose security is sufficient will be restrained from waste: see *Millett v. Davey*, 31 Beav. 470; *Fish. Mort.* 864; *Kerr*, 80; and see *inf.* Chap. XLVII., "MORTGAGES"; but the Conv. Act, 1881, s. 19, sub-s. 1 (iv), empowers a mortgagee in possession to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale to be completed within twelve months from making the contract.

## PERMISSIVE WASTE.

In cases of permissive waste, *i.e.*, suffering the estate and buildings to fall out of repair, the rule of the Court of Chancery (notwithstanding a decision to the contrary in *Parteriche v. Poulet*, 2 Atk. 383) has been not to interfere either to prohibit by injunction, or to give satisfaction by account: *L. Castlemain v. Craven*, 22 Vin. Abr. tit. Waste, p. 523; *Lansdowne v. L.*, 1 Jac. & W. 522; even though the estate were vested in trustees: *Powys v. Blagrove*, 4 D. M. & G. 448; *Re Cartwright*, *Avis v. Newman*, 41 Ch. D. 532; and see *Barnes v. Dowling*, 44 L. T. N.S. 809; *Vaizey*, 912.

—except under special circumstances: see *Yool*, 58 (citing *Caldwall v. Baylis*, 2 Mer. 408; *Marsh v. Wills*, 2 S. & S. 87).

But at law, tenants for terms of years and tenants for life have been held liable for both commissive (voluntary) and permissive waste: *Yellowly v. Gower*, 11 Ex. 274; *Harnett v. Maitland*, 16 M. & W. 257; *Co. Litt.* 53; *Davies v. D.*, 36 W. R. 399; 38 Ch. D. 499; *Vaizey*, 911; but as to tenant for life, see *Re Cartwright*, *Avis v. Newman*, *sup.*

After the death of the particular tenant, however, without some special circumstances (*e.g.*, personal liability imposed by the will or settlement, and capable of being enforced in equity: see *Grigg v. Coates*, 23 Beav. 33; *Rees v. Engleback*, 12 Eq. 225), there was no remedy, either at law or in equity, for permissive waste: *Turner v. Buck*, 22 Vin. Abr. 523; *Phillips v. Homfray*, 34 Ch. Div. 439, 455; and see *Woodhouse v. Walker*, 5 Q. B. D. 404; *Re Cartwright*, *Avis v. Newman*, *sup.*; *Re Williames*, *Andrew v. W.*, 54 L. T. N.S. 105; *S. C.*, 52 L. T. N.S. 105.

But under 3 & 4 Will. 4, c. 42, s. 2, which gives a right of action against the exor in respect of permissive waste or wrongs by the testator against another, in respect of his property, the remainderman can bring an action against the exor of the devisee for life for non-repair of the premises which such devisee was directed to repair: *Woodhouse v. Walker*, 5 Q. B. D. 404; and where, by the will, the persons to whom equitable interests have been successively given have been directed to keep the property in repair, the liability for permissive waste can be enforced by the trustees against the estate of a deceased life tenant, without being affected by the limit of time imposed by 3 & 4 Will. 4, c. 42, s. 2: *Re Williames*, *Andrew v. W.*, 54 L. T. N.S. 105; 52 *ib.* 41.

A tenant for life of leaseholds left in disrepair by testator is not bound to put them in the repair required by the leases: *In re Courtier*, *Coles v. Courtier*, 34 Ch. Div. 136; distinguishing *Re Fowler*, 16 Ch. D. 723.

## MELIORATING WASTE.

In cases of meliorating waste, *i.e.*, permanent alteration of the character of land or buildings, even though the value be increased, or rebuilding a house more large than it was before (so that there will be more charge for the lessor to repair it: *Co. Litt.* 53), an injunction and an account may be obtained: see *Yool*, 21.

Accordingly, tenant was restrained from altering the property by pulling down and rebuilding a house against the landlord's will: *Smyth v. Carter*, 18 Beav. 78; and compelled to reinstate premises which had been altered in excess of a licence to convert a dwelling-house into a shop: *Doggett v. Curnow*, V.-C. B., 8 March, 1876, *sup.* Forms 7, 8.

See also observations of M. R., *Jones v. Chappell*, 20 Eq. 540, 541, that the erection of buildings upon land, which improve the value thereof, is not waste, and that the owner or lessor will not in such a case obtain an injunction, but be left to his remedy in damages: and see *Doherty v. Allman*, 3 App. Ca. 709.

#### ANCILLARY RELIEF IN RESPECT OF WASTE.

Tenant for life will not be allowed to benefit by his own wrong, and when he has committed acts of waste must account for the proceeds, or make good the damage done: *Seagram v. Knight*, 2 Ch. 628; *Bateman v. Hotchkin*, 31 Beav. 486; *Blake v. Peters*, 1 D. J. & S. 345; *D. Leeds v. Amherst*, 2 Ph. 120; 14 Sim. 357; *Williams v. D. Bolton*, 3 P. Wms. 268.

Even in cases of equitable waste the whole proceeds have been given to the owner of the first estate of inheritance: *Butler v. Kynnersley*, 8 L. J. Ch. 67; 7 L. J. Ch. 150; *Rolt v. Somerville*, 2 Eq. Ca. Ab. 759.

But according to the general rule the proceeds are invested so as to follow the uses of the settlement, giving the income to the successive owners for life (except the wrongdoer): *Honywood v. H.*, 18 Eq. 307; and see *Bagot v. B.*, 32 Beav. 509; *E. Cowley v. Wellesley*, 1 Eq. 656; *Gent v. Harrison*, Joh. 519; *Lushington v. Boldero*, 15 Beav. 1, 9, n.; and the corpus to the first person who, from the nature of his estate, would have been entitled to cut timber: *Lowndes v. Norton*, 6 Ch. D. 139.

The proceeds of periodical cuttings or trimmings which are not acts of waste have been held to belong to tenant for life as incident to his estate: *Pidgeley v. Rawling*, 2 Coll. 275; *Bateman v. Hotchkin*, 31 Beav. 486.

The proceeds of timber blown down and of cuttings made by direction of the Court, or of decaying timber, will be invested, and the interest only given to tenant for life: *E. Cowley v. Wellesley*, *sup.*; *Lushington v. Boldero*, 15 Beav. 1, 7; *Tooker v. Annesley*, 5 Sim. 235; *Wickham v. W.*, 19 Ves. 419. According to the earlier cases, however, the proceeds of timber severed either by accident or by a trespasser were held to belong to the owner of the first estate of inheritance, to the exclusion of tenant for life: *D. Newcastle v. Vane*; *Whitfield v. Beurit*, 2 P. Wms. 240, 241; 3 P. Wms. 267.

But a tenant for life *sans* waste would not be restrained from properly cutting timber (*Bridges v. Stephens*, 2 Sw. 150, n.; *Smythe v. S.*, 2 Sw. 251; *A. G. v. D. Marlborough*, 3 Madd. 498); he was absolutely entitled to the proceeds of timber cut by direction of the Court: *L. Lovat v. D. Leeds* (2), 2 Dr. & Sm. 75; or to windfalls: *Lewis Bowles' case*, *sup.*

If life tenant (*sans* waste) cuts timber which, though ornamental, might have been ordered by the Court to be cut for preservation and improvement of the rest, he is entitled to the proceeds, though the remaindermen might, before the timber was cut, have obtained an injunction: *Baker v. Sebright*, 13 Ch. D. 179; *Ford v. Tynte*, 2 D. J. & S. 133.

Trees which are severed from the soil are personal estate, and trees which are not actually severed, though injured by a gale, or dead, belong to the inheritance, the life and manner of growth being no test of attachment to the soil: *Re Ainslie*, *Swinburne v. A.*, 30 Ch. Div. 485 (reversing 28 Ch. D. 89); *Re Llewellyn*, 37 Ch. D. 317, 324.

Assignees in bankruptcy of a tenant for life who have committed equitable waste are in no better position than tenant for life, and will not be allowed to receive the income of accumulated proceeds of ornamental timber improperly cut by them: *Lushington v. Boldero*, 15 Beav. 1, 9, n.

(On appeal this case was compromised and two years' interest was paid to the assignees: L. J., 16 Jan. 1852, Reg. Min. f. 18.)

An account was given in the case of mines, the working of which was waste, even in cases where no injunction would lie: *Jesus College v. Bloome*, 3 Atk. 262.

And see cases collected in *Parrott v. Palmer*, 3 My. & K. 632.

The produce of mines, the opening of which is waste, belongs, as in the case of timber, to the owner of the first estate of inheritance: *Kerr*, Inj. 104;

*Bell v. Wilson*, 1 Ch. 303; but compensation money paid by a railway co. for minerals which might possibly have been gotten during the life of a tenant for life *sans* waste belonged to him: *Re Barrington, Gamlen v. Lyon*, 33 Ch. D. 523.

And the tenant for life is not entitled to the interest unless the remainderman has debarred himself by adopting the act for other purposes: *Gresley v. Mousley*, 3 D. F. & J. 433.

The amount of damages to be recovered in respect of equitable waste was measured by the injury to the inheritance: *Bubb v. Yelverton*, 10 Eq. 465.

Credit is given for the application of the proceeds by tenant for life in permanent improvements: *Birch Wolfe v. Birch*, 9 Eq. 683.

And neither tenant for life *sans* waste nor his estate were made accountable for the materials of a mansion-house pulled down, when such materials had been applied in rebuilding: *Morris v. M.*, 3 D. & J. 323; *S. C.*, Form 2, *sup.* p. 171.

So also tenant for life will not be charged with sums produced by acts of (technical) waste which have improved the land (e.g., by digging and carrying away turf): *Harris v. Elkins*, 20 W. R. 999.

The claim in respect of acts of equitable waste must be made within six years from death of tenant for life: *Birch Wolfe v. Birch*, 9 Eq. 683; *D. Leeds v. E. Amherst*, 14 Sim. 365; 2 Ph. 117; *S. C.*, p. 186.

But the right of action or account for the proceeds of legal waste accrues, it seems, and the Statute of Limitations begins to run, from the time when the wrong was committed, not from the death of tenant for life: *Higginbotham v. Hawkins*, 7 Ch. 676; *Birch Wolfe v. Birch*, *sup.*; *Seagram v. Knight*, 3 Eq. 398; and see *Gent v. Harrison*, Joh. 517.

Delay is very material on such a claim: see *Bagot v. B.*, 32 Beav. 509; *Harcourt v. White*, 28 Beav. 303; *Ernest v. Vivian*, 12 W. R. 295.

Interest on the produce of waste is chargeable from the death of tenant for life: *Bagot v. B.*, *sup.*; and see *D. Leeds v. Amherst*, 14 Sim. 367; *Garth v. Cotton*, 1 L. C. Eq. 697.

In the case of the lord digging without special custom for minerals under copyhold tenements, the measure of damages is the gross amount produced by the sale of the minerals (coprolites), less the expenses of working, and such a sum by way of profit as would have induced a stranger to undertake the working: *A. G. v. Tomline*, 5 Ch. D. 750; and see *S. C.*, 15 Ch. D. 150.

#### ECCLIASTICAL WASTE.

A rector or vicar will be restrained from felling timber, save for necessary repairs, for the parsonage buildings and premises, &c.: *Strachy v. Francis*, 2 Atk. 217; *D. Marlborough v. St. John*, 5 D. & S. 174; *Sowerby v. Fryer*, 8 Eq. 417; but not from ploughing up ancient meadow in order to clean and lay it down again: *D. of St. Albans v. Skipwith*, 8 Beav. 354; and see *S. C.*, as to the position of a rector or vicar in respect to waste.

The patron, or, if he is a consenting party, the ordinary, may sue for an injunction against waste on the glebe: *Holden v. Weekes*, 1 J. & H. 278; and is, it seems, entitled to an account of the proceeds of timber wrongfully cut by the incumbent; and if the timber so cut has not been sold, to have it sold and the proceeds brought into Court: *Sowerby v. Fryer*, *sup.*; *Yool*, 78—80; *Kerr, Inj.*, 83—87.

See, however, *Knight v. Mosely*, Amb. 176; *Holden v. Weekes*, *sup.*

For the application for the permanent improvement of the living of the produce of past waste, see *Bartlett v. Phillips*, 4 D. & J. 414.

Churchwardens may sue, on behalf of themselves and the other parishioners, to restrain an alteration of the floor, walls, brickwork, or the internal arrangement or structure of the church: *Cardinall v. Molyneux*, 4 D. F. & J. 117; 2 Giff. 536; *sup.* Form 11;

—or the pulling down of the churchyard wall: *Marriott v. Tarpley*, 9 Sim. 279.

But the Court has no jurisdiction to compel the restoration of the church, and will not order the incumbent to concur in taking proceedings to obtain a faculty for that purpose, nor direct a scheme thereupon to be carried into effect: *Cardinall v. Molyneux*, *sup.*

And the Court will not exercise its jurisdiction to compel by mandatory

injunction the restoration of a way into a churchyard, when the ecclesiastical Court has jurisdiction to order the restoration: *Batten v. Gedy*, 41 Ch. D. 507.

As to waste by ecclesiastical corporations, see *Wither v. D. and C. Winchester*, 3 Mer. 427; *Herring v. D. and C. St. Paul's*, 3 Sw. 492; and Phillimore's Ecclesiastical Law, 1610.

## SECTION IV.—TRESPASS.

### (I.) TRESPASS (ORDINARY).

#### 1. *Injunction against Trespassing on Plt's Land.*

"LET the Deft T., his agents &c., be restrained by injunction until judgment in this action, or until further order, from committing any trespass upon the Plt's estates at &c., devised by the will of &c., or any part thereof."—*Lowndes v. Thomas*, V.-C. H., 11 Jan. 1876, B. 21.

For injunction against cutting trees in a wood, and acts of trespass in exercise of an alleged legal claim, see *Stanford v. Hurlstone*, 9 Ch. 116; and see *Lowndes v. Bettie*, 10 Jur. N.S. 226.

For injunction restraining a lessor, without express power of entry for the purpose, from entering upon the demised premises to effect repairs which lessor refused to do, see *Stocker v. Planet Bldg. Soc.*, 27 W. R. 793, 877.

#### 2. *Mandatory Injunction against laying Pipes on Plt's Land or under a Highway.*

"LET the Deft R., his servants &c., be perpetually restrained by injunction from allowing any pipes which have been already laid by the Deft in or through the land or soil beneath the surface of the highway adjoining the Plt's lands in the statement of claim mentioned to the undivided moiety whereof the Plt is entitled as in the statement of claim also mentioned to remain therein."—Deft to pay Plt's costs of suit, to be taxed &c.—See *Goodson v. Richardson*, M. R., 3 Dec. 1873, A. 2980; affirmed, 9 Ch. 221.

For injunction restraining an encroachment by buttresses on Plt's land, see *Holmes v. Upton*, 9 Ch. 214, n.

For interim order restraining Deft from removing the soil on land adjoining the parish church of St. Stephen, Walbrook, &c., and the churchyard belonging to the said church, so as to deprive the walls of the church and churchyard of the support they derive from such adjoining land, see *Windle v. Brass*, V.-C. H., 19 June, 1876, B. 1046.

For injunction restraining Deft from any further excavation upon his premises so as to occasion damage or injury to Plt's warehouses and buildings, with inquiry as to damages, see *Barnett v. Marzetti*, V.-C. W., 14 Dec. 1867, A. 3061.

### 3. *Mandatory Injunction against laying Rails on Plts' Land, or across Bridge.*

USUAL undertaking.—“Let the Defts &c., their contractors, workmen &c., be restrained by injunction, until &c., from laying or placing or affixing, or from permitting to continue or remain, laid, placed, or affixed on or to the bridge, or the approaches thereof, or any part of the land of the Plts in the Plts' statement of claim respectively mentioned, any rails, tramplates, sleepers, or other articles, or any earth, stones or rubbish, and from making or constructing, or permitting to continue or remain, any tramroad or railroad over, upon, or across the said bridge, or the approaches thereto, or upon any part of the land of the Plts, and from making, or permitting to continue or remain, any embankment in any part of the said land of the Plts for the purpose of a tramroad across the said bridge, and from excavating or in any manner interfering with any part of the fabric of the said bridge, and from digging any holes in, or otherwise injuring or interfering with, the soil of the Plts' said land, and from using the said bridge, or the approaches thereto, or any part of the said land of the Plts for the purpose of a tramroad, or for the passage along such tramway of waggons or vehicles of any kind either for the carriage of coal, minerals, or other articles, or otherwise.”—See *Neath Canal Co. v. Ynisarwed Resolven Colliery Co.*, L. J., 3 May, 1875, B. 761 (varying order of V.-C. B., 23 March, 1875, B. 505, by adding the usual undertaking by Plts as to damages): *S. C.*, 10 Ch. 450.

For injunction to restrain Deft from permitting photographic room to remain on the flat roof of the Plt's shop, on the ground of trespass upon the construction of Plt's lease, see *Martyr v. Lawrence*, 2 D. J. & S. 266.

To restrain the removal of a signboard affixed to the side of Deft's house, and being the signboard of Plt's house next door, see *Moody v. Steggalls*, 12 Ch. D. 261.

To restrain interference with a fascia fixed on the wall of the house adjoining the Plt's house, and comprised in the grant from the common landlord, see *Francis v. Hayward*, 22 Ch. Div. 177.

To restrain the obstruction of an easement by preventing the passage of smoke from flues, see *Hervey v. Smith*, 1 K. & J. 389. See also for additional instances of injunctions in Equity to stop a mere trespass, *L. & N. W. Ry. Co. v. Lanc. Ry. Co.*, 4 Eq. 174; *Hodgson v. Duce*, 2 Jur. N.S. 1014; or trespass in the exercise of disputed rights over land, or under colour of title, *Greehalgh v. Manch. Ry. Co.*, 3 M. & Cr. 784; *Fooks v. Wilts Ry. Co.*, 5 Hare, 199.

### 4. *Injunction against obstructing Communication with Branch Railway and Mandatory Injunction to restore.*

UPON the appeal of the Defts from the order dated &c., and upon hearing counsel for the appellants, and for the Plt, Let the Defts, their officers, servants, and agents, be perpetually restrained from continuing to prevent communications between the Plts' branch railway at &c., and the Defts' railway in the writ mentioned; And Let the Defts forthwith restore the junction between the said branch rail-



way and Defts' railway in such a manner as to permit carriages to be brought to and from the said branch railway and Defts' railway.—*Woodruff v. The Brecon, &c. Ry. Co.*, C. A., 5 Dec. 1884, B. 1456; S. C., 28 Ch. Div. 190.

*5. Trespass in Churchyard by Interment of non-Parishioners restrained.*

USUAL undertaking by the relators as to damages.—“Let the Deft the Reverend S. (clerk), his assistant curates, parish officers, servants &c., and all other persons claiming authority, commission, or licence from him or them, be restrained by injunction from burying, or interring, or suffering to be buried or interred in the churchyard of &c., without the consent of the churchwardens and parishioners of the said parish, the corpse of any person not being a parishioner of the said parish, or any person not being a parishioner who may have died within its precincts, until the hearing &c. But this order is to be without prejudice to any question in this action, and is not to extend, to interfere with interments in any graves already purchased.”—*A. G. v. Strong*, V.-C. G., 19 March, 1868, A. 660 (made perpetual, by consent, 3 June, 1868, A. 1481).

It seems that strangers may not be buried in the churchyard of another parish than that in which they died, at least without the consent of the parishioners or churchwardens, whose parochial right of burial is invaded thereby, and perhaps also of the incumbent, whose soil is broken: *Phill. Ecc. Law*, 843; and see *Glen*, *Burial Board Acts*, 3, 4.

*6. Injunction against cutting Reeds or Sedges on Plts' Land.*

LET the Deft, the Right Hon. A. H., Baron A., his servants, agents and workmen, be perpetually restrained by injunction from digging or carrying away land or soil, and from cutting reeds or sedges, and from committing any trespass upon the Plts' estates situate &c., or any part thereof, and from interfering in any way with the use and enjoyment by the Plts of their said estates; And Let the said Deft, the Right Hon. —, forthwith remove the stakes driven by him or by his order in the bed of the stream belonging to the Plts and forming part of their said estates in the pleadings mentioned.—Inquiry as to damages (if any) Plts are entitled to as compensation for the wrongful acts of the Deft in the pleadings mentioned.—Costs.—Liberty to apply.—*Hammond v. L. Ashburton*, V.-C. B., 11 July, 1883, A. 1584.

For injunction to restrain trespass by holder of bill of sale from tenant after the expiration of the tenancy, see *Smith v. Brown*, 48 L. J. Ch. 694.

For injunction against highway board for trespassing on land of Plt for the purpose of clearing out a “dumb well,” i.e., a well into which water from the highway flowed, and thence percolated into the soil, see *Croft v. Rickmansworth Highway Board*, 39 Ch. Div. 272.

As to right of local authority to repair a public well on private property,

see *Smith v. Archibald*, 5 App. Cas. (Sc.) 489; and Public Health Act, 1875, s. 64.

### 7. Injunction against removing Shingle so as to endanger Neighbour's Land.

THIS action coming on for trial &c. in the presence of counsel for the Informant, the Plt, and the Deft, Let the Deft, his agents, servants and workmen, be perpetually restrained by injunction from so digging or removing any shingle from the natural barrier of shingle protecting the land situate at or near Felixstowe Ferry, which forms the site of and the enclosure surrounding the Martello Tower known as &c., and from authorizing any such shingle to be so digged or removed as to endanger the said land or expose the same to inroads of the sea.—See *A. G. and Secretary of State for War v. Tomline*, Fry, J., 19 May, 1879, A. 1354.

#### NOTES.

Before the Jud. Acts, Courts of Equity did not, except in the case of destructive waste, interfere to restrain a legal trespass, though by the C. L. P. Act, 1854, s. 82, in an action of trespass (at law) Plt might obtain an injunction to restrain the repetition or continuance of the wrongful act: see *Stocker v. Planet Bldg. Soc.*, 27 W. R. 793, 794. But by the Jud. Act, 1873, s. 25 (8), an injunction to prevent any threatened or apprehended waste or trespass “may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both, or by either of the parties, are legal or equitable.”

The distinctions formerly taken between the cases where the Deft committing the acts of trespass or spoliation complained of was or was not in possession, and claimed under any colour of title, or was a mere stranger (see *Stanford v. Hurlstone*, 9 Ch. 116; *Lowndes v. Bettie*, 12 W. R. 399; *E. Talbot v. Scott*, 4 K. & J. 96; *Haigh v. Jaggard*, 2 Coll. 231; *Shaw v. Earl of Jersey*, 4 C. P. Div. 359), no longer exist.

Even under the old practice continued acts of trespass or of irreparable injury to property would be restrained by perpetual injunction, without compelling the party injured to obtain verdicts at common law: *Goodson v. Richardson*, 9 Ch. 221; *Allen v. Martin*, 20 Eq. 462; *L. & N. W. Ry. Co. v. Lanc., &c. Ry. Co.*, 4 Eq. 174; *Ardley v. St. Pancras Guardians*, 39 L. J. Ch. 871; and see *Turner v. Ringwood Highway Board*, 9 Eq. 418; Kerr, 117, &c.

In an action to restrain alleged trespass, Plt is entitled to particulars of any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, on which Defts intend to rely, and of the names of the persons by whom the same were done or made: *Spedding v. Fitzpatrick*, 38 Ch. D. 410.

As to trespass on a private stream in exercise of an alleged right of recreation, and that such a right cannot exist by custom in the public generally, but only in the inhabitants of a particular district, see *Bourke v. Davis*, 44 Ch. D. 110.

And that a person using his property, e.g., a party wall, so as to involve risk to a neighbour's property is bound to see that all proper precautions are taken, and cannot escape liability by employing a contractor, see *Hughes v. Percival*, 8 App. Cas. 443; and as to the user of and rights in a party wall, see *Watson v. Gray*, 14 Ch. D. 192; *Buchan v. Arlett*, W. N. (88) 76.

## (II.)—ANCIENT LIGHTS.

1. *Order for Interlocutory Injunction against obstruction of Ancient Lights.*

USUAL undertaking as to damages.—“Let the Deft L., his agents &c., be restrained by injunction from erecting on the site of the old parapet wall between No. 35 B— and the courtyard of No. 34 B— in the Plt’s statement of claim mentioned, or on the site of the said courtyard, any wall or other structure, and from constructing any bridges or passages over or across the said courtyard so as to darken, injure, or obstruct any of the ancient lights of the Plt as the same were enjoyed previously to the taking down by the Deft of No. 34 B— until &c., and also to restrain the Deft L., his agents &c., from erecting on the sites of Nos. 9 and 10 P— any wall or building so as to darken, injure, or obstruct any of the ancient lights of the Plt as the same were enjoyed previously to the taking down by the Deft of Nos. 9 and 10 P— until &c.”—See *Burton v. Lacey*, V.-C. M., 24 July, 1873, A. 2073.

2. *Perpetual Injunction as to Light—Angle of Incidence.*

“LET the Defts B. &c., their servants &c., be perpetually restrained by injunction from raising or heightening the Defts’ buildings in J— Street &c., in the pleadings mentioned, to a greater height than they stand at present, namely, 46 feet from the level of the pavement on the west side of J— Street aforesaid; but this injunction is not to prevent the Defts from putting on a sloping roof higher than 46 feet, so long as the angle of incidence of light over such sloping roof on the centre part of the ground-floor windows of Nos. —, —, in J— Street, aforesaid, be not less than 45 degrees from the perpendicular above the point of incidence.”—Defts to pay Plt’s costs of action, and of motion for injunction to be taxed.—*Hackett v. Baiss*, M. R., 9 June, 1875, A. 988; 20 Eq. 494; see *Parker v. First Avenue Hotel Co.*, 24 Ch. Div. 282, and *v. inf.* p. 492.

The word “air,” as coupled with light, ought not to be inserted in these orders, unless by special direction: *Baxter v. Bower*, 23 W. R. 805; *City of London Brewery Co. v. Tennant*, 9 Ch. 212; *v. inf.* p. 493.

3. *Perpetual Injunction against obstruction of Light.*

THIS action coming on &c., for trial &c., in the presence of counsel for the Plt and Defts [enter evidence, including report &c.], Let the Defts (names), their contractors, servants, workmen, and agents, be perpetually restrained by injunction from erecting or building any building or erection whatsoever on the Defts’ land abutting on or adjoining the street separating the said land from the Plt’s property, and known as &c., and immediately fronting or contiguous or adjacent to the N.E. and N.W. sides of the Plt’s warehouse and premises situate at &c., in such manner as to hinder or obstruct the free access of light and air

coming to the Plt's ancient windows, Nos. &c., in the report &c., in a greater degree than the buildings recommended by the said report would if erected.—*Cooper v. Straker*, Kay, J., 10 Nov. 1888, A. 1709.

4. *Mandatory Injunction against obstructing Ancient Lights—  
Operation suspended.*

“LET the Deft L., be perpetually restrained by injunction from permitting any buildings raised by him above the level of the old houses in the Plt's statement of claim mentioned on the site thereof to remain, and from erecting any buildings or permitting any erections to remain on the site of the said former houses, so and in such manner as to darken, injure, or obstruct the ancient lights and windows of the house and premises in the Plt's statement of claim mentioned, whereof the Plt is lessee, as the same were enjoyed previously to the taking down of the said houses; but the operation of the said injunction is suspended until after the — day of —.”—Deft to pay to Plt costs of this cause to be taxed.—Liberty to apply.—See *Teichert v. Lange*, V.-C. H., 17 Nov. 1875, B. 1913.

For injunction on bill by the owner of one of the houses in a row to restrain Deft, the owner of another of the houses, from building a bay window, contrary to the covenant of his vendor with the original landowner, of which he had notice, see *Western v. Macdermott*, 1 Eq. 499 (affirmed 2 Ch. 72).

For injunction against erecting any building so as to darken, hinder, or obstruct the lights of any building to be erected on a site, so far as such lights should occupy the same position as the lights of a building previously standing thereon, see *Eccl. Commrs. v. Kino*, C. A., 5 March, 1880, A. 761, 14 Ch. Div. 213.

5. *Injunction against obstructing Ancient Lights—Liberty to apply  
as to pulling down existing Buildings.*

LET the Deft C. J., his agents, workmen, and servants, be perpetually restrained by injunction from erecting any building upon the site of the premises known as D. Wharf in the pleadings mentioned, so or in such manner as to darken, injure, or obstruct any of the ancient lights or windows of the Plt's messuage known as &c., as the same ancient lights and windows were enjoyed previously to the taking down of the ancient buildings which formerly stood on D. Wharf aforesaid; And the Plt and Deft respectively are to be at liberty to apply as they may be advised to the Judge at Chambers with reference to the pulling down of any of the buildings which have already been erected by the Deft so as to darken, injure, or obstruct any of the said ancient lights or windows as the same were enjoyed previously to the taking down of the said houses or buildings, and with reference to the erection of any buildings on the Deft's property, but so as not to infringe the said injunction.—See *Fates v. Jack*, L. C., 24 Mar. 1866, B. 791; 1 Ch. 295.

### 6. *Mandatory Injunction to remove Hoarding.*

THIS action coming on for trial &c., in the presence of counsel for the Plt and the Deft, Let the Deft, his agents, servants, and workmen, be perpetually restrained from permitting to remain erected in or upon the arch (No. 88 in the evidence mentioned), any wall, building, hoarding, or woodwork, or from doing or permitting, or suffering to be done, any act or thing so as to obstruct the access of light to the sitting-room and kitchen windows of the Plt's messuage in the pleadings mentioned, as the same was enjoyed before the erection of the hoarding at the west-end of the said arch.—*Myers v. Catterson*, Kekewich, J., 15 July, 1889, B. 1019; S. C., 43 Ch. Div. 470.

The decision in this case was founded on the implied obligation of a railway company towards the purchaser from them of superfluous lands.

### 7. *Mandatory Injunction as to obstructing Ancient Lights—Operation suspended—Arbitrator to decide whether Order had been complied with.*

"LET the Deft S., his contractors, builders, agents, and workmen, be perpetually restrained by injunction from permitting to remain erected or built upon, along or adjoining the party wall forming the boundary between the Plt's premises and the Deft's premises as in the pleadings mentioned, any wall, erection, or building of greater height than the height of the said party wall as it stood at the commencement of the building operations of the Deft in the pleadings also mentioned, and from permitting to remain erected or built on the site of the back-yard of his premises, or any part thereof, any wall, building, or erection, so or in such manner as to darken, injure, or obstruct any of the ancient lights or windows of the Plt's premises, as the same ancient lights and windows were enjoyed previously to the erection of — by the Deft in the pleadings mentioned; and by consent Let, in the event of any difference arising between the parties whether the Deft has pulled down sufficient to comply with the said injunction, such difference or differences, so often as they may respectively arise, be referred to H., of &c., as arbitrator; and the costs of every such reference are to be in the discretion of the said arbitrator."—By consent the Deft to pay Plt £25 for damages, and his costs of suit to be taxed—"and the (operation of the) injunction hereby awarded is to be suspended until the — day of —."—*Liberty to apply.*—*Smith v. S.*, M. R., 11 June, 1875, B. 1025; 20 Eq. 500.

This order follows *Yates v. Jack* (see Form 5, *sup.*), 1 Ch. 295, as to form of the injunction, but omits the directions there given as to applying in Chambers with respect to pulling down and rebuilding Deft's buildings. And these directions, though sometimes given since, are not now inserted: see *Kidd v. Wagner*, M. R., 1 May, 1874, A. 1036.

The proper words are as above, "*so as to darken, injure, or obstruct*": *Willoughby v. Hicks*, M. R., 25 Nov. 1875, Reg. Min. See *Dent v. Auction Mart Co.*, 2 Eq. 228, 235; *Stokes v. City Offices Co.*, 2 H. & M. 650.

For reference to a surveyor in case of any dispute whether what the Deft

pulled down was sufficient to meet the exigency of the order, see *Jessel v. Chaplin*, 3 Jur. N.S. 931, Ex.

For reference to an architect as special referee to inquire and report whether the Plt had sustained, and would continue to sustain, material injury in the carrying on his professional business by the Deft's proposed buildings, and the extent of such injury; and if Plt had sustained any material injury, what ought to be done as to pulling down or lowering the buildings or otherwise, see *Cartwright v. Last*, V.-C. M., 3 Feb. 1876, A. 353. But see note, *inf.* p. 491.

For an injunction limited to ancient windows and altered windows when restored, and made conditional upon Plt submitting to an order within a limited time to block up or close permanently against any access of light (or air) from Deft's premises the several windows (new or altered), as to which Deft was entitled to obstruct the access of light (or air), but with liberty for Plt, as to the altered windows, to restore them to their original situation under the direction of the Judge, see *Weatherley v. Ross*, V.-C. W., 13 Jan. 1863, B. 308; 1 H. & M. 349.

But see note *inf.*, and *quære* whether, in the present state of the authorities, the injunction would be so restricted.

For injunction giving liberty to Defts to apply to dissolve if circumstances should occur making its further continuance unreasonable, see *Ecclesiastical Commrs. v. Kino*, 14 Ch. Div. 213.

#### 8. Order for Payment of Damages assessed by the Judge at the Trial in respect of Obstruction of Light and also of Air.

LET the Defts, the L. & C. Co., pay to the Plt H. the sum of £—, in respect of damages sustained by him in consequence of obstruction to the light of three of the windows in the Plt's premises; And Let the Defts, the L. & C. Co., pay to the Plt H. a further sum of £— in respect of damages sustained by the Plt in consequence of obstruction, as to the air, in the slaughter-house part of the said premises.—Defts to pay Plt's costs, but such costs are not to include the costs occasioned by having more than two surveyors.—*Hall v. Lichfield Brewery Co.*, Fry, J., 26 June, 1880, A. 1700; 43 L. T. N.S. 380.

For assessment of damages by the Judge at the trial at £200 where an injunction was refused, see *Nat. Prov., & C. Co. v. Prudential Assurance Co.*, 6 Ch. D. 757.

#### 9. Injunction refused—Inquiry as to Damages.

"THIS Court doth not think fit to grant any injunction in this action; but Let an inquiry be made what, if any, sum of money is proper to be awarded to be paid by the Deft to the Plt by way of compensation for any injury that has been sustained by the Plt by the erection of that part of the party wall in the statement of claim mentioned adjoining that part of the shop belonging to the Plt's premises which is lighted by means of the dome or skylight in the statement of claim mentioned."—And after certificate, liberty to apply.—See *Chapple v. Crow*, V.-C. S., 14 Dec. 1865, A. 2466.

For the like inquiry, see *Senior v. Pawson*, 3 Eq. 330; 1863, A. 2520; *Iseberg v. E. I. Ho. Co.*, 3 D. J. & S. 263; *Curriers Co. v. Corbett*, 2 Dr. & Sm. 355.

For inquiry what sum of money is proper to be awarded to be paid to the Plt by the Deft by way of compensation for any damage occasioned by Deft's new buildings, see *Hunt v. Hiller*, V.-C. M., 13 June, 1873, A. 1829.

10. *Form of Reference by the Court to an Expert.*

THE Judge, by consent of all parties, nominates O. of &c., surveyor, to inquire and report—

1. Whether any addition to the Deft's buildings on the site of Nos. 8 and 9, — Street, as they now stand, to be made in accordance with the present plans of the Deft, will materially obstruct the existing access of light to the Plt's windows.

2. Whether the Deft's buildings, if completed in accordance with such plans, will interfere with the access of light to the Plt's windows as it existed before the Deft's buildings on the site of Nos. 8 and 9, — Street, were pulled down.

3. Whether any addition made to the Deft's buildings since &c., the date of the service of the writ in this action, has materially obstructed the access of light to the Plt's windows as it existed at that time.

The report of the said surveyor is to be filed at the Central Office after the order has been made on the Plt's motion.—*Andrade v. Knowles*, Stirling, J., 27 June, 1890.

By O. LV. 19, the Judge in Chambers may, in such way as he thinks fit, obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons the better to enable any matter at once to be determined, and he may act upon the certificate of any such person.

This rule is taken from s. 42 of 15 & 16 V. c. 80, but is worded differently from that section, so as to confine the power to the Judge in Chambers.

In some cases a reference has been sent to Chambers to appoint a person to make the inquiry (Form 3, p. 614); and if a person is appointed in Court, it must be by consent of the parties, and no order is drawn up.

## NOTES.

## RIGHT TO INJUNCTION AGAINST OBSTRUCTION OF LIGHT.

The right to an injunction to restrain an interference with ancient lights exists whenever an action could be maintained at law, and damages—not merely nominal, but really substantial or considerable—recovered: *Aynsley v. Glover*, 18 Eq. 544.

And to give a right of action and sustain the issue there must have been "a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent Plt from carrying on his accustomed business on the premises as beneficially as he had formerly done": *Dent v. Auction Mart Co.*, 2 Eq. 246, adopting the principle laid down in *Back v. Stacey*, 2 C. & P. 466; *Kino v. Rudkin*, 6 Ch. D. 160. The onus of proving the injury rests upon the Plt: *Curriers' Co. v. Corbett*, 4 D. J. & S. 764; see also *Ratcliffe v. D. Portland*, 10 W. R. 687, that the threatened injury must not rest on mere opinion.

As stated by Jessel, M. R., the right to an injunction is not limited by the amount of light necessary for the purpose for which the room is being used, without regard to any future use to which the room may be applied, but is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used—"to the blessing and comfort of the entry of the direct rays of the sun": *Aynsley v. Glover*, 18 Eq. 544; *Hackett v. Baise*, 20 Eq. 494; *Yates v. Jack*, 1 Ch. 295; *Calcraft v. Thompson*, 15 W. R. 387; *Kell v. Pearson*, 6 Ch. 809; *Dent v. Auction Mart Co.*, 2 Eq. 238; *Dyers' Co. v. King*, 9 Eq. 438; *Moore v. Hall*, 3 Q. B. D. 178; *A. G. v. Queen Anne Mansions*, 60 L. T. N.S. 759; 37 W. R. 572; *Dicker v. Popham*, 63 L. T. N.S. 379.

These decisions, it may be observed, are opposed to some of the earlier cases, e.g., *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275, deciding that the

Court will not interfere if the present use of the room is not materially injured, and that any future use to which the room may be applied will not be regarded. See also *Curriers' Co. v. Corbett*, 13 W. R. 1056; *Lanfranchi v. Mackenzie*, 4 Eq. 421; *Dickinson v. Harbottle*, 28 L. T. N.S. 186; *Adamson v. Gatty*, W. N. (70) 184, as opposed to the theory of an absolute and unqualified right to the same amount of light as has been hitherto enjoyed.

The distinction between the extent of the right of town and country occupiers to protection of their ancient lights taken by Lord Cranworth in *Clarke v. Clark*, 1 Ch. 16 (and apparently approved in *Kelk v. Pearson*, 6 Ch. 812), was abandoned by himself in the later case of *Fates v. Jack*, 1 Ch. 295, and seems to have been now exploded: *Hackett v. Bais*, 20 Eq. 494; *Martin v. Healdon*, 2 Eq. 425; *Lyon v. Dillimore*, 14 W. R. 511.

In the absence of special circumstances, the erection of an opposite building, so as to diminish any portion of the 45 degrees of light, is an interference with light which in general will be restrained by injunction: *Hackett v. Bais*, 20 Eq. 494; *City of London Brewery Co. v. Tennant*, 9 Ch. 212.

But the question of amount of obstruction is always one of fact, and the Plt whose light is obstructed is entitled to judgment in general terms without reference to the angle of incidence, unless there is special evidence justifying the insertion of such a reference: *Parker v. First Avenue Hotel Co.*, 24 Ch. Div. 282; and there is no presumption, except of the slightest kind, that where the angular height of an erection is less than 45 degrees, the access of light is not substantially interfered with: *Ecclesiastical Commrs. v. Kino*, 14 Ch. Div. 213.

For the statutory rule as to the angle of 45 degrees in buildings erected in London, see the Metropolis Local Management Amendment Act, 1862 (25 & 26 V. c. 102), s. 85, and the bye-law issued under parliamentary authority by the Metropolitan Board of Works: and *Theed v. Debenham*, 2 Ch. D. 168. In determining the height of the building and the width of the street, the measurement is taken from the level of the centre of the street: *S. C.*

The right given to the building owner by the Metropolitan Building Act, 1855 (18 & 19 V. c. 122), s. 83, to raise any party structure permitted by the Act to be raised, upon condition of making good all damage occasioned thereby to adjoining premises, does not authorize the obstruction of adjoining ancient lights: *Crofts v. Haldane*, L. R. 2 Q. B. 194.

A mere tenant may obtain an injunction to restrain obstruction of light, but the injunction will be limited to the continuance of his tenancy: *Simper v. Foley*, 2 J. & H. 555.

The grant of a lease of lights and easements may be so controlled by the antecedent agreement to which the lease refers as to deprive the lessee of the right to restrain an obstruction of light by other lessees: *Salaman v. Glover*, 20 Eq. 444.

#### MANDATORY INJUNCTION—DAMAGES.

On the question whether a Plt, who has not established a case for relief by mandatory injunction in respect of interference with his ancient lights, may obtain relief by an inquiry as to damages, see *Lady Stanley v. E. Shrewsbury*, 19 Eq. 616; *City of London Brewery Co. v. Tennant*, 9 Ch. 212; *Calcraft v. Thompson*, 35 Beav. 559; *Sparling v. Clarkson*, 17 W. R. 518, and cases there cited; *Kino v. Rudkin*, 6 Ch. Div. 160; *Nat. Prov., &c. Co. v. Prudential, &c. Co.*, 6 Ch. D. 757.

The discretion given by Lord Cairns' Act must be exercised according to the facts of each particular case, and not so as to grant or sell to the Def't, against the Plt's will, a licence to commit the wrong of which the Plt complains, especially where an undertaking to pull down has been accepted from Def't on motion: *Greenwood v. Horsey*, 33 Ch. D. 471; and see *Holland v. Worley*, 26 Ch. D. 578; *Aynsley v. Glover*, 18 Eq. 544; *Krehl v. Burrell*, 7 Ch. D. 55; 11 Ch. Div. 146; *Lawrence v. Horton*, 59 L. J. Ch. 440; 62 L. T. N.S. 749; 38 W. R. 535; *Dicker v. Popham*, 63 L. T. N.S. 379.

Where Def't appealing against injunction offered an undertaking to pull down, the Court of Appeal accepted the undertaking and discharged the injunction, but observed that, without the undertaking, there would be jurisdiction at the trial to order the pulling down of buildings erected after action



or notice that Plt objected: *Smith v. Day*, 13 Ch. Div. 651; but in *Newson v. Pender*, 27 Ch. Div. 43, the balance of convenience was held to be in favour of granting an interim injunction, rather than allowing completion of the buildings upon an undertaking to pull down.

A mandatory injunction may be granted although the obstructing building was completed before the issue of the writ: *Lawrence v. Horton*, *sup.*

A mandatory injunction will be granted where Deft, upon receiving notice of motion, seeks to anticipate the action of the Court by hurrying on his building: *Daniel v. Ferguson*, (1891) 2 Ch. (C. A.) 27; *et v. sup.* p. 461.

And that the maxim of the common law, *actio personalis moritur cum personâ*, does not apply to the equitable remedy by mandatory injunction for the removal of an obstruction to light, see *Jones v. Simes*, 43 Ch. D. 607.

#### EVIDENCE.

When the Court has not been satisfied on the evidence, whether the proposed building will or not materially obstruct the Plt's light, the erection of a temporary screen or scaffolding to the height of the proposed wall has been directed, and a surveyor appointed to report on the effect: *Leech v. Schweder*, 9 Ch. 463.

Personal inspection by the Judge of the property alleged to be injured was considered not advisable: see *Jackson v. D. Newcastle*, 3 D. J. & S. 275; *Leech v. Schweder*, 22 W. R. 292; but such inspection is expressly authorized by O. L. 4.

The power given to the Court by the Jud. Act, 1873, s. 56, to refer questions in pending causes or matters for inquiry and report to any official or special referee, will not be exercised by appointing a scientific person before the trial to report upon the extent of injury likely to arise from the erection of the proposed building: *Baltic Co. v. Simpson*, 24 W. R. 390.

#### AIR.

The ancient formula by which, in these obstruction cases, "air" was invariably coupled with "light" not only in the pleadings and order, but also in the evidence, has been most distinctly disapproved: *City of London Brewery Co. v. Tennant*, 9 Ch. 212; *Baxter v. Bower*, 23 W. R. 805; though in a proper case an obstruction to free access of air as well as of light is the subject of relief: *Hall v. Lichfield Brewery Co.*, 43 L. T. N.S. 380; but see *Russell v. Watts*, 25 Ch. Div. 559; 10 App. Cas. 590.

#### ACQUISITION OF RIGHT—PRESCRIPTION ACT.

The general words in sect. 2 of the Prescription Act (2 & 3 Will. 4, c. 71) do not apply to the easement of light, which is governed by sect. 3, and subsequent ancillary sections: *Perry v. Eames*, (1891) 1 Ch. 658. The effect of sect. 3 is to give an absolute and indefeasible right to the access and use of light after twenty years of uninterrupted enjoyment; unless such enjoyment is shown to have been by consent: *Tapling v. Jones*, 11 H. L. O. 290; *Lanfranchi v. Mackenzie*, 4 Eq. 427; *Truscott v. Merch. Taylors' School*, 11 Ex. 855.

The nature and extent of the right to access of light have not been altered by this Act, but merely the mode in which that right may be obtained: *Kelk v. Pearson*, 6 Ch. 813; *Leech v. Schweder*, 9 Ch. 472.

In order to bring a case within the section, there must have been access by one and the same definite channel for the statutory period: *Harris v. De Pinna*, 33 Ch. Div. 238; and a right to passage of air over the general surface of the servient tenement cannot be acquired: *S. C.*; *Webb v. Bird*, 13 C. B. N.S. 841; *Bryant v. Lefever*, 4 C. P. Div. 172; *secus*, where the channel is defined, as in the case of a cellar ventilated by a shaft cut through the rock into a disused well: *Bass v. Gregory*, 25 Q. B. D. 481. And as to the meaning of the expressions "access" and "right thereto" used in the section, see *Scott v. Pape*, 31 Ch. Div. 554.

A timber stage or structure for storing timber has been held not to be a building within the section: *Harris v. De Pinna*, 33 Ch. Div. 238 (*per Chitty, J.*); *secus*, a memorial chapel, unconsecrated, and used for services and confirmation and other classes, and illumination of works of art: *A. G.*

*v. Queen Anne Mansions Co.*, 60 L. T. N.S. 759; 37 W. R. 572; and as to a church, see *Duke of Norfolk v. Arbutnot*, 5 C. P. Div. 390; *Ecclesiastical Commrs. v. Kino*, 14 Ch. Div. 213.

The use of light has been "enjoyed" within the section if the owner has had the amenity or advantage of using the light; continuous user is not necessary: *Cooper v. Straker*, 40 Ch. D. 21, where light was acquired in respect of windows with moveable shutters, which were only occasionally opened.

The Crown not being named in the section is not bound by it: *Perry v. Eames*, *sup.*

As to what constitutes an interruption within the Act, and as to the different considerations which may arise according as the alleged interruption is permanent or fluctuating, see *Presland v. Bingham*, 41 Ch. Div. 268; and that to establish acquiescence in an interruption, the existence of actual notice must be proved, *Seddon v. Bank of Bolton*, 19 Ch. D. 462.

A provision in a lease for the purpose of relieving the lessor from the application of the rule against derogating is not a consent or agreement by the lessee within the section: *Mitchell v. Cantrill*, 37 Ch. D. 56; and that the mere fact of there being windows in an adjoining house is not constructive notice of any agreement giving a right to light, see *Allen v. Seckham*, 11 Ch. Div. 790; observing on *Miles v. Tobin*, 16 W. R. 465.

It is sufficient if the consent is signed by the owner of the dominant tenement: *Bewley v. Atkinson*, 13 Ch. Div. 283.

But the right cannot be acquired during unity of possession of the house and the land over which the right would extend: *Ladyman v. Grave*, 6 Ch. 763.

As to the possibility of the acquisition, in respect of a church, of a title to light by prescription or grant over the glebe, see *Ecclesiastical Commrs. v. Kino*, 14 Ch. Div. 213.

#### IMPLIED GRANT.

The implication in favour of a grantee, whereby, under a grant of part of a tenement, continuous and apparent easements over the other part pass to the grantee, does not, in general, apply in favour of a grantor; so that if a vendor does not on conveyance reserve the right to light, no reservation is implied, and the purchaser can build so as to obstruct the windows: *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Taves v. Knowles*, 39 W. R. 512 (where the principle was applied to a mortgagee); *secus*, where there is any contract between the parties, *e.g.*, a building scheme, which would render such an act contrary to good faith: *Russell v. Watts*, 10 App. Cas. 590 (reversing *S. C.*, 25 Ch. Div. 559). And as to the difference between implied grant and implied reservation, see also *Bayley v. G. W. Ry. Co.*, 26 Ch. Div. 434, 458; *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13.

Where the owner of a house and land sells and conveys contemporaneously the house to one and the land to another, either purchaser being aware of the conveyance to the other, the purchaser of the land cannot obstruct the light of the house: *Allen v. Taylor*, 16 Ch. D. 255; and where a railway co. sold land adjoining railway arches, with a recital that all other land acquired by them would be used for the purposes of their railway, there was an implied obligation on their part not to obstruct the light coming through the railway arches: *Myers v. Catterson*, 43 Ch. Div. 470; *q. v.*, also, as to the principles upon which the doctrine of implication depends.

The implication is not prevented by the fact that the dominant tenement is in lease, and therefore not in the possession of the grantor: *Barnes v. Loach*, 4 Q. B. D. 494; and applies though the title of the grantor is equitable only: *Beddington v. Atlee*, 35 Ch. D. 317; the extent of the right of the grantee being measured by the state of the grantor's title, *ex. gr.*, being subject to any contract of sale entered into by the grantee: *S. C.*; and depending on all the circumstances existing at the time of the grant, and known to the grantee; *ex. gr.*, an improvement scheme as to land sold by a corporation: *Birmingham Bkg. Co. v. Ross*, 38 Ch. Div. 295.

And the grantor does not escape the operation of the rule by leaving a strip of vacant land intervening between the house granted and land retained: *S. C.*

The implication holds good in the case of a lease by a mortgagor under the Conveyancing Act, s. 18, as against a subsequent grantee from the mortgagee: *Wilson v. Queen's Club Co.*, W. N. (91) 133.

ABANDONMENT OF RIGHT.

After some conflict of opinion, it is now settled that the fact that an owner of ancient lights has altered and enlarged his windows, or added new ones will not deprive him of the right to an injunction against interference with his ancient light—provided there be a material injury to that which is a clear legal right, and damages will give no adequate compensation: *Aynsley v. Glover*, *sup.*; *Staight v. Burn*, 5 Ch. 163; *Tapling v. Jones*, 11 H. L. C. 290; *Barnes v. Loach*, 4 Q. B. D. 494; *Newson v. Pender*, 27 Ch. Div. 43, 55; *Greenwood v. Horsey*, 33 Ch. D. 471; *Raper v. Fortescue*, W. N. (86) 78; though where the portion of an ancient window, which is retained in the area of a new window, is so small that the damage to the ancient light is insignificant, the Court might decline to grant an injunction: *Newson v. Pender*, 27 Ch. Div. 43, 62; and the right to light is not abandoned by alteration of the plane of the windows by advancing them or setting them back: *Scott v. Pape*, 31 Ch. Div. 554; *Bullers v. Dickinson*, 29 Ch. D. 155; if there is user through the new apertures of the same, or a substantial part of the same cone of light which passed through the old apertures: *Scott v. Pape*, *sup.*; nor lost, although the actual enjoyment of the light has been entirely suspended by reason of there being no existing windows: *Ecclesiastical Commrs. v. K'no*, 14 Ch. Div. 213; but there may be an abandonment of the ancient lights if the alterations are such as to show such an intention: *Newson v. Pender*, 27 Ch. Div. 43; *Nat. Prov. Co. v. Prudential Assoc. Co.*, 6 Ch. D. 757; or if the owner of the dominant tenement has by his alterations so confused the evidence that he cannot prove the identity of the light: *Scott v. Pape*, *sup.*; and as to the importance of preserving distinct evidence as to the position and dimensions of the ancient windows, see *S. C.*, and *Fowlers v. Walker*, 49 L. J. Ch. 598; 28 W. R. 579; *Newson v. Pender*, 27 Ch. Div. 43, 55.

The recent cases have thus virtually overruled *Heath v. Bucknall*, 8 Eq. 1 (which decided that after an alteration or enlargement of windows the only relief was in damages), and also the common law decisions—*Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 8 C. B. N.S. 102; 9 C. B. N.S. 863; and extended the protection which in *Turner v. Spooner*, 1 Dr. & Sm. 467, and in *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 353, was apparently limited to cases where the change was trivial or immaterial, *e.g.*, putting in improved frames and glass; and in *Weatherley v. Ross*, 1 H. & M. 349, was limited to ancient windows when restored, Plt being ordered, as the condition of obtaining any injunction, to block up the new and to restore the altered windows to their original size.

(III.)—MINERAL RIGHTS.

1. *Account and Injunction in respect of Mineral Workings by Copyholder under Ancient Inclosures within a Manor.*

“LET an account be taken of all the coal and minerals which have been raised or dug by the Deft H., or by his licence or authority, from underneath the piece of copyhold land within and parcel of the manor of B., in the county of &c., and which formerly belonged to W., deceased, and now belongs to the Deft H., and which same piece of land is either ancient inclosure land, or is part of the open arable fields inclosed under the B— Inclosure Act, as allotted and awarded to the said W., deceased, and contains about &c., and is now in the occupation of &c., — and of the value of such coal and minerals and of all money received by the Deft H., or by his order or for his use from the sale, or otherwise in respect of such coal and minerals; And Let the said Deft, his agents &c., and all others by his authority, be perpetually restrained by injunction from raising, digging, or working,

or in any way interfering with the coal or other minerals lying underneath the said copyhold lands of the Deft H. within the said manor, being old inclosures, or which have been allotted to him as copyholds out of the open arable fields."—Deft to pay Plt's costs of suit to be taxed.—Adjourn &c., and subsequent costs.—*D. of Portland v. Hill*, V.-C. W., 15 Mar. 1866, B. 947; 2 Eq. 765; followed in *D. of Rutland v. Tutin*, V.-C. M., 22 July, 1878, B. 1958.

## 2. *Lateral Support to Church—Coal Workings restrained.*

"AND both sides (by their counsel) consenting to treat this motion as the trial of this action, Let the Defts D. and G., their agents &c., be restrained by injunction from further proceeding with their mining operations and workings in the coal mines so occupied by them as in the statement of claim mentioned, and from working the coal in their said mines at any part thereof nearer to the Plt's church than that to which the workings of their predecessors (in title) were carried, and from getting the ribs and pillars of coal, including the thick rib of coal in the said statement mentioned, so left by their predecessors as aforesaid, within eighty yards from the ground immediately under the said church, and from commencing or proceeding with any mining operations or workings in such manner as to cause damage to the Plt as the vicar of the said church; And Let the Plt and his agents be at liberty from time to time to inspect the said mines and workings, and the working plans connected therewith, at all reasonable times."—Deft to pay Plt's costs of suit, to be taxed.—*Wall v. Dunn*, V.-C. M., 2 Mar. 1876, B. 693; affirmed on appeal, 7 July, 1876.

## 3. *Injunction as to Coal Workings—Account of Coals gotten—Support.*

"LET Deft W., his servants &c., be perpetually restrained by injunction from working or getting any coals or other materials in the mines under the close of land called &c., or other lands of the Plt, situate at &c., or from carrying on any working under the same lands, and from permitting the ways, passages, and apertures which have been made or opened in or to the said mines to remain open, or from permitting the surface of the land to remain insufficiently supported; And Let an account be taken of all coals and other materials worked or gotten or rendered unworkable under the same lands by the Deft W., and of the value of such coals and other material, without any allowance for the cost of working or getting the same."—Deft W. to pay Plt's costs of suit.—Adjourn &c.—*Bell v. Joell*, V.-C. H., 8 July, 1875, A. 295.

For decree restraining the working of minerals, to the support of which Plts were entitled under their contracts, in such a manner as to occasion damage to them, see *N. E. Ry. Co. v. Crossland*, 2 J. & H. 565; 4 D. F. & J. 550.

For injunction to stay the owner of a bed of china clay from getting it so as to destroy or seriously injure the surface, see *Hext v. Gill*, 7 Ch. 699.

For injunction to stay Deft working coals under Plt's railway, or within twenty yards of any building, so as to damage or obstruct it, unless after the notice required by the Railways Clauses Act, s. 78, or so as to affect a bridge, without prejudice to Deft's right to pump water from the shaft, see *N. E. Ry. Co. v. Elliott*, 1 J. & H. 158; 2 D. F. & J. 423.

For inquiry with a view to an injunction against a lessee of mines disturbing supports of lessor's house, see *Dugdale v. Robertson*, 3 K. & J. 695.

#### 4. Injunction as to Mines—Support—Inspection—Account.

(By consent) Let &c., be restrained by injunction from digging or getting any coals, culm, or other minerals or soil from under the E. estate, in &c., mentioned, or in any manner digging under the same, and also from destroying or taking away the pillars or supports which have been left or erected in the workings under &c., or any part thereof, and also from using such parts of the communications called the &c., as lie under the said &c., or any part thereof, or such parts of any other communications from &c., until &c.; And Let the Plts, or a proper person to be appointed by them for that purpose, be at liberty, on reasonable notice being given, to inspect the workings of the Defts under the said E. estate; And Let the following &c.—1. An account of the several quantities of coal, culm, and other minerals, worked, raised, or procured by the Defts, or any of them, or by any other person or persons by their or any of their order, or for their or any of their use, out of or from the said E. estate or any part thereof; 2. An inquiry how, and in what manner, and at what time or times, and for what sum or sums of money, the same, and every part thereof, have or has been sold, applied, or disposed of.—Adjourn &c.—See *Baynton v. Leonard*, M. R., 15 Feb. 1853, A. 454.

For an interlocutory order for Plt to inspect at all reasonable times, upon giving one day's notice, so far as might be necessary to ascertain whether Deft had worked into Plt's land, and how far and to what extent, with liberty to measure, dial, and make all such plans or surveys as might be necessary for that purpose, and to use the Deft's machinery for descending and ascending, doing no injury to the Deft's works, and paying the Deft any expenses he may incur, see *Bennett v. Whitehouse*, M. R., 9 Feb. 1860, A. 232; 28 Beav. 119.

For an order in Chambers under the C. L. P. Act, 1854, s. 58, that Plt be at liberty by his witnesses &c., to inspect the Defts' mine; that for this purpose the Defts give all reasonable facilities for access to and in the mine, and for ventilation during the process; and that Plt be at liberty, so far as is necessary for the purpose of inspection, to make a drift-way as described &c.; before commencing the inspection Plt to give security, to the satisfaction of the master, to the extent of £500, or deposit that sum with the master to abide any order as to indemnifying Defts for any loss or damage which might be sustained in consequence of the inspection, see *Bennett v. Griffiths*, 30 L. J. Q. B. 98.

#### 5. Inspection of Mines, in Suit to establish the Right.

LET the Commrs of her Majesty's Woods and Forests be at liberty on behalf of the informant, at all seasonable times, and on giving reasonable notice, to enter, inspect, and examine, by surveyors to be appointed by them, the coal mines now or lately worked by the Defts, by means of the four several pits or shafts &c., for the purpose of

ascertaining, so far as may be necessary to ascertain, how far seawards from the said pits or shafts the said Defts have worked the said mines, and every one of them.—*A. G. v. Chambers*, V.-C. W., 18 July, 1849, A. 1948; 12 Beav. 159, 160.

For order for injunction to stay Deft getting coals under the Plt's land, and for Plt and his agents to be at liberty to inspect the workings, see *E. Lonsdale v. Curwen*, L. C., 7 June, 1799, A. 399; and for further order appointing persons to view, and directing obstructions to be removed and air-courses opened, and inspection to be allowed from time to time so as to enable the viewers to make a complete report of the workings, *Ib.*

For a similar order, see *Lewis v. Marsh*, 19 April, 1849, B. 791; 8 Ha. 100.

#### 6. *Using Way under Plt's Land for conveying Coals from Deft's Mines restrained.*

LET the Deft Earl G., his viewers &c., be perpetually restrained by injunction from conveying any coal or ironstone, or other produce of the freehold lands in the (bill) mentioned, and from making or using, or allowing any road or way to remain underneath the copyhold lands in the (bill) also mentioned, for the purpose of conveying such coal &c., or other produce, or for the purpose of working or getting, or assisting the Deft to work or get any coal out of the freehold mines, and from using or continuing to use any part of the surface of Plt's copyholds, for the purpose of a railway for conveying any coal &c., or produce of the said freehold lands, or any coal out of any other estate or property not comprised in and held of the said manor of N.—*Eardley v. Earl Granville*, M. R., 18 Feb. 1876, A. 629; 3 Ch. D. 826.

For an interlocutory order (upon Plt's personal undertaking) restraining mineral lessees of the lord of the manor from entering upon or taking possession of any part of Plt's copyhold lands in the manor, and from proceeding with the construction of the tramway commenced by Defts upon part of the said copyhold lands, and from proceeding to construct any railway or tramway upon any part of the said copyhold lands, see *Holden v. Hargreaves*, V.-C. B., 3 Aug. 1876, A. 1584.

For an injunction to restrain Deft from conducting or allowing to pass any water into the Plt's mine by means of the troughs or air-drifts constructed, &c., by the Deft, or by any other new works to be constructed by the Deft, see *Westminster Brymbo Co. v. Clayton*, V.-C. W., 25 April, 1867, B. 1337; 36 L. J. Ch. 476.

For the like order, and to restrain Defts from getting &c., or carrying away any coals or other minerals belonging to the Plts as owners of the colliery; appointment of a special referee to report what kind of barrier ought to be erected by the Defts between their works and those of the Plts; Defts to erect such works under the superintendence of such referee; referee to ascertain the extent of the coal got by the Defts belonging to the Plts, and the amount the Defts ought to pay for the value of the coal so got; Defts to afford every facility to the referee and his assistants for ascertaining the extent of coal got; referee to ascertain the extent of damage, if any, by the water from the Defts' works flowing into the Plts' works; Defts, within fourteen days from the date of the report, to pay to the Plts such sum as the referee should certify to be fair and reasonable for the trespass and damage committed by the Defts; costs, charges, and expenses already incurred, or which should be incurred or sustained, by Plts in consequence of the Defts' trespass, including the surveyor's charges and the charges of the referee and the Plts' costs of the action, to be taxed and paid by Defts, see *Craven v. Kaye*, Field, J., for V.-C. H., 29 Aug. 1876, A. 1647.

7. *Account of Coal obtained by Defts from within Plts' Barrier, inadvertently or under Belief of Title—Damages—Way-leaves.*

VARY the decree—"And his Lordship being of opinion that as between the parties hereto the indenture dated &c., in the pleadings mentioned, could not in equity be disputed as a valid demise of the mines in the pleadings mentioned for twenty-one years, from the 25th March, 1840, and the Defts by their counsel submitting to account as assignees of the said lease, and as the parties in possession of the mines and premises &c., since the expiration of the said lease, as this Court shall direct, Let the following &c.": 1. An account of rents and royalties payable under the lease of the 2nd May, 1840, with a direction as to the mode in which the rent was to be calculated; 2. "An account of all coal and other minerals got from the said mines by the Defts, or either of them, or by the S. Co. (*assignors of the lease*), since the 25th March, 1861, and of the value of such last-mentioned coal and other minerals; And declare that in taking such last-mentioned account the Defts are to be charged with the fair value of such coal and other minerals at the same rate as if the said mines had been purchased from the Plts by the Defts at the fair market value of the district; And Let &c., 3. An inquiry whether any and what damage has been occasioned to the C. estate beyond the removal of the coal and other minerals by the working of the said mines since the said 25th March, 1861, and what if anything is proper to be allowed to the Plts as compensation for such damage; 4. An inquiry what since the said 25th March, 1861, ought to be paid by the Defts, or either of them, or the said S. Co. to the owner of the C. estate, as or by way of way-leave in respect of the passing of the coal and other minerals not the produce of the said mines, and of materials, through and by means of the mines and workings in and under the said C. estate; And Let the total amount due on taking the said accounts and making the said inquiries be ascertained; And Let the same be paid by the Defts &c., to the Plts &c., within one month after the date of the chief clerk's certificate to be made in pursuance hereof."—So much of the Plts' (bill) as prayed damage, save as to damage done since the 25th March, 1861, to the estate and mines by working the mines, and by not leaving barriers, and not sinking proper shafts, dismissed—no costs up to the hearing.—Liberty to apply in Chambers as to the costs of the accounts and inquiries.—*Jegon v. Vivian*, L. C., 25 Jan. 1871, A. 273; 6 Ch. 742; and see *Livingstone v. The Ravyards Coal Co.*, 5 App. Ca. 25.

For decree for injunction, as in Form 4, *sup.* p. 497, "and from using any drifts, roads, or communications, which have been made in such coal and cannel respectively for the purpose of working, ventilating, or draining any other mine, or getting, carrying away, and raising to the surface any coals, cannel, or substance from any such other mine; but notwithstanding the said injunction, the Deft to be at liberty to continue the drainage and ventilation of the mine belonging to the Plt (*sic* in Reg. Lib.) until the accounts hereinafter mentioned shall have been taken; and reasonable time to be given to the Deft to remove any machinery belonging to him from the

mines;”—Plt to be at liberty to go down Deft's mines for the purpose of inspecting the Plt's said mine;—Accounts of coals &c., gotten, and Deft to be charged with the fair value, as if the coal-field had been purchased by him at the market-price of the district; and inquiry whether Plt is entitled to any and what compensation as way-leave for minerals brought by Deft from other mines belonging to Deft through or into the said mines belonging to the Plt, see *Hilton v. Woods*, V.-C. M., 6 July, 1867, A. 1769; 4 Eq. 432.

For allowance in the case of an innocent trespasser for severing and bringing the coal to bank, see *Ashton v. Stock*, V.-C. H., 2 May, 1877, A. 1055; 6 Ch. D. 719; *Taylor v. Mostyn*, 33 Ch. Div. 226.

### 8. *Inquiry as to Value of Coals wrongfully got, and Damage by breaking through Plts' Boundary.*

1. “LET an inquiry be made what was the market value at the pit's mouth of all the coal worked and gotten by the Defts from the Plts' mine at — in the Plts' (bill) mentioned, and the aggregate amount thereof, after making to the Defts all just allowances for the costs and expenses incurred by them in bringing such coal to the pit's mouth, and all other just allowances, but not including the cost of severing such coal; And Let the Defts within (one month) from the date of the chief clerk's certificate of the result of such inquiry pay such aggregate amount as aforesaid to the Plts; 2. And Let an inquiry be made whether the Plts have sustained any, and if any what, damage by reason of the Defts having broken through the boundary between their mine at — in the pleadings mentioned, and the said mine of —; And declare that the Defts are liable to pay to the Plts the amount, if any, that shall be certified to be payable in respect of such damage—Defts to pay Plts' costs up to and including the hearing.”—Adjourn &c. and subsequent costs.—Liberty to apply.—*Llynvi Coal Co. v. Brogden*, V.-C. B., 15 Nov. 1870, B. 2981; 11 Eq. 188.

For the like inquiry as to value of minerals removed, and damage by such working, see *Hunt v. Peake*, Joh. 713.

For inquiry as to damage sustained by Plt in respect of his coal which, though not worked by Deft, had been rendered valueless by reason of the Deft's working other coal of the Plt, see *Williams v. Raggett*, Fry, J., 7 August, 1877, B. 1844; 37 L. T. N.S. 96.

### NOTES.

#### SUPPORT.

*Primâ facie* there is a natural right of support for the soil as an incident of property and not in the nature of an easement: *Bonomi v. Backhouse*, E. B. & E. 655; 9 H. L. C. 503; and see *Midland Ry. Co. v. Robinson*, 15 App. Cas. 19, 30; and minerals cannot be worked by the owner of the subjacent or adjacent soil (that is, “the owner of that portion of land the existence of which in its natural state is necessary for the support of the land” of his neighbour: *Mayor, &c. of Birmingham v. Allen*, 6 Ch. D. 284, 289) so as to cause that land to fall in: *Humphries v. Brogden*, 12 Q. B. 739; *Hunt v. Peake*, Joh. 705; *Dugdale v. Robertson*, 3 K. & J. 695; *Bell v. Wilson*, 1 Ch. 303; *Hext v. Gill*, 7 Ch. 699; and see *Rowbotham v. Wilson*, 8 H. L. C. 348; Gale, 328, &c.

As to how far this right may be modified or lost by the erection of buildings on the land so as to render additional support necessary, see *Wyatt v. Harrison*, 3 B. & Ad. 871; *Hunt v. Peake*, *sup.*

Lateral support for buildings from adjoining land or buildings may be



acquired by twenty years' enjoyment: *Dalton v. Angus*, 6 App. Ca. 740; 4 Q. B. D. 162; 3 *Ib.* 85; *Love v. Bell*, 10 Q. B. Div. 547; 9 App. Cas. 286; *Lemaître v. Davis*, 19 Ch. D. 281; *Bonomi v. Backhouse*, *sup.*; and see *Rogers v. Taylor*, 2 H. & N. 828; and this right may also be claimed as an easement under the Prescription Act (2 & 3 Will. 4, c. 71), s. 2: see *Dalton v. Angus*, 6 App. Ca. 798; *Lemaître v. Davis*, 19 Ch. D. 281; but the enjoyment of the support must be as of right: *Tone v. Preston*, 24 Ch. D. 739; and that a right of support from adjacent land of a grantor may be implied in a grant for building purposes, see *Rigby v. Bennett*, 21 Ch. Div. 559.

To support an action for infringement of this right of support there must have been appreciable damage: *Smith v. Thackerah*, L. R. 1 C. P. 564.

A grant of minerals and also the reservation of minerals in the grant of the surface will imply such a working as not to affect the right to support which is incident to the occupation of the surface: *Rowbotham v. Wilson*, 8 H. L. C. 360; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449; *N. E. Ry. Co. v. Crosland*, 2 J. & H. 565; 4 D. F. & J. 550.

And there is an implied obligation on the vendors not to work minerals in their adjoining land so as to cause a subsidence in the land sold: *Siddons v. Short, &c. Co.*, 2 C. P. D. 572.

But this *prima facie* right may be affected by express contract, or by necessary implication, or by statutory enactment.

(a) In a grant of land for building purposes the reservation to the grantor of the right to take and work minerals, making compensation to the grantee for all damage to the buildings thereby occasioned, gives the grantor, subject to his obligation to make compensation, the right of working, even to the injury of the buildings: *Aspden v. Seddon*, 10 Ch. 394.

And that the terms of the grant of the surface may be such as to contract the grantee out of his right to support, or even to compensation for loss of support, see *Buchanan v. Andrew*, L. R. 2 H. L. Sc. 286; *Williams v. Bagnall*, 12 Jur. N.S. 987; *Rowbotham v. Wilson*, 6 E. & B. 593; 8 E. & B. 123; 8 H. L. C. 348.

But the reservation of minerals in a grant of the surface must be so framed as to show the clear intention to get the minerals without regard to the surface (*e.g.*, by quarrying): *Hext v. Gill*, 7 Ch. 699.

Coprolites (see *A. G. v. Tomline*, 5 Ch. D. 750), china-clay (see *Hext v. Gill*, 7 Ch. 699), and generally anything got from underneath the surface for profit, are "minerals," the property in which is in the lord, though, in the absence of special custom, he cannot dig them without permission of the tenant.

And clay was held to be a mineral within a reservation of minerals: *Earl of Jersey v. Neath Guardians*, 22 Q. B. Div. 555.

In a reservation of minerals to the Crown, granite was held to be included, although the words "coal, limestone, and slate," were added: *A. G. v. Welsh Granite Co.*, W. N. (87) 86.

(b) The terms of the instrument under which the minerals are worked may be such as to give by manifest intention an unrestricted power of working the mines without regard to the safety of any of the surface not specially protected: see *Taylor v. Shafto*; *Shafto v. Johnson*, 8 B. & S. 228, 252, n.; *Eadon v. Jeffcock*, L. R. 7 Ex. 379; *Smith v. Darby*, L. R. 7 Q. B. 716.

But inasmuch as the common law right to support exists unless it is taken away, the onus lies on those who assert the right to let down the surface, and no implication will be made in their favour in the absence of clear intention: *Love v. Bell*, 9 App. Cas. 286; *Davis v. Tretharne*, 6 App. Cas. 460; *Dixon v. White*, 8 App. Cas. 833.

(c) The effect of the Railways Clauses Act (8 & 9 V. c. 20), ss. 77—85, is to modify the ordinary purchaser's or grantee's right to lateral and vertical support in the case of a statutory purchase by a co. of the right to make a line or a tunnel through land: see *G. W. Ry. Co. v. Bennett*, L. R. 2 H. L. 27.

If the railway co. exercises its option of purchasing the land without the minerals, the owner of them may work in the usual way, without regard to whether such working will let down the surface: *Pountney v. Clayton*, 11 Q. B. Div. 820.

After notice by the owner, under sect. 78, of his intention to work the minerals within the prescribed limit, the co. cannot restrain such working

unless they compensate the owner for the loss of his minerals: *L. & N. W. Ry. Co. v. Ackroyd*, 10 W. R. 367; and although in the case of apprehended injury workings within or even beyond the prescribed limit may be restrained, the injunction will only be granted upon an undertaking by the co. to pay the amount of compensation when ascertained: *Midland Ry. Co. v. Checkley*, 4 Eq. 19.

But after compensation has been agreed on, and paid or tendered, a perpetual injunction may be granted against the working of the mines: *Smith v. G. W. Ry. Co.*, 3 App. Cas. 165; and the co. may give the counter-notice of their willingness to compensate at any time when danger to the line is apprehended: *Dixon v. Caledonian, &c. Ry. Co.*, 5 App. Cas. 820.

To the same effect, as establishing the right of the owner either to work the minerals or to be compensated, see *Fletcher v. G. W. Ry. Co.*, 4 H. & N. 242; 5 Ib. 689.

The same principle has been applied to working mines under canals regulated by Acts containing provisions similar to those of the Railways Clauses Act, ss. 77, &c. (e.g., the Waterworks Clauses Act, 10 & 11 V. c. 17, ss. 22—27): *Wyrley Canal Co. v. Bradley*, 7 East, 368; *Dudley Nav. Co. v. Grazebrook*, 1 B. & Ad. 59; *Stourbridge Canal Co. v. E. Dudley*, 3 E. & E. 409; *Birm. Canal Co. v. E. Dudley*, 7 H. & N. 969; *Birm. Canal Co. v. Swindell*, Ib. 980, n.; *Midland Ry. Co. v. Checkley*, *sup.*; *Knowles v. Lancashire and Yorkshire Ry. Co.*, 14 App. Cas. 248; *M. S. & L. Ry. Co. v. Johnson*, 36 Ch. D. 629, n.

For cases in which it has been held that the general right to support was not qualified by the particular Act under which the land was compulsorily acquired, see *Caledonian Ry. Co. v. Sprot*, *sup.*; *Caledonian Ry. Co. v. Belhaven*, 3 Macq. 56; *N. E. Ry. Co. v. Elliott*, 1 J. & H. 145; 2 D. F. & J. 423; 10 H. L. C. 333; *N. E. Ry. Co. v. Crosland*, 2 J. & H. 565; 4 D. F. & J. 550; Gale, 337.

A railway co. by paying compensation, under sect. 78, to a mineral lessee for leaving the minerals under the line, acquires the right to support, and to restrain the reversioner, on the surrender or determination of the lease, from working the minerals, without prejudice to any question as to compensation, having regard to the payment already made: *G. W. Ry. Co. v. Smith*, 2 Ch. D. 235; affirmed 3 App. Ca. 165.

A notice by a mine owner, under sect. 78, of his intention to work the mines may be validly given, although he intends to let them, provided he has a *bonâ fide* intention of working either by himself or his lessees, and although the notice includes minerals under a long extent of railway: *Midland Ry. Co. v. Robinson*, 37 Ch. Div. 386; *S. C.*, 15 App. Cas. 19.

The "mines" and "minerals," specified in sects. 77 and 78, include such as can only be gotten by open working, e.g., ironstone, limestone, clay: *Midland Ry. Co. v. Robinson*, 15 App. Cas. 19; 37 Ch. Div. 386; *Midland Ry. Co. v. Haunchwood Brick Co.*, 20 Ch. D. 552; but see *contra* (as to Scotland), *Provost of Glasgow v. Farie*, 13 App. Cas. 657.

The owner of a mineral estate intersected by lines of railway is not entitled to trespass upon the railway in order to work his mines: *Midland Ry. Co. v. Miles*, 30 Ch. D. 634.

As to the power of a railway co. to purchase mines compulsorily, see *Smith v. G. W. Ry. Co.*, 3 App. Cas. 165; *Errington v. Met. Dist. Ry. Co.*, 19 Ch. Div. 559.

As to the rights of a mineral owner through whose land a sewer is constructed under the Public Health Act, 1875, and his duty to preserve subjacent support, see *Re Corporation of Dudley*, 8 Q. B. Div. 86.

A local custom for a tenant (under an agreement for a lease) to remove and sell flints thrown up in the course of husbandry is reasonable and valid: *Tucker v. Linger*, 8 App. Cas. 508; 21 Ch. Div. 18; but in the absence of custom or prescription the lord cannot take minerals from under copyhold lands either by surface or underground workings: see *Bourne v. Taylor*, 10 East, 201; *Mitchell v. Dora*, 6 Ves. 147.

That a custom to work mines within a manor without making compensation for damage by subsidence is bad, see *Hilton v. E. Granville*, 5 Q. B. 701; *Blackett v. Bradley*, 1 B. & S. 940 (but see *Gill v. Dickinson*, 5 Q. B. D. 159); but not, as above stated, a grant or express contract with such a provision.

In an action by a copyholder to restrain lessees of the lords from working coal, the lords may be joined as Defts authorizing and justifying the wrongful working: *Shafte v. Bolckow*, 34 Ch. D. 725.

As to the right of the lord of the manor, under the reservation to him by an Inclosure Act, to work minerals, even to the utter destruction of the surface, subject to the liability of making reasonable compensation: see *D. Buccleuch v. Wakefield*, L. R. 4 H. L. 377, varying 4 Eq. 613; *Gill v. Dickinson*, 5 Q. B. D. 159; *Hext v. Gill*, 7 Ch. 699; but such a right cannot be established by the lord unless the language of the Act is explicit to that effect: *Love v. Bell*, 9 App. Cas. 286, 293; 10 Q. B. D. 547, where a compensation clause was held to be limited to surface workings, and therefore not to confer any right to let the surface down: and see *Dixon v. White*, 8 App. Cas. 833. The onus of proving that the lord is unduly availing himself of his right lies on the tenants: *Hall v. Byron*, 4 Ch. D. 667.

Working by instroke from an adjoining colliery has been held no breach of a covenant to work the coal in a proper and workmanlike manner: *Lewis v. Fothergill*, 5 Ch. 103; *Jegon v. Vivian*, 6 Ch. 742.

A lessor who wishes to reserve rights of working in derogation of the lease must do so in plain terms: *Mundy v. Duke of Portland*, 23 Ch. Div. 81. Ceasing to pump out water from a mine is no derogation from a grant of right of access to lessees: *Payne v. Rocher*, W. N. (87) 37.

Under a building lease with reservation of minerals, the lessee may dig foundations, and dispose of the material dug out, but not dig in order to improve the surface as a building site: *Robinson v. Milne*, 53 L. J. Ch. 1070.

That the maxim *actio personalis moritur cum persona* applies to an action for an account in respect of mines wrongfully worked by A. under the Plt's land, see *Phillips v. Homfray*, 24 Ch. Div. 439.

#### INSPECTION.

Upon a *prima facie* case of mineral trespass or encroachment by the Deft, and where the fact of trespass (which is denied) can only be ascertained by inspection, and no injury will result to the Deft therefrom, an interlocutory order will be made for inspection of his mine: *Bennitt v. Whitehouse*, 28 Beav. 119; and see *Whaley v. Brancker*, 12 W. R. 570, 595.

The order will, when necessary, extend to the removal of obstructions to the inspection: *E. Lonsdale v. Curwen*; *Walker v. Fletcher*, 3 Bli. O.S. 168, n., 172, n.; *A. G. v. Chambers*, 12 Beav. 159; and see *Ennor v. Barwell*, 1 D. F. & J. 529; where, in a suit to restrain the diversion of water, so much of an order for inspection on motion before the hearing as gave Plt leave to break up soil by making trenches, remove earth and obstructions, and cut down an embankment, was struck out on appeal.

And by O. L. 3, power is given to the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property, being the subject of such cause or matter; and to authorize any person, &c., to enter upon or into any land or building in the possession of any party to such cause or matter, and to authorize samples to be taken, observations made, or experiments to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

By r. 4, power is given to the Judge, by whom any cause or matter may be heard with or without a jury, or on appeal, to inspect any property or thing concerning which any question may arise therein; and by r. 5 the provisions of r. 3 are made applicable to inspection by a jury; an order for which may, where the other side consents, be obtained *ex parte*: see *Pickard v. G. N. Ry. Co.*, W. N. (83) 194; similar provisions were contained in C. L. P. Act, 1852, s. 114, and C. L. P. Act, 1854, s. 58.

Digging up a street to ascertain the course of drains said to come from Deft's premises was treated as coming within "experiments" under this rule: *Lumb v. Beaumont*, 27 Ch. D. 356, Form 11, *inf.* p. 524.

#### ACCOUNT AND COMPENSATION.

In assessing compensation for mineral trespass or wrongful working, a different principle is applied when the minerals have been taken inadvertently, and when taken fraudulently, or in wilful wrong—

(a) If taken by Deft inadvertently or under a *bona fide* belief of title, the

Plt is entitled to be paid the value of the coal or minerals, as if the field had been purchased by Deft at the fair market value of the district; the expenses of winning and getting being allowed to Deft: *Jegon v. Vivian*, 6 Ch. 742, *sup.* Form 7; *Hilton v. Woods*, 4 Eq. 432; and see *West v. Morewood*, 3 Q. B. 440, n.; *Morgan v. Powell*, 3 Q. B. 278; *Joicey v. Dickenson*, 45 L. T. N.S. 643; *Ashton v. Stock*, 6 Ch. D. 719; *Livingstone v. Rawyards, &c. Co.*, 5 App. Ca. 25. So long as the wrongful working can be treated as inadvertent, the Statute of Limitations applies, and the account will be limited to six years from issue of writ: *Trotter v. Maclean*, 13 Ch. D. 574; *Dean v. Thwaite*, 21 Beav. 621; and see *Hood v. Easton*, 2 Jur. N.S. 917; 2 Giff. 692.

So also in *Powell v. Aiken*, 4 K. & J. 343, an inquiry was directed to ascertain "the market price or value, or as near thereto as might be, of all coal, &c. (improperly taken), at the pit's mouth, all just allowances being made to the parties chargeable in respect of their charges and expenses, on account of such coal." And for the mode of calculating the profits and expenses, and that interest on expenses is at the rate of 5 p. c., see *L. Rokeby v. Elliot*, 13 Ch. Div. 277; 9 Ch. D. 685; and for a case in which under peculiar circumstances the best evidence of value was considered to be the royalty paid in surrounding coal-fields, see *Livingstone v. Rawyards, sup.*

(b) If taken fraudulently or wilfully, after full notice of Plt's title, damages will be assessed against the Deft on a stricter principle; and he will be allowed the costs of bringing the coal to the pit's mouth only, not of severing or getting: *Phillips v. Homfray*, 6 Ch. 770; *Llynvi Co. v. Brogden*, 11 Eq. 188, *sup.* Form 8; *Morgan v. Powell*, 3 Q. B. 278; and see *Trotter v. Maclean*, 13 Ch. D. 574; *Martin v. Porter*, 5 M. & W. 351; *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66.

And the further inquiries—what is fit and proper to be paid by Deft for way-leave for minerals carried through Plt's property (*Phillips v. Homfray*, 6 Ch. 770; *Jegon v. Vivian, sup.*; *Martin v. Porter, sup.*); and as to damages by reason of Deft having broken through Plt's boundary (*Llynvi Co. v. Brogden, sup.*),—will be directed.

For case in which compensation was awarded once for all, where persons were exercising right of mining under Plt's land, subject to payment of compensation for permanent injury, see *Great Laxey Mining Co. v. Clague*, 4 App. Ca. 115.

As to the right to compensation money for coals wrongfully worked under a settled estate, see *Re Barrington, Gamlen v. Lyon*, 33 Ch. D. 523.

The inquiry may be extended to damage sustained by Plt in respect of coal which, though not worked, has been injured by the Deft's working of Plt's coal: *Williams v. Raggett*, 37 L. T. N.S. 96.

In cases of subsidence, the cause of action arises when and as the subsidence, or each successive subsidence, occurs, and the action may therefore be maintained though more than six years have elapsed since the last working of the mines: *Darley Main Colliery v. Mitchell*, 11 App. Ca. 127; *S. C.*, 14 Q. B. Div. 125; *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. (C. A.) 503.

#### WAY-LEAVES.

A right of way over or under copyhold tenements of the manor, for the conveyance of minerals worked within the manor, may be asserted by the lord, but not for the conveyance of minerals dug beyond the limits of the manor: *Bousser v. Maclean*, 2 D. F. & J. 415; and see *Eardley v. Granville, sup.*, Form 6; *S. C.*, 3 Ch. D. 826.

But the owner of minerals by grant, or under a general reservation in a grant of the surface, is entitled to use them for any purpose, and to drive way-leaves through them for conveyance of minerals gotten from adjacent lands: *Proud v. Bates*, 34 L. J. Ch. 406; *D. Hamilton v. Graham*, L. R. 2 H. L. Sc. 166.

Where a grantor of land reserved the mines and also a specified right of way "for a waggon or cart road," he was not entitled to lay down a railroad or tramway: *Bidder v. N. Staffordshire Ry. Co.*, 4 Q. B. Div. 412.

And as to the right, under a Canal Act, of a mineral owner to make roads and railways over the lands of other persons from his mines to the canal, and that he is not of necessity restricted to the shortest line, see *Richards v. R.*, Joh. 255.

A landowner, entitled under a special Act, and s. 80 of the Railways Clauses Act, to make passages under a railway from his land, has no implied right

of way over the railway for the purpose of working minerals: *Midland Ry. Co. v. Miles*, 33 Ch. D. 632.

(IV.)—RIGHT OF WAY.

1. *Interim Order—restraining Use of Private Road.*

LET the Defts — &c., their agents &c., be restrained until after — the — day of —, —, or until further order, from using or permitting to be used any part of the lane at &c., the soil of which, it is alleged, belongs to the Plts as a carriage-way for the passage of carts, carriages, or other vehicles, either going to or from the land marked B. in the plan annexed to the said (bill) or for any purpose whatsoever.—*Foster v. Lumb*, V.-C. H., 1 June, 1876, A. 1100.

2. *Perpetual Injunction against obstructing Road, and permitting Obstructions to remain—Damages.*

“LET the Defts, their servants &c., be perpetually restrained by injunction from doing any act whereby the Plt may be hindered or obstructed in the free use of the Rock Road in the (bill) mentioned, from Rock House therein mentioned to the other terminus thereof, on foot or by horses or carriages; and from continuing or allowing to remain any of the obstructions to the said road, which have been placed there by the Defts, their servants &c., and whereby the Plt and other persons going to or from the said Rock House and premises, on foot or by horses or carriages, are prevented or hindered from using the said road, and also from interfering with the Plt, his servants &c., in the removal of any of the obstructions which have been placed on the said road preventing the user thereof by the Plt as aforesaid;”—Defts to pay to the Plt costs up to this time, to be taxed.—“And Let an inquiry be made what damages, if any, the Plt has sustained in consequence of the obstruction of the said Rock Road, by the Defts as in the (bill) mentioned; And Let what if anything shall be ascertained to be due to the Plt in respect of such damage be within (one) month after the date of the chief clerk’s certificate paid by the Defts &c. to the Plt D.”—Liberty to apply in Chambers respecting the subsequent costs and otherwise.—*Dendy v. Cary*, V.-C. W., 26 June, 1863, A. 1418.

For an injunction against blocking up the access by a footpath to a station of the Plt co., see *L. & N. W. Ry. v. Lanc. and Yorks. Ry.*, 4 Eq. 174.

Against obstructing the free use of roads and ways through Deft’s estate by a fence erected by him at the extremity of his land, *Phillips v. Treeby*, 8 Jur. N.S. 711; 3 Giff. 632.

3. *Establishing Right of Way, and for removal of Obstructions.*

“DECLARE that there is a public right of way through and over the whole of St. M. Alley in the statement of claim mentioned up to the eastern end thereof; And Let the Defts, their surveyors &c., be restrained by injunction from erecting or proceeding with the fence or

barricade in the information mentioned, and otherwise obstructing the free passage of persons passing over and along St. M. Alley aforesaid or any part thereof; And Let the Defts remove all such girders, fences, and other obstructions as they shall have already erected or made in the said alley."—Defts to pay the Plt's costs of suit, to be taxed.—See *A. G. v. Wrench*, V.-C. H., 22 July, 1874, A. 2359.

For declaration that Plt and Defts have an equal and reciprocal right to the use of the roadway, and that the persons interested therein have not, nor have any of them, any preferential right of way, and that the necessity or urgency of their particular trade or business does not give them any right to occupy such roadway by any stationary obstruction when the passage is required by any other person having the right of any such roadway, with consequent directions; and an injunction to restrain the Defts and any persons interested in the said roadway, their respective servants, &c., from placing or leaving any stationary obstruction in the said roadway, except at such time as the use thereof is not required for any other of the persons interested therein, and from making use of the said roadway in any manner inconsistent with the meaning of the said declarations, see *Thorpe v. Brumfit*, 8 Ch. 650, 654.

For the like declaration of the concurrent right of Plt and other owners (of whom Deft was one) of adjoining houses to use a private road (forming a *cul-de-sac*) for the purposes of access to their property, and that Deft was not entitled to place any stationary obstruction when the road was required by the other persons so entitled, and was bound, when required, to remove such obstruction, see *Shoemith v. Byerley*, V.-C. W., 9 May, 1873, 21 W. R. 669; *Cannon v. Villars*, M. R., 7 March, 1878, A. 454, 8 Ch. D. 415.

For perpetual injunction to restrain stopping up an implied way of necessity, see *Davies v. Sear*, 7 Eq. 427.

#### 4. *Railway Company restrained from obstructing a Right of Way over a Level Crossing.*

DECLARE that the Plts are entitled for themselves and their tenants and the under-lessees and occupiers of the messuages, lands, and hereditaments so purchased by them as in the (bill) mentioned, and their officers and servants &c., to the free and uninterrupted use and enjoyment of the level crossings in the (bill) mentioned, and each of them, but so as not to interfere with the traffic on the railway; And Let the Defts, the co., their officers, servants &c., be perpetually restrained by injunction from permitting any train, engine, carriage, or truck, to stand across the level crossings or either of them, and from doing or permitting any other act so as to obstruct or impede the Plts, or their tenants or lessees, or the occupiers of the lands purchased by the Plts, or any of them, from or in the free and uninterrupted use and enjoyment of the said level crossings or either of them. But this injunction is not to restrain the co. from the use of the railway for the reasonable and proper working of their traffic.—See *United Land Co. v. G. E. Ry. Co.*, as varied on appeal, L. JJ., 13 July, 1875, B. 1951; 10 Ch. 586; *S. C.*, V.-C. M., 5 Nov. 1873, B. 2912.

For injunction to restrain conservancy board from using a towing-path so as to interfere with the use of it by the public for purposes of navigation, see *Lee Conservancy Board v. Button*, 12 Ch. Div. 383, at p. 410; *S. C.*, 6 App. Cas. 685.

For injunction to restrain railway co. from using part of their railway on

the site of a diverted road until they had made a sufficient road for the use of the public, see *A. G. v. Barry Docks and Ry. Co.*, 35 Ch. D. 573.

For injunction to restrain railway co. from making or maintaining a bridge over public land with less headway than fifteen feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded, see *A. G. v. Furness Ry. Co.*, 47 L. J. Ch. 776.

##### 5. *Railway Company restrained from using Works until Public Highway Restored.*

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Defts, Let the Defts, their servants, agents, and workmen, be restrained until judgment &c. from using the railway and works made by the Defts upon the site of the part of a parish road or public highway, called &c., until the Defts shall have caused to be made and appropriated for the use of the public, a sufficient road as convenient for passengers and carriages as the said part of the said road was before the Defts used or interfered with the same, or as near thereto as may be, and from encroaching upon other parts of the said road which lie on the west side or road side of a wooden fence erected by the Defts at the side of the said road, and which commences at or near &c., and from interfering with such last-mentioned parts of the said road in such a way as to render them dangerous to passengers and carriages passing along the same.—*A. G. v. The Barry Docks and Rys. Co.*, North, J., 15 Jan. 1887, A. 78.

##### 6. *Injunction against Local Board restraining Obstruction of Footway.*

THIS action coming on &c., in the presence of counsel for the Plt and Defts, Declare Defts not entitled to enclose, occupy, or use the highway lying between the Plt's house and grounds, in the pleadings mentioned, and the curbed footway coloured &c. as or for a stoneyard, or as or for a place for the permanent or general deposit of stones and other materials for road-making or mending (*injunction in terms of declaration*), and from otherwise obstructing the Plt, her servants or agents, in the enjoyment of a convenient access to or from the said house and grounds, or any part thereof over the said highway, but this injunction is not to preclude the Defts from lawfully exercising over or in relation to the said highway any power or authority which is or may be vested in them by statute or otherwise.—*Grosvenor v. The Sutton (Surrey) Local Board*, Chitty, J., 22 Nov. 1888, A. 1680, W. N. (88) 223.

#### NOTES.

##### RIGHT OF WAY.

In claiming a right of way by user, the purposes for which the way may be used are limited by the previous state of user.

Thus, a right of way for farming purposes across a common cannot be enlarged into a right of way for carting building materials when the condition of the dominant tenement has been altered by laying out as building land that which was a farm: *Wimbledon Conservators v. Dixon*, 1 Ch. D. 362; and see *Allan v. Gomme*, 11 A. & E. 759; *Ackroyd v. Smith*, 10 C. B. 164;

*Cowling v. Higginson*, 4 M. & W. 245; *Williams v. James*, L. R. 2 C. P. 577; *Bradburn v. Morris*, 3 Ch. D. 812; *Finch v. G. W. Ry. Co.*, 5 Ex. D. 254.

For the general principle that the owner of the dominant tenement cannot extend his enjoyment of the easement so as to impose an additional servitude, see *Gale*, 355, &c.

And that the use of a particular easement will in general be restricted to a reasonable use for the purpose of the land as it was when the grant was made, see *Wood v. Saunders*, 10 Ch. 582; *Corporation of London v. Riggs*, 13 Ch. D. 798; but see *Finch v. G. W. Ry. Co.*, 5 Ex. D. 254; and that a local board taking land compulsorily for sewage works may acquire a right of way for all purposes connected with such works, see *Serff v. Acton Local Board*, 31 Ch. D. 679.

Where the right of way or easement is vested by grant, the question whether the grant is for all purposes, or limited to certain purposes only, is one of construction: *United Land Co. v. G. E. Ry. Co.*, 10 Ch. 586; *Ardley v. St. Pancras Guardians*, 39 L. J. Ch. 871; *Mayor of New Windsor v. Stovell*, 27 Ch. D. 665; *Gale*, 324.

In the case of a right of way an enlarged construction will be given to the grant: *Selby v. C. P. Gas Co.*, 30 Beav. 606; *Henning v. Burnet*, 8 Ex. 194; and see *Watts v. Kelson*, 6 Ch. 166; *Cousens v. Rose*, 12 Eq. 366; *Kay v. Oxley*, L. R. 10 Q. B. 360; *Brett v. Clowser*, 5 C. P. D. 376; *Barkshire v. Grubb*, 18 Ch. D. 616; *Thomas v. Owen*, 20 Q. B. Div. 225, 231; *Bayley v. G. W. Ry. Co.*, 26 Ch. Div. 434, 457, showing that under general words in a conveyance a right of way may pass where such right has been specifically enjoyed, although, by reason of unity of possession, it could not be actually acquired: *Gale*, 108; *Shelford*, R. P. S. 78 *et seq.*

And accordingly the use of level crossings constructed by a railway co., under the obligation imposed by their Act of making communications between severed portions of the land, will not be restricted to the purposes for which the land was used when the railway was made: *United Land Co. v. G. E. Ry. Co.*, 10 Ch. 586.

But a right of way over a passage granted by a lease (containing a covenant by lessee to do nothing to the annoyance, &c., of lessor or his adjoining tenants or occupiers) will not be allowed to be used so as to cause a nuisance, *e.g.*, by making it a noisy access to a noisy entertainment: *Collins v. Slade*, 23 W. R. 199.

A conveyance of premises, together with the exclusive use of a gateway under part of a house, described by its dimensions, was held to pass not a mere right of way, but the right to use the gateway for all lawful purposes: *Reilly v. Booth*, 44 Ch. Div. 12. For case in which a railway co. having defined their lessee's right of way could not afterwards alter it, see *Deacon v. S. E. Ry. Co.*, 61 L. T. N.S. 377.

That a grant of land together with all ways appertaining will not bind the grantor to grant new easements over land acquired by him under an enclosure award, in lieu of old easements extinguished by the inclosure, see *Turner v. Urush*, 4 App. Cas. 221.

The grantee of a right of way which has been obstructed by the grantor is entitled to deviate over the grantor's land, without enforcing the removal of the obstruction, and to protection by injunction: *Selby v. Nettlefold*, 9 Ch. 11, 115.

As to the right to damages where a private right of access from a house to the adjoining highway is interfered with by an unreasonable use of the highway, *e.g.*, by conveying building materials along it, see *Fritz v. Hobson*, 14 Ch. D. 542.

As to the presumption, in the case of a towing-path, that river commrs have acquired an easement merely, and not the soil, see *Lee Conservancy Board v. Button*, 6 App. Cas. 685.

Although a tenant cannot, as against his landlord, acquire an easement (*Russell v. Harford*, 2 Eq. 507; *Gayford v. Moffatt*, 4 Ch. 133, 135), the tenant of "land-locked" land will be entitled to a way of necessity for the purposes of his tenancy over an outer close belonging to his landlord: *Gayford v. Moffatt*, *sup.* The implied right of way of necessity passes by way of re-grant, and is limited by the necessity which created it: *Corporation of London v. Riggs*, 13 Ch. D. 798; *Midland Ry. Co. v. Miles*, 33 Ch. D. 632. And see *Daniel v. Anderson*, 8 Jur. N.S. 328; *Gale*, 143, &c.



That such a way of necessity will pass where the owner of two closes, one of which can only be reached by the other, devises them to two different persons, see *Pearson v. Spencer*, 3 B. & S. 761; and as to the right of grantor to select one of several ways, see *Bolton v. B.*, 11 Ch. D. 968.

As to an implied grant of a right of way, see *Espley v. Wilkes*, L. R. 7 Ex. 298; and see *Brown v. Alabaster*, 37 Ch. D. 490, where a right of way over a formed road leading to a gate, useless without the way, was held to pass; and as to the application of the doctrine of implied grant to a right of way, see *Tawes v. Knowles*, 39 W. R. 512.

In order to support a right of way by prescription there must have been a user raising a reasonable inference of continuous enjoyment: *Hollins v. Verney*, 13 Q. B. Div. 304; where the right is claimed by virtue of forty years' enjoyment under the Prescription Act, the time during which the servient tenement has been vested in a tenant for life cannot be deducted: *Symons v. Leaker*, 15 Q. B. D. 629; and see *Laird v. Briggs*, 19 Ch. Div. 22.

#### PUBLIC WAY.

The dedication to the public of a right of way across a field may be limited by the right of the owner of the soil to plough it up periodically in due course of farming; and any interference on behalf of the public with this right in the owner constitutes a trespass: *Arnold v. Blaker*, L. R. 6 Q. B. 433; *Mercer v. Woodgate*, L. R. 5 Q. B. 26.

Dedication of a right of way from continuous user can only be presumed in favour of the public generally, not of the inhabitants of a particular parish: *Bermondsey Vestry v. Brown*, 1 Eq. 204.

As to sufficiency of evidence of public user in the case of a mountain path in a thinly-populated district, see *Macpherson v. Scottish Rights of Way Soc.*, 13 App. Cas. 744; and see *Mann v. Brodie*, 10 App. Cas. 978.

As to evidence of user in support of presumed dedication of a way over copyholds, see *Powers v. Bathurst*, 49 L. J. Ch. 294.

As to the circumstances under which a *cul-de-sac* may be a highway, see *Bourke v. Davis*, 44 Ch. D. 110.

As to the right of the public in respect of strips by the side of the highway, see *Nicol v. Beaumont*, 53 L. J. Ch. 853; *Curtis v. Westeven County Council*, 45 Ch. D. 504.

As to the presumption that the soil of a highway passes to the grantee of adjoining land *ad medium filum viæ*, and that such presumption does not apply to land intended to be used as a highway, but never dedicated to the public, see *Leigh v. Jack*, 5 Ex. Div. 264; whether it applies to a lease, *qu.*: *Landrock v. Met. Dist. Ry. Co.*, W. N. (86) 195.

An injunction to restrain the obstruction of a public way may be obtained in respect of the particular private injury to the Plt without making the A. G. a party: *Cook v. Mayor of Bath*, 6 Eq. 177; *Spencer v. L. & B. Ry. Co.*, 8 Sim. 193.

The vestry of a parish could not maintain a suit to restrain the infringement of a public right of way, except as relators on information by the A. G.: *Bermondsey Vestry v. Brown*, 1 Eq. 204. The A. G. may sue to restrain such interference without proof of public injury: *A. G. v. Shrewsbury Bridge Co.*, 21 Ch. D. 752.

Surveyors of highways will not be restrained by injunction from removing that which has been decided to be an obstruction to a public highway: *Bagshaw v. Buxton Board*, 1 Ch. D. 220; and see *Turner v. Ringwood Board*, 9 Eq. 418.

A local authority having only a limited statutory property in a street so far as necessary for their control of it and its safe and convenient user (see *Coverdale v. Charlton*, 4 Q. B. Div. 104), could not maintain an action for an injunction to restrain the carrying of telephone wires across the street: *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. Div. 904.

Under 18 & 19 V. c. 120, s. 96, streets in the metropolis are vested in the vestry only so long as they are highways, and if they are legally stopped up or diverted, the interest of the vestry determines: *Rolls v. Vestry of St. George's*, 14 Ch. Div. 785.

The power of a railway co. to divert a road, under sect. 16 of the Railways Clauses Act, 1845, is exercisable only when the road presents an actual

obstacle to the line, and not merely for the purpose of saving the co. expense: *Pugh v. Golden Valley Ry. Co.*, 15 Ch. Div. 330; and that sect. 53 (providing for substitution of roads previous to interference with existing roads) applies to a permanent as well as a temporary diversion, see *A. G. v. Barry Docks and Rail. Co.*, 35 Ch. D. 573.

(V.)—WATER RIGHTS.

1. *Injunction against Diverting or Diminishing Flow of Water.*

LET the Deft &c., be restrained by injunction from diverting the water in the ponds or springs situated &c., so as to prevent the same from flowing into the river P.; and from employing any steam engines, pumps, or any other means of using the water in the said ponds or springs so as to diminish the quantity of the said water which flows into the said river; And also from diverting the course of the water which flows from surface springs on the south side &c., so as to prevent the same from flowing in its natural course towards and into the said river. (Parties agreeing that the legal right should be decided by the Court), Declare that the Plt is not entitled to the use of the water in the reservoir, nor to the use of the water in the pond called P. pond.—*Ennor v. Barwell*, V.-C. S., 12 July, 1860, A. 2331.—Leave was afterwards given to bring an action, *S. C.*, 1 D. F. & J. 530.

2. *Mandatory Injunction—Flow of Water—Inquiry as to Damages—Operation of Injunction suspended.*

“DECLARE that the Plts and the Defts B. &c., are entitled, according to their respective interests in the messuage called &c., now in the Plts’ occupation, and situate &c., to the free and uninterrupted enjoyment of the supply of water to the said messuage for the use of the occupiers thereof, from the Deft H.’s land, called &c., and all ancient wells, springs, troughs, and drains therein as such supply of water has heretofore, and up to the interruption thereof by the Deft H., been enjoyed as in the (bill) mentioned; And Let the said Deft H., his servants &c., be perpetually restrained by injunction from interrupting or interfering with the said supply of water as so heretofore enjoyed, and from permitting the same to continue unrestored, and from permitting to continue on his said land any drains or works whereby the same is or may be, wholly or partially, diverted or interfered with; and from in any wise infringing, or permitting to continue infringed, the Plts’ said right to the said supply; But the operation of the said injunction is hereby suspended for the period of three months from this date;—And Let an inquiry be made what sum or sums the said Deft H. ought to pay, and to whom, by way of compensation in damages for any temporary or permanent injury occasioned, or to be occasioned, to the Plts and the other persons interested in the said messuage, according to their respective interests therein by his interruption of, or interference with, the said supply of water thereto;—And Let the said Deft H. pay any sum or sums so certified to the Plts (names) and such other persons (if any) as may be named in the

chief clerk's certificate as entitled to the same."—Deft H. to pay all costs of the suit.—*Harrop v. Hirst*, V.-C. B., 13 Mar. 1872, A. 705.

For the like decree against diverting a watercourse, with inquiry as to damages, see *Ivimey v. Stocker*, 1 Ch. 396.

—to restrain a local board from drawing off, by their drainage works, subterranean waters, and thus diverting water from a running surface stream, see *G. Junction Canal v. Shugar*, 6 Ch. 483.

—to restrain grantees of a watercourse from altering the level of the watercourse so as to encroach upon the grantor's land, and from causing any diminution in the overflow of water at the weirs, with order on them to restore it to its original state, see *Taylor v. St. Helen's Corp.*, 6 Ch. D. 26.

—to restrain riparian owners from continuing the erection of a weir, and from obstructing the rights of the Plts to the flow of the water, according to its usual course and volume to a part of their lands, see *Belfast Ropeworks Co. v. Boyd*, 21 L. R. Ir. 560.

### 3. Declaration of Water Rights of Canal Proprietors, and Injunction to restrain Interference therewith.

DECLARE that the Plts, as the owners of the tenement called W. Mill, are entitled to the W. stream, and to the waters flowing in a defined and natural channel into and forming part of the same, as such stream and waters have been accustomed (before the interference therewith &c.) to flow down to the said tenement, subject to the ordinary and reasonable use of the said stream and waters by the riparian owners higher up on the said stream; And Declare that the diversion by Defts of the said stream and waters into their reservoir &c., for the purpose of supplying water to the town of S., is not within such ordinary or reasonable use; And Declare that the Plts, under and by virtue of the powers contained in the Acts of Parliament in the pleadings mentioned, are entitled to use the said stream and waters as the same have been accustomed (before such interference as aforesaid) to flow down to and into their canal, so far as the said stream and waters are required for the supply and navigation of their canal, and subject to such ordinary and reasonable use by upper riparian owners as hereinbefore mentioned; And Let the Defts &c., their servants &c., be restrained by injunction from diverting into their reservoir or otherwise the said stream and waters, so as to interfere with the supply of water required for the navigation of the said canal.—Order of L. JJ., subject to the above-mentioned variations, affirmed.—Appellants to pay to respondents their costs of appeal.—Cause remitted back to (Court of Chancery) to do therein as shall be just and consistent with this variation and judgment.—*Wills and Berks Canal Co. v. Swindon Waterworks Co.*, Lords' Journals, 15 June, 1875; L. R. 7 H. L. 697, 715; 9 Ch. 451.

### 4. Obstruction of Navigable Stream restrained.

LET the Deft, his servants &c., be restrained by injunction from erecting or constructing, or causing or allowing to remain, any platform, piles, or other erections or works in or above the river S.,

beyond the line of his quay, and from otherwise obstructing the navigation of the river [or the public use of his quay for the purpose of mooring vessels along the same].—*A. G. v. Terry*, as varied on appeal by omitting the words in brackets, L. C., 3 Mar. 1874, A. 612; 9 Ch. 423.

5. *Obstruction of Wharfinger's Right of Access to the Thames restrained.*

LET the Defts, the wardens, &c., of the Fishmongers of the city of London, their servants, contractors, and agents, be perpetually restrained by injunction from making or putting up any embankment facing their property on the south side, and facing the Plt's property on the west side thereof, or constructing any other works or doing any other thing whereby the Plt's right of access to the river Thames on the west side of his wharf in the (bill) mentioned, or the privilege heretofore enjoyed by the Plt of laying and mooring craft, and loading and unloading, embarking and disembarking goods on the west side of his said wharf, directly from the river, may be defeated, destroyed, or prejudiced; and also from continuing any works or creating or continuing any obstructions so as to interfere with the Plt's right of access to the river, and privilege as aforesaid; And Let the Defts, the Conservators of the river Thames, be in like manner restrained from selling any part of the shore or granting or continuing any authority or licence to the other Defts, whereby the Defts, the Fishmongers' Co., their servants, contractors, or agents, may be authorized or empowered to make or put up any embankment on the south side of their premises, and from creating or continuing any obstructions whereby the Plt may be stayed, impeded, or prejudiced in the right or privilege heretofore enjoyed by him of free access to and from his said wharf from and to the river on the west side of his wharf, and of mooring or laying craft on the river, or loading or unloading goods directly into or from his said wharf into or from the river.—*Directions as to costs.*—*Lyon v. Fishmongers' Co.*, V.-C. M., 3 May, 1875, B. 1002. Reversed by C. A., 30 July, 1875, B. 2112; 10 Ch. 679; but restored H. L. 27 July, 1876, 1 App. Ca. 662.

For an injunction to restrain a railway co. from taking water from the River Cam for the supply of the Cambridge station so as to impede or injure the navigation of the river, see *A. G. v. G. E. Ry. Co.*, 6 Ch. 572.

For injunction to restrain owner of a servient tenement from building a small house over a line of underground pipes which supplied the dominant tenement with water, see *Goodhart v. Hyett*, 25 Ch. D. 182.

NOTES.

The diversion or obstruction of the flow of water in a stream will be restrained by injunction at the suit of the riparian owner thereby affected: *Robinson v. L. Byron*, 1 Bro. C. C. 588; *Elwell v. Crowther*, 31 Beav. 163.

Although the riparian owner's right is not limited by the actual damage sustained (*Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *E. Norbury v. Kitchin*, 15 L. T. N.S. 501), a diversion of water by licence from an upper riparian owner will not, when the water has been returned to the stream undiminished

and uninjured, give a lower riparian owner any right of action: *Kensit v. G. E. Ry. Co.*, 27 Ch. Div. 126; 23 Ib. 566; and see *W. Cumberland Iron Co. v. Kenyon*, 11 Ch. Div. 782.

As to the right of a riparian owner to the ordinary use of water flowing past his land, and also, provided he does not thereby interfere with the rights of other proprietors above and below, to the extraordinary use, see *Miner v. Gilmour*, 12 Moo. P. C. 156; *Belfast Ropeworks Co. v. Boyd*, 21 L. R. Ir. 560 (C. A.).

Though every owner is entitled to appropriate water which percolates under his own land (*Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349), any pollution by him of the common source, so as to interfere with the beneficial use by a neighbour of the water which reaches his well, will be restrained: *Ballard v. Tomlinson*, 29 Ch. Div. 115 (reversing 26 Ch. D. 194); and see *Snow v. Whitehead*, 27 Ch. D. 588.

A railway co., being riparian proprietors, were entitled to take a reasonable quantity of water for supplying locomotives, and the general purposes of a railway station: *Earl of Sandwich v. G. N. Ry. Co.*, 49 L. J. Ch. 225.

Turning the natural gravitation of the water into water power is a reasonable use: *Belfast Ropeworks Co. v. Boyd*, 21 L. R. Ir. 560.

A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the stream: *Ormerod v. Todmorden Mills Co.*, 11 Q. B. D. 155.

The rights of riparian owners on a tidal navigable river and on an inland stream do not differ; and the right of a wharfinger to bring an action in respect of an obstruction which deprives him of, or renders less easy, access to his wharf, is not limited by the extent to which his interest in the public right of navigation has been affected, but extends to interference with his private right as a riparian owner: *Lyon v. Fishmongers' Co.*, 1 App. Ca. 662 (reversing 10 Ch. 679), *sup.* Form 5; *North Shore Railway v. Pion*, 14 App. Cas. 612; and see *A. G. v. E. Lonsdale*, 7 Eq. 377; *Exeter Corporation v. E. Devon*, 10 Eq. 234; *A. G. v. Thames Conservators*, 1 H. & M. 1; *Kearns v. Cordwainers' Co.*, 6 C. B. N.S. 388; *Reg. v. G. N. Ry. Co.*, 9 Q. B. 315.

As to the distinction between the *prima facie* right of a riparian owner in respect of a natural watercourse, and his right in respect of an artificial watercourse, which must rest on some grant, either proved or presumed, or on some other legal origin, see *Rameshur v. Koonj*, 14 App. Cas. 121; and as to the acquisition of riparian rights in artificial streams, see *Blackburne v. Somers*, 5 L. R. Ir. 1; *Kensit v. G. E. Ry. Co.*, 27 Ch. Div. 122; *Roberts v. Richards*, 50 L. J. Ch. 297; 44 L. T. N.S. 271; following *Sutcliffe v. Booth*, 32 L. J. Q. B. 136.

In order to give rise to riparian rights, the land must be in actual daily contact with the stream: *North Shore Railway v. Pion*, *sup.*

Whether riparian owners can establish a private right of way over a stream, or a right of boating for recreation for themselves and their friends by custom, *qu.*: *Bourke v. Davis*, 44 Ch. D. 110.

As establishing the right of a riparian owner on the Thames to compensation for the loss of his water frontage by the construction of the Embankment, see *D. Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Metropolitan Board of Works v. M'Carthy*, L. R. 7 H. L. 243.

An enjoyment by virtue of a lease is not an "enjoyment as of right" which can confer a prescriptive right to a watercourse after expiration of the lease: *Chamber Colliery Co. v. Hopwood*, 32 Ch. Div. 549; and as to evidence of unity of possession negating such enjoyment, see *Outram v. Maude*, 17 Ch. D. 391.

The presumption that a grant of land (of any tenure: see *Tilbury v. Silva*, 45 Ch. D. 98) passes the adjoining half of the bed of a river may be rebutted by circumstances showing a contrary intention at the time, but not by circumstances arising subsequently: *Micklethwait v. Newlay Bridge Co.*, 33 Ch. Div. 133.

For forms of orders and notes relating to the interference with the rights of riparian owners by fouling the stream, *v. inf.* Sect. V., "NUISANCE" (II.).

#### ESCAPE OF WATER.

On the principle that a man who, for his own purposes, brings on his land things which have a tendency to escape and cause mischief (*e.g.*, water) must

take care that they do not get on to his neighbour's land, he is *primâ facie* answerable for all damage which is the natural consequence of its escape: *Fletcher v. Rylands*, 3 H. & C. 774; L. R. 1 Ex. 265; 3 H. L. 330; *Crompton v. Lea*, 19 Eq. 128; *Baird v. Williamson*, 15 C. B. N.S. 376; and see *Smith v. Fletcher*, L. R. 9 Ex. 64; *Westminster Brymbo Co. v. Clayton*, 36 L. J. Ch. 476, *sup.* p. 498; *Evans v. Manchester, &c. Ry. Co.*, 36 Ch. D. 626; *Ballard v. Tomlinson*, 29 Ch. Div. 115.

But when the escape of water has been caused by *vis major*, or the act of God, or by percolation and gravitation, the Deft will not be liable: *Nichols v. Marsland*, L. R. 10 Ex. 256; 2 Ex. D. 1; *Box v. Jubb*, 4 Ex. D. 76; *Wilson v. Waddell*, 2 App. Ca. 95; *Dixon v. Met. Board of Works*, 7 Q. B. D. 418.

And it seems that a distinction will be taken between water trespassing by natural overflow, and by the diversion of the watercourse: *Smith v. Fletcher*, L. R. 9 Ex. 64; *Smith v. Kenrick*, 7 C. B. 515; and see *West Cumberland Co. v. Kenyon*, 11 Ch. D. 783 (reversing 6 Ch. D. 773), that if the escape of water is only the result of the proper use of the land, whether for mining or other operations, and throws no new burden on the neighbour's land, such neighbour has no right of action.

A canal co. being bound to keep the water in their canal were held liable for the preventible consequences of a leakage caused by third parties: *Evans v. M. S. and L. Ry. Co.*, 36 Ch. D. 626.

An owner whose land is flooded has no right to protect himself by transferring the mischief to the land of his neighbour: *Whalley v. Lancashire and Yorkshire Ry. Co.*, 13 Q. B. Div. 131.

A reversioner whose land is flooded cannot recover damages for a mere temporary injury, though the selling value of his reversion is thereby diminished: *Rust v. Victoria Graving Dock Co.*, 36 Ch. D. 113.

Although the owner of the foreshore is not bound to maintain a natural barrier of shingle on the foreshore against the inroads of the sea, he will be restrained from removing the barrier or using his land so as to cause an inroad of the sea to the injury of the adjoining land: *A. G. v. Tomline*, 14 Ch. D. 58; 12 *Ib.* 214.

#### (VI.)—RIGHTS OF COMMON.

##### 1. Decree establishing Rights of Common over the Waste Lands of Epping Forest, and restraining further Inclosure.

DECLARE that the Plts and the other owners and occupiers of lands and tenements lying within that part of the forest of Essex, in the county of Essex, now known by the name of Epping Forest, other than the waste lands of the said E. Forest, are entitled in right of, and as appurtenant to, their several lands and tenements within the said E. Forest to a right of common of pasture upon all the waste lands of the said E. Forest, for all manner of cattle (that is to say, neat beasts and horses) commonable within the forest, levant and couchant upon their respective lands within the said E. Forest, according to the assize and customs of the said E. Forest; And Let the Plts be quieted in the possession and enjoyment of their said rights.

And the Plts &c., by their counsel, not asking for any injunction as regards lands which on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, or as regards lands which were actually inclosed on or before the 14th August, 1851; Declare that the Plts are entitled to an injunction to restrain the Defts respectively, other than H. M.'s A. G. and the Deft H., and their respective servants and agents, from permitting or suffering to be or to remain inclosed or

built upon any of the waste lands of the said E. Forest, other than and except lands which on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings or lands actually inclosed on or before the 14th of August, 1851.

And Let an inquiry be made what waste lands of the said E. Forest in the possession of or belonging to the Defts respectively, other than H. M.'s A. G. and the Deft H., for any and what estate or interest, are inclosed or built upon other than and except as aforesaid; and the Plts are to be at liberty to apply for an injunction or injunctions in pursuance of the declaration of right hereinbefore contained.

And Let the Defts G. &c. respectively, and their respective servants, agents, and workmen, be perpetually restrained by injunction, (1) from building upon any part of the waste lands of the said E. Forest, which have been inclosed since the 14th of August, 1851, except such parts thereof as were on the 14th of August, 1871, actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, and from carrying away or destroying the loam or soil of any part of such waste land, except as aforesaid, and from destroying or injuring the pasture, turf, or herbage being or growing thereon, so as in any manner to prevent, disturb, or interfere with the exercise by the Plts, or the other persons entitled as aforesaid, or any of them, of their said rights hereinbefore declared over the said lands when the same shall become uninclosed; (2) from inclosing or building upon any part of the waste lands of the said E. Forest now uninclosed, or which shall for the time being be uninclosed, and from carrying away or otherwise destroying the loam or soil of the said waste lands now uninclosed, or which shall for the time being be uninclosed, or the pasture, turf, or herbage being or growing thereon, so as in any manner to prevent, disturb, or interfere with the exercise by the Plts, or the other persons entitled as aforesaid, or any of them, of their said right hereinbefore declared in and over the waste lands of the said E. Forest now uninclosed, or which shall for the time being be uninclosed; (3) from otherwise preventing, disturbing, or interfering with the exercise by the Plts, or the other persons entitled as aforesaid, or any of them, of their said right in and over the waste lands of the said E. Forest now uninclosed, or which shall for the time being be uninclosed.—Defts G. &c. to pay Plts' costs of the cause, to be taxed. Adjourn &c.—Liberty to apply.—*Commrs. of Sewers, &c. v. Glasse*, M. R., 24 Nov. 1874, B. 552; S. C., 19 Eq. 134; for a like order, see *Hall v. Byron*, V.-C. H., 15 Feb. 1877, A. 386; 4 Ch. D. 667.

## 2. *Like Decree establishing Commonable Rights—and Injunction.*

DECLARE that the Plt and the other freehold tenants of the manor of Tooting Graveney, in the county of Surrey, are entitled to a right of common of pasture upon the common and waste land generally known as Tooting Common, delineated in the plan:

annexed to the Plt's bill, and thereon coloured &c., for all manner of commonable beasts and animals levant and couchant upon their tenements holden of the lord of the said manor, and also to the right to cut from the said common and waste lands so much heath, gorse, fern, and furze, as may be required for fodder and litter for cattle levant and couchant upon their said tenements; also to a right to dig in convenient places on the said common and waste lands, and carry away sufficient gravel and sand for necessary use and consumption on their said lands and houses; And Let the Deft be restrained by injunction from permitting so much of the fence erected as in the Plt's bill mentioned as lies between the parts of T. G. Common, coloured &c. on the said plan, to remain after the — day of —; And Let the Deft, his servants &c., be perpetually restrained by injunction from inclosing any part of the said common and waste lands, and from erecting, replacing, restoring, or repairing, or causing to be erected, replaced, restored or repaired, any fences or inclosures upon the said common or waste lands or any part thereof, and also from digging up and destroying, or causing to be dug up and destroyed, any of the pasture, heath, gorse, and heather growing on the said common or waste lands, so as in any manner to disturb or interfere with the exercise or enjoyment by the Plt and the other freehold tenants of their rights hereinbefore declared, without prejudice to the lord's right to dig and take away the soil for his own benefit—no costs on either side.—Liberty to apply.—*Betts v. Thompson*, L. C., 2 Aug. 1871, A. 2701; 6 Ch. 732.

For like decree, except as to gravel and sand, and restraining Defts from erecting, or commencing to erect, any houses, buildings, or fences upon any part of Plumstead, &c. commons, and from allowing any roads or paths in or over the same, or any part thereof, which have been stopped up, at any time in or since the year —, to remain so stopped up, see *Warrick v. Provost, &c., of Queen's Coll., Oxford*, L. C., 2 Aug. 1871, B. 2537; 6 Ch. 716.

For a similar decree restraining the inclosure of Berkhamstead Common in a suit by a freehold and copyhold tenant of the manor on behalf of himself and all other copyhold and freehold tenants, see *Smith v. Brownlow*, M. R., 14 Jan. 1870, B. 324; 9 Eq. 241.

For a similar decree, see *Hall v. Byron*, V.-C. H., 15 Feb. 1877, A. 386, 4 Ch. D. 667.

For decree where the right was partially established, but no infringement proved, see *Robinson v. Dhuleep Singh*, Fry, J., 27 May, 1879, 11 Ch. D. 837.

#### NOTES.

##### COMMONABLE RIGHTS.

A freehold tenant of a manor claiming by prescription on a presumed grant, is entitled to sue on behalf of himself and all others who are freeholders to establish and protect their rights of common as against the lord: *Warrick v. Queen's College, Oxford*, 6 Ch. 716; 10 Eq. 105; *Mayor of York v. Pilkington*, 1 Atk. 282.

And see *Betts v. Thompson*, 6 Ch. 732, where the necessity of joining the copyholders as Plts in a suit by the freeholders against their common invader is discussed: *Smith v. Brownlow*, 9 Eq. 241.

In *Commissioners of Sewers v. Glasse*, 19 Eq. 134 (Epping Forest case), the bill was, on behalf of Plts and all others the owners and occupiers of lands and tenements lying within the forest, other than the waste lands of the said



forest, to establish a general right of common of pasture upon all the waste lands, and to restrain the Doffe from inclosing or building upon the waste.

And see the frame of suit discussed on demurrer, *S. C.*, 7 Ch. 456.

To obtain against a purchaser of a portion of the waste the benefit of the former decree in this case establishing rights of common, and restraining interference therewith, leave of the commissioners must be obtained under the Epping Forest Act, 1872 (35 & 36 V. c. 95), s. 3: *Commissioners of Sewers v. Gellatly*, 24 W. R. 1059.

As to the effect of an enfranchisement deed in preventing the lord from again granting rights of fishing on the expiration of the existing lives for which the copyholds were held, see *Tilbury v. Silva*, 45 Ch. Div. 98.

To establish a right of common, under the Prescription Act, actual enjoyment and possibility of legal origin by custom, prescription or grant must be shown, but the ground on which the claimant rests his alleged right is not material: *Earl de la Warr v. Miles*, 17 Ch. Div. 535; *q. v.* as to the object and effect of the Act generally; and see *Tilbury v. Silva*, 45 Ch. Div. 98. And that "common without stint" cannot be claimed by prescription, see *Morley v. Clifford*, 20 Ch. D. 753.

A right of fishing, being in the nature of a profit *à prendre*, cannot be claimed by prescription on behalf of a large and indefinite class, such as owners and occupiers: *Tilbury v. Silva*, 45 Ch. Div. 98 (*per Kay, J.*), distinguishing *Goodman v. Mayor of Saltash*, 17 App. Cas. 633, as to presumption of a legal origin for an immemorial usage.

And as to prescription for common of pasture, and that a copyholder cannot prescribe in excess of the custom of his manor, see *Morley v. Clifford*, 20 Ch. D. 753.

A demise of "all the warren of conies" in L. was held, under special circumstances, to pass a right to the soil: *Robinson v. Duleep Singh*, 11 Ch. Div. 798.

The rule of English law, that a right to an incorporeal hereditament can only be conveyed by deed, is part of the *lex loci*, not of the *lex fori*; so that an English lease of sporting rights over land in Scotland can be enforced in England, though not under seal: *Adams v. Clutterbuck*, 10 Q. B. D. 403.

A fold course is not a several right to the herbage, but a right of common appurtenant of pasture for sheep: *Robinson v. Duleep Singh*, *sup.*

Under "common pasturage and herbage," in a decree in 1653, commoners could only take by the mouth or bite of cattle, and could not cut or carry away the growth of the soil: *Earl de la Warr v. Miles*, 17 Ch. Div. 754.

Evidence of subsequent usage was not admitted to affect the construction of the decree, which was plain and unambiguous: *S. C.*

Under the Statute of Merton, the lord can (upon issuing advertisements under the Commons Act, 1876 (39 & 40 V. c. 56, s. 31)) approve against common appurtenant of pasture; the proviso in 13 Edw. 1, and 1 Will. 4, c. 46, only prevents derogation from an express grant: *Robinson v. Dhuleep Singh*, *sup.*

In the case of approvement, the *onus probandi* is on the lord, his right to inclose being treated as conditional upon his showing that he has left sufficient waste for the tenants to enjoy their right of common: *Hall v. Byron*, 4 Ch. D. 667.

The question whether there is a sufficiency of common of pasture for sheep must be determined not according to the average number of sheep turned out during a long course of years, but the aggregate number which the commoners are entitled to turn out: *Robertson v. Hartopp*, 43 Ch. Div. 484 (considering *Lake v. Plaxton*, 10 Ex. 196; *Lascelles v. Onslow*, 2 Q. B. D. 433), where the lord was restrained from doing any acts which would diminish the amount of pasturage, *v. sup.* Form 2. Whether, in ascertaining the sufficiency, the modern system of farming, whereby the sheep do not get all their sustenance from the common, ought to be considered, *quære: S. C.*

That the Act of 29 Geo. 2, c. 36, applies only to agreements entered into by persons entitled to common of pasture, and does not legalize agreements affecting the rights of freehold tenants to bushes and underwood, see *Nicholls v. Miford*, 20 Ch. D. 380.

A right of shooting over freehold allotments, under an Inclosure Act, cannot be reserved to the lord unless in express terms, or by necessary implication: *Duke of Devonshire v. O'Connor*, 24 Q. B. Div. 468.

Where upon inclosure, under 8 & 9 V. c. 118, rights of common have been extinguished, allotments awarded in lieu of them are not to be deemed parts of the lands of the commoners, so as to pass by general words in a lease of such lands: *Williams v. Phillips*, 8 Q. B. Div. 437.

A right of recreation by custom upon the land of another cannot exist in the public generally, but must be confined to the inhabitants of a particular district: *Bourke v. Davis*, 44 Ch. D. 110.

The presumption which the Court makes in favour of a legal origin of a right long exercised depends on the circumstances of the enjoyment, and a legal origin cannot be presumed in favour of a body of copyholders on the assumption of a long series of lost grants: *Tilbury v. Silva*, 45 Ch. Div. 98.

By the Commons Act, 1876 (39 & 40 V. c. 56), which contains provisions for the regulation or inclosure of commons, jurisdiction is given by sect. 30 to the county court within whose jurisdiction any common is situate to hear any case relating to any illegal inclosure or encroachment of or upon such common made after the passing of the Act, or to any nuisance impeding the exercise of any right of common arising after the passing of the Act, and to grant an injunction against such inclosure, encroachment, or nuisance, or to make an order for the removal or abatement of such inclosure, encroachment, or nuisance, with right of appeal to the High Court of Justice in a summary manner, or by special case or otherwise, as may be prescribed by rules of the Supreme Court, against any order, &c., by a county court under this section. Pending an appeal from the county court, the order directing the removal or abatement of any inclosure, encroachment, or nuisance, shall be suspended. Nothing in the Act contained is to abridge or interfere with any existing right of abating or otherwise preventing any illegal inclosure of, or encroachment on, any common, or any nuisance interfering with any right of common.

Inclosure Commrs will not be restrained from affixing their seal or applying to Parliament for its sanction to a scheme approved by them for inclosure of a common: *Queen's College, Oxon v. Darby*, W. N. (76) 301.

#### (VII.)—MARKET.

##### 1. *Injunction against establishing a Market.*

UPON the appeal &c., by counsel for the Defts, and upon hearing counsel for the Plts, This Court doth declare that the Plts and others claiming under the charter of the 34 Chas. II., in the statement of claim mentioned, are entitled to two markets every week, namely, on Thursday and Saturday, for the sale of fruit and vegetables, to be held in or next to the place described in the said charter as the Spittle Square, in the parish of Stepney, in the county of Middlesex; And it is ordered that the Defts, their directors, servants, agents, and workmen, be, from and after the 18th January, 1884, perpetually restrained from establishing a fruit and vegetable market at Bishopsgate, and from using or permitting to be used any portion of their station or property there in any such manner as to interfere with or prejudicially affect the rights of the Plts in the said markets as hereinbefore declared; And it is ordered that the Defts, their directors, servants, agents, and workmen, be perpetually restrained from advertising, or causing to be advertised, any portion of the said station or property at Bishopsgate as a market, or as a place used or to be used in any such manner as to interfere with or prejudicially affect the rights of the Plts as hereinbefore declared.—*Goldsmid v. The Gt. Eastern Ry. Co.*, C. A., 18 Dec. 1883, A. 1935; *S. C.*, 25 Ch. Div. 511; 9 App. Ca. 927.

## 2. Injunction against Interference with erection of Weighing Machine.

THIS action coming on for trial &c., in the presence of counsel for the Plts and Defts; Let the Deft Board, its servants, workmen, and agents, be perpetually restrained from interfering with the erection and provision by the Plts, in or upon the site in the Market Place at Romford &c., of the proposed building place or weighing machine for weighing cattle.—*McIntosh v. Romford L. B.*, Kay, J., 3 July, 1889, B. 931; *S. C.*, 61 L. T. N.S. 185.

### NOTES.

As to what acts amount to a disturbance of market, see *Abergavenny Improvement Commrs. v. Straker*, 42 Ch. D. 83; *G. E. Ry. Co. v. Goldsmid*, 9 App. Cas. 927; 25 Ch. Div. 511; *Elwes v. Payne*, 12 Ch. Div. 468; *Mayor of Manchester v. Lyons*, 22 Ch. Div. 287; *Wolverhampton Waterworks v. Hawkeford*, 28 L. J. C. P. 242; *Mayor of London v. Low*, 49 L. J. Q. B. 144; 42 L. T. N.S. 18.

Insufficiency of accommodation in an existing market, though a defence on the part of a person selling outside because he cannot find room within, is no answer to an action for infringement by setting up a rival market: *G. E. Ry. Co. v. Goldsmid*, *sup.*

In such an action the Court of Appeal, on the balance of convenience, reversed the order of Jessel, M. R., granting an interlocutory injunction, and put the Defts on an undertaking to keep an account; as if the injunction were granted, and the Defts ultimately proved to be in the right, there would be great difficulty in ascertaining the compensation to which they were entitled; whereas if the injunction was refused and the Plts succeeded, the compensation to them could be readily ascertained, and their market would suffer no permanent injury from the interim sales by Defts: *Elwes v. Payne*, 12 Ch. Div. 468.

In order to make the Deft liable, it is not necessary to prove that he acted with intent to defraud the Plts of their tolls by taking advantage of the concurrence at their market: *Goldsmid v. G. E. Ry. Co.*, 25 Ch. Div. 511; *S. C.*, 9 App. Cas. 927, where a railway co., having established a depôt for the sale of vegetables brought by their line, within a quarter of a mile of the Plt's ancient market for vegetables, though no tolls were taken at the depôt, were held to have infringed the Plt's rights.

An ancient charter of 1 Edw. 3, though (*semble*) capable of operating as an Act of Parliament conferring on "citizens of London" individually rights distinct from the corporation, was construed as a grant to the corporation, of which they had power to waive the benefit: *G. E. Ry. Co. v. Goldsmid*, *sup.*

A grant of a market "*in sine juxta*" a specified place, was held to extend to external as well as internal streets, the inference being drawn that the streets were dedicated to the public subject to exercise of the market rights: *A. G. v. Horner*, 11 App. Cas. 66; 14 Q. B. Div. 245.

As to the right of a grantee of a market, not confined to a particular locality, to change the site to suit his convenience, on condition that he provides a market place, *i.e.*, gives reasonable accommodation to those members of the public who use the market, see *Magistrates of Edinburgh v. Blackie*, 11 App. Cas. 665.

An ancient right of market granted by the Crown was held superseded by a local Act conferring a right of market extending further than, and differing in other respects from, the ancient market: *Corporation of Manchester v. Lyons*, 22 Ch. Div. 287.

An injunction was granted to restrain a local board from interfering with the erection of a weighing table and accompanying building on the market plain by the owners of the market, as market authority, under the Markets and Fairs (Weighing of Cattle) Act, 1887, s. 4: *McIntosh v. Romford Local Board*, 61 L. T. N.S. 185; *sup.* Form 2.

## [SECTION V.—NUISANCE.]

## (I.)—PRIVATE NUISANCE.

1. *Nuisance from burning Bricks restrained.*

LET the Defts S. &c., their servants &c., be perpetually restrained by injunction from burning, or causing to be burnt, any bricks on the Defts' plot of land, in the writ mentioned, so as to occasion a nuisance to the Plt, as the owner or occupier of the messuage or dwelling-house and garden in the writ mentioned to belong to, and to be occupied by, the Plt.—Deft S. to pay Plt's costs of suit, to be taxed.—Liberty to apply.—*Buffy v. Stevens*, M. R., 18 Feb. 1876, A. 261. (Language dictated by the Court after reference to the cases.)

2. *Another Form.*

THIS action coming on &c. for trial &c. in the presence of counsel for the Plt and Deft, Let the Deft A. B., his servants and agents, be perpetually restrained from burning or causing to be burnt any bricks on his brickfields and premises at or near &c., or any part thereof, in such manner as to cause a nuisance to the inhabitants of &c. and other neighbourhoods of the said brickfields and premises.—*A. G. v. Hussey, Kay, J.*, 26 June, 1890, A. 899.

For the like order against allowing smoke, steam, or vapour to issue from the Deft's clamp or brick-kiln, &c., so as to occasion nuisance, &c. to Plts as occupiers of the cottage, &c., or any of them, see *Haywood v. Richards*, V.-C. W., 4 Aug. 1873, A. 2341.

The leading case of *Walter v. Selfe*, 4 D. G. & S. 315, restraining brick-burning so as to occasion "damage or annoyance" to Plt, or "injury or damage" to the house and premises, shrubberies and plantations, is not to be taken as having settled the general form of order in nuisance cases; and the words "nuisance or injury," or "nuisance" (see *Ball v. Ray*, 21 W. R. 282, *inf.* Form 3), when used in the prayer for relief, will be adopted in preference: *Per Selborne, C.*, 21 W. R. 449; and see *Goose v. Bedford*, 21 W. R. 449, *inf.* Form 7, p. 522.

For injunction to restrain the Defts from using their kilns "for the burning of cement, and from carrying on their works in such a way as to be injurious to the health and comfort of the occupants of the fort at O—, or other persons resident or employed upon the land belonging to the War Department," but operation of injunction suspended until the 1st of December, 1874, see *A. G. v. Francis*, V.-C. H., 13 July, 1874, A. 1933.

For an injunction to restrain Defts, as from the 2nd of November, 1866, from permitting any vapours or gases to be emitted or to escape from their works to the injury or damage (nuisance or injury) of the inhabitants of the township of O—, see *A. G. v. Staffordshire Copper Extracting Co.*, V.-C. W., 29 June, 1866, A. 1501.

The form of order in cases of nuisance from burning or "calcining" heaps of mineral refuse is discussed in *Fleming v. Hislop*, 11 App. Ca. 686.

There, and in *Shotts Iron Co. v. Inglis*, 7 App. Ca. 546, the absolute words of the "interlocutor" were modified by adding the words—"or in any other manner so as to cause material discomfort and annoyance to the (Plts);" so as not to exclude all scientific attempts to get rid of the material without causing a nuisance.

### 3. Nuisance—Offensive Occupation—Inquiry as to Damages.

DISCHARGE judgment,—And Let the Deft R., his servants &c., be restrained by injunction from keeping or suffering any horse to be on the ground-floor of No. 19 G— Street, in the (bill) mentioned, so as to occasion any nuisance to the Plt, his family and lodgers, residing at No. 18 G— Street aforesaid.—Inquiry what damages have been sustained by reason of the user by the Deft of the said building No. 19 G— Street, so as to occasion a nuisance to the Plt, his family and lodgers, as aforesaid; And Let the Deft R., within one month after the date of the certificate of the result of the said inquiry, pay to the Plt B. what shall be certified to be the amount of such damages, and his costs of this suit, to be taxed &c.—Liberty to apply.—*Ball v. Ray*, C. A., 16 Jan. 1873, A. 86; 8 Ch. 467.

For the like order to restrain nuisance from the business of a veterinary surgeon, carried on in the ground-floor of a house in Old Bond Street, see *Gullick v. Tremlett*, V.-C. B., 31 Jan. 1872, A. 227, 20 W. R. 358.

### 4. Injunction against Use of a Building as a Small Pox Hospital.

UPON motion &c., and upon hearing &c., and upon reading &c., and the report dated &c., of M., the person nominated by consent of the Plts and the Defts to inquire and report whether, by reason of the situation of the place called the Hirst, and now used as a small pox hospital, or the management thereof or otherwise, there is danger created to the Plts or any of them, which report is filed in the Central Office; And the Plts by their counsel undertaking (*as to damages*), Let the guardians of the Union of &c., their servants and agents, be restrained by injunction on and after the 19th December, 1887, until judgment in this action or until further order, from using or permitting to be used the cottage now occupied by them as a small pox hospital at &c., or any other premises at &c., so as to occasion a nuisance to the Plts as the owners and occupiers respectively of the three messuages or dwelling-houses, gardens, farm, and dairy, at &c., belonging to the Plt B. and occupied by the other Plts, the Defts by their counsel undertaking until the 19th December, 1887, to continue the precautions hitherto used, and not to allow any communication through &c., and so far as possible to prevent any communication over the wall &c., and not to bring any other patients into the hospital.—*Bendelow v. Wortley Union*, Stirling, J., 15 Nov. 1887, A. 1694; 57 L. J. Ch. 762; 57 L. T. N.S. 849; 36 W. R. 168.

### 5. Nuisance from storing Heavy Weights on Upper Floor.

LET the Deft R., his servants and agents, be restrained by injunction until judgment in this action, or until further order, from leaving, storing, or continuing to leave or store, or permitting to be left or stored in any part of the first floor of the messuage known as &c., at &c., now underlet to the Defts P. & Co., to the Deft D., any litho-

graphic or other stones or materials of such weight or size, or so placed, left, or stored, as to injure any of the principal timbers or walls of the said building, or doing or causing any damage, danger, or nuisance to the Plts, or any of them, or the superior landlords of the same premises, contrary to the covenants in an indenture of lease dated &c., and made between &c., the reversion of which lease is now vested in the Plts C. &c., and from doing any other act or thing to endanger the stability of the building aforesaid, or the safety of the Plt M. on the ground floor thereof.—*Cohen v. Poland*, North, J., 22 July, 1887, A. 1104.

6. *Nuisance from Carriages &c., drawing to and leaving Club after Midnight.*

THIS action coming on for trial &c., Let the Deft be perpetually restrained from carrying on or permitting to be carried on by himself, his managers or agents, the business or concern of the P— Club, so as to cause a nuisance by noise to the Plts or any of them, as owners, lessees, or occupiers of the premises No. —, — Street, or any of the tenants or underlessees of the Plts, as owners or lessees of the last-mentioned premises, first by cabs or carriages drawing to or leaving the club premises, or by the whistling for cabs or carriages drawing to or leaving the club premises between the hours of midnight and 7 a.m., and secondly, by any crowd caused to be assembled by the boxing contests or entertainments held on the club premises.—*Bellamy v. Wells*, Romer, J., 16 Dec. 1890, A. 1712; *S. C.*, 39 W. R. 158; 63 L. T. N.S. 635.

7. *Nuisance from Steam Hammer—Noise and Vibration restrained.*

VARY decree—And Let the Deft B., his servants &c., be restrained by injunction from working the steam-hammer in the pleadings mentioned in such a way as to cause a nuisance or injury to the Plt and his premises in the pleadings mentioned; And Let an inquiry be made what damage has been occasioned to the Plt and his said premises by the working of the said steam-hammer; and refer it to the taxing master to tax the Plt his costs of this cause.—Direction for set off of costs.—Deft to pay to Plt the balance certified to be due.—Liberty to apply.—*Goose v. Bedford*, C. A., 25 Feb. 1873, A. 602; 21 W. R. 449.

For the like order to restrain Deft from working a steam-engine and machinery between the hours of 7 P.M. and 6 A.M., so as to occasion a nuisance (or annoyance) to the Plt or the tenants or occupiers of his house, see *Beaumont v. Emery*, V.-C. M., 23 Feb. 1875, L. J., 31 May, 1875, A. 392, 1364.

For order appointing special referee to report as to noise coming from Deft's stables, and whether the Plt's premises are likely to be affected by the drainage from the Deft's stables, see *Broder v. Saillard*, M. R., 1 March, 1876, A. 338; and for further order after report of referee, see *S. C.*, M. R., 29 March, 1876, A. 837; *S. C.*, 2 Ch. D. 692.

8. *Fireworks.*

LET the Deft R., his servants &c., be perpetually restrained by injunction from letting off, or causing or permitting to ascend, from the P— Gardens in the (bill) mentioned, any rockets, shells, fire balloons, or other pyrotechnic devices or contrivances which, or the sparks from which, may, or may be liable to, fall on the B— mill premises in the said (bill) mentioned, and endanger the timber stored thereon, or any part thereof.—Deft to pay costs of suit, but taxing master to look into the affidavits, and distinguish such parts as are of unnecessary length, and set off those costs.—*Schofield v. Reilly*, M. R., 13 Jan. 1876, B. 42.

9. *Noisy Entertainment.*

LET the Deft be restrained by injunction from using or permitting to be used the premises called &c., or any part thereof, for the purpose of balloon ascents, fireworks, dancing, music, or other sports or entertainments, whereby a nuisance may be occasioned to the (annoyance and) injury of any of the inmates of the asylum in the (bill) mentioned.—*Freer v. Clewes*, V.-C. M., 21 Dec. 1867, A. 3046.

For similar orders, see *Walker v. Brewster*, 5 Eq. 25 (where the form of the order is discussed, and limited to any public exhibition, or other entertainment, whereby a nuisance may be occasioned to the annoyance and injury of the Plt); *Colbourn v. Hardy*, V.-C. J., 29 Jan. 1869, A. 261; *Inchbald v. Robinson*, 4 Ch. 388; *Bostock v. North Staffordshire Ry. Co.*, 5 D. G. & S. 590; 3 Sm. & G. 283.

10. *Dangerous Occupation—Testing Fire-arms.*

LET the Defts be perpetually restrained by injunction from firing at a target in such a manner as to be a nuisance to the Plts or other owners, lessees, or occupiers of the lands and hereditaments known as the S. estate, and from using in such manner as to be a nuisance any part of his premises as a place for proving or testing fire-arms therein, and from using fire-arms therein in such manner as to be a nuisance.—*Darvall v. Dougall*, V.-C. W., 20 July, 1871, A. 1990.

See also *Banister v. Bigge*, 34 Beav. 287, for an injunction to restrain the use of a rifle-range for ball-practice, certified by the Secretary of State for War, until it should have been rendered free from danger to Plt, his family and workmen.

For the like order to restrain the use of land at Birmingham as a range for trying and proving fire-arms, or the discharge of fire-arms thereon, to the annoyance or injury of the patients in a hospital, see *Cadbury v. Walter*, V.-C. H., 3 Feb. 1876, A. 171.

For an injunction restraining blasting operations by a railway co. for the construction of their line "in such manner as thereby to cast upon Plt's house and buildings, or upon any part of his gardens or land there, or any of the said pieces of land in his occupation, any stones, pieces of rock, or other missiles or things," see *Arnold v. Furness Ry. Co.*, V.-C. B., 23 April, 1874, A. 947; 22 W. R. 613.

For an injunction restraining a smoke nuisance by a railway co., see *Smith v. Midland Ry. Co.*, 25 W. R. 861; nuisance from gas works, see

*A. G. v. Gas Light, &c. Co.*, 7 Ch. D. 217; *A. G. v. Metropolitan Ry. Co.*, Kay, J., 13 Jan. 1882, *ex relatione* (case not reported nor order drawn up).

For an inquiry as to damages in respect of nuisance from noise, vibration, and obstruction of light (completed before bill filed), where a mandatory injunction was refused, see *V. Gort v. Clark*, 16 W. R. 569.

For forms and notes upon the injury to property and health from river pollution, see *inf.*, "NUISANCE" (II.).

### 11. *Leave to enter for the purpose of trying Experiments*—O. L. 3.

UPON the application of the Plt, adjourned into Court at the Plt's request as a motion, and upon motion this day accordingly by counsel for the Plt, and upon hearing counsel for the Defts, Let the Plt, his servants and workmen, be at liberty (without prejudice to the rights of persons not parties to this action), Upon giving forty-eight hours' notice to the Defts to enter upon that part of P— Street, E—, in the county &c., in the pleadings mentioned, which belongs to the Defts, for the purpose of experimenting in order to discover whether the pipe which joins the Plt's drain proceeds directly from the Deft's parsonage-house, and for this purpose to dig and excavate the street so far as may be necessary, the Plt by his counsel undertaking to do no unnecessary harm, and to replace the street so soon as the investigation is concluded, and as quickly as possible at his own expense; And Let the Plt, his servants and workmen, be at liberty, on giving like notice, to enter on the Deft's land to take the height and dimensions of the Deft's chapel.—Costs to be costs in action.—*Lumb v. Beaumont*, Pearson, J., at Chambers, 25 July, 1884, B. 1046; *S. C.*, 27 Ch. D. 356.

#### NOTES.

The grounds of interference in the case of private nuisance are:—

(a) Material injury or imminent and inevitable risk to property or health: see *A. G. v. Nichol*, 16 Ves. 338; *Haines v. Taylor*, 2 Ph. 209; 10 Beav. 75; *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 436; 7 H. L. C. 600 (injury to the crops of a market gardener); *Beardmore v. Tredwell*, 3 Giff. 683 (injury to trees from brick-kilns); *Tipping v. St. Helen's Smelting Co.*, 1 Ch. 66 (injury to land by the smoke of copper works); *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642; *Arnold v. Furness Ry. Co.*, 22 W. R. 613 (tipping rock or rubbish on Plt's land); *Hepburn v. Lordan*, 2 H. & M. 345 (storing inflammable materials, jute, near Plt's house); *Crowder v. Tinkler*, 19 Ves. 617 (powder mill); *Bendelow v. Wortley Union*, 57 L. J. Ch. 762; 57 L. T. N.S. 849; 36 W. R. 168 (small pox hospital). And see also *Crowhurst v. Amersham Burial Board* (allowing poisonous trees to project over neighbour's land); and that there is no duty as between adjoining landowners to cut thistles, the natural growth of the soil, see *Giles v. Walker*, 24 Q. B. D. 657.

The injury to property (e.g., to vegetation from smoke and vapours) must be actual, substantial, and visible—such as would entitle the Plt to recover damages in an action; and contingent, prospective, or remote damage will not give the right to an injunction: *Salvin v. Brancepeth Coal Co.*, 9 Ch. 705; *Elmhirst v. Spencer*, 2 Mac. & G. 45; *Shotts Iron Co. v. Inglis*, 7 App. Cas. 518, 543.

Mere speculative depreciation of property (e.g., by the erection of a national school in the immediate neighbourhood) is not enough: *Harrison v. Good*, 11 Eq. 338.

And see *White v. Cohen*, 1 Drew. 312; *Biddulph v. St. George's Vestry*, 3 D. J. & S. 493.

Circumstances of locality will be taken into consideration: *Sturges v.*



*Bridgman*, 11 Ch. Div. 852; and although a man by "coming to the nuisance" (of noxious vapours) in a manufacturing district does not lose his right to relief, the injury to his property must be such as sensibly to diminish its value; and *a fortiori* a much stronger case of personal discomfort will have to be shown by a Plt residing in a manufacturing district: *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 643; and see *Salvin v. Brancepeth Co.*, *sup.*

Where the Deft claims the right to do the act complained of, and refuses to give an undertaking, the Court infers that there will be a repetition of the nuisance: *Phillips v. Thomas*, 62 L. T. N.S. 793.

If there is no exceptional risk, and the injury is accidental or occasional only, and precautions have been taken, there will be no injunction: *Cooke v. Forbes*, 5 Eq. 166; nor where a mere decision on the legal question will give the Plt all the relief he is really entitled to: *Jenkins v. Jackson*, 40 Ch. D. 71.

And generally, if the nuisance is not continuous, but temporary and occasional only, the Court will not interfere: *Gaunt v. Fynney*, 8 Ch. 8; *Swaine v. Great Northern Ry. Co.*, 4 D. J. & S. 211; *A. G. v. Cambridge Gas Co.*, 4 Ch. 71; *A. G. v. Sheffield Gas Co.*, 3 D. M. & G. 304; *Cooper v. Crabtree*, 20 Ch. Div. 589; *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div. 113; *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409.

(b) Material interference with the reasonable ordinary comfort of human existence: see *Walter v. Selfe*, 4 D. & S. 315; *Crump v. Lambert*, 3 Eq. 409; *Robinson v. Kilvert*, 41 Ch. Div. 88; *Bellamy v. Wells*, 39 W. R. 158; 63 L. T. N.S. 635.

To give a right of action (including summary relief by injunction) in respect of nuisance or annoyance, it is not necessary to prove pecuniary loss, or direct injury, or actual risk to health; it is enough if the nuisance be such as to interfere with the ordinary comfort or enjoyment of life and property; as, *ex. gr.*, by causing a reasonable apprehension of risk from infectious disease: *Tod-Heatley v. Benham*, 40 Ch. Div. 80; *Rex v. White*, 1 Burr. 333; *Gaskell v. Bayley*, 30 L. T. N.S. 516; or if it (the nuisance) be offensive to the senses: *Rex v. Neil*, 2 Car. & Pay. 485. And a user of premises, reasonable *per se*, is actionable if it is such as to cause serious annoyance to a neighbour: *Reinhardt v. Mentasti*, 42 Ch. D. 685.

As to the meaning of the words "annoyance" and "grievance" in a covenant against nuisance, see *Tod-Heatley v. Benham*, 40 Ch. Div. 80; and as to the operation of a covenant for quiet enjoyment as protection to covenantee against nuisance by covenantor, see *Robinson v. Kilvert*, 41 Ch. Div. 88; *Sanderson v. Mayor of Berwick*, 13 Q. B. D. 547, 551; *Dennett v. Atherton*, L. R. 7 Q. B. 316, 326, 327.

A Plt is entitled to the enjoyment of pure air by night as well as by day: *Knight v. Gardner*, 19 L. T. N.S. 673.

On this branch of the subject the following cases may be consulted:—

*Brick-burning.*—*Walter v. Selfe*, 4 D. & S. 313; *Pollock v. Lester*, 11 Ha. 275; *Luscombe v. Steer*, 15 W. R. 1191; *Roberts v. Clarke*, 18 L. T. N.S. 49; *Bamford v. Turnley*, 3 B. & S. 62 (overruling *Hole v. Barlow*, 4 C. B. N.S. 334, and deciding that brick-burning by which nuisance was occasioned was not a reasonable use by Deft of his land); *A. G. v. Tossell*, V.-C. W., 2 Aug., 19 Dec. 1867 (deciding that brick-burning within certain limits (180 yards) is a nuisance, and that the remedy in penalties, given by the Public Health Act, 1848, s. 140, does not affect the right of the Plt to file an information at the relation of the local board to put a stop to a public nuisance): *A. G. v. Hussey*, Kay, J., 26 June, 1890.

And see *Wanstead Local Board v. Hill*, 13 C. B. N.S. 479, on the question whether brick-making is an offensive trade within the Public Health Act, 1848 (11 & 12 V. c. 63), s. 64 (re-enacted by the Public Health Act, 1875, s. 112).

*Calcing.*—*Shotts Iron Co. v. Inglis*, 7 App. Ca. 518.

*Carpet-beating.*—*Lusher v. Gibbs*, Kay, J., 14 May, 1884, B. 719.

*Cement Works.*—*Umfreville v. Johnson*, 10 Ch. 580; *A. G. v. Francis*, V.-C. H., 13 July, 1874, A. 1933; L. J., 9 Nov. 1874, A. 2932.

*Chemical or gas works, noxious vapours and smoke.*—*Barlow v. Bailey*, W. N. (71) 95; *Bankart v. Houghton*, 27 Beav. 425; *Salvin v. Brancepeth Coal Co.*, *sup.*; *Crump v. Lambert*, 3 Eq. 409; *Savile v. Kilner*, 26 L. T. N.S. 277; *Smith v. Midland Ry. Co.*, 25 W. R. 861; *A. G. v. Metropolitan Ry. Co.*,

Kay, J., 13 Jan. 1882, *ex relatione* order not drawn up (nauseous and offensive odours from the manufacture of gas).

*Dangerous trade.*—*McMurray v. Cadwell*, W. N. (89) 216; W. N. (90) 63 (manufacture of amorces; injunction suspended for a fortnight to enable appellant to apply to Home Office for leave to make protective alterations).

*Fried-fish shop.*—*Wood v. Miles*, V.-C. H., 1 Dec. 1880, B. 2249; that such a business is not *per se* an offensive trade within the Public Health Act, 1875, s. 112, see *Braintree Local Board v. Boyton*, 52 L. T. N.S. 99.

*Heating premises.*—*Robinson v. Kilvert*, 41 Ch. Div. 88, 97; *Reinhardt v. Mentast*, 42 Ch. D. 685.

*Hospital for infectious diseases.*—*Metropolitan Asylums v. Hill*, 6 App. Ca. 193; *Tod-Heatley v. Benham*, 40 Ch. Div. 80; *Bendelow v. Wortley Union*, 57 L. J. Ch. 762; *Dalton v. St. Mary Abbots, Kensington*, 47 L. T. N.S. 349.

The non-consumption, so far as is practicable, of smoke in any manufacturing or trade process, and the emission of black smoke in such quantity as to be a nuisance from any chimney (not of a private dwelling-house) are nuisances to be summarily dealt with by the local authority. See Public Health Act, 1875, 38 & 39 V. c. 55, s. 91 (re-enacting, with some alterations and additions, Nuisances Removal Act, 18 & 19 V. c. 121, s. 8; and Sanitary Act, 1866, 29 & 30 V. c. 90, s. 19). And for cases on these enactments, see *Cooper v. Woolley*, L. R. 2 Ex. 88; *Barnes v. Akroyd*, L. R. 7 Q. B. 474; *Norris v. Barnes*, *Ib.* 537; *Gaskell v. Bayley*, 30 L. T. N.S. 516; *Barnes v. Eddleston*, 1 Ex. D. 102; *Weekes v. King*, 53 L. T. N.S. 51.

*Manure works, and carting night soil.*—*Knigh v. Gardner*, 19 L. T. N.S. 673.

*Noise and vibration.*—*Steam-hammer, &c.*—*Roskell v. Whitworth*, 5 Ch. 459; *Goose v. Bedford*, 21 W. R. 449; *Eaden v. Firth*, 1 H. & M. 573; *Crump v. Lambert*, 3 Eq. 409; *Fenwick v. E. Lond. Ry.*, 20 Eq. 544; *Sturges v. Bridgman*, 11 Ch. Div. 252 (pestle and mortar); *Webb v. Bacher*, W. N. (81) 158 (alteration of premises, hammering at night); *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409 (temporary use of lift pumps).

—*Bell-ringing.*—*Soltau v. De Held*, 2 Sim. N.S. 133; *Hardman v. Holberton*, V.-C. S., 30 June, 1866, A. 1373 (dissolved 5 Dec. 1866, A. 2502; see W. N. (66) 379).

—*Keeping horses on ground-floor of a London dwelling-house.*—*Ball v. Ray*, 8 Ch. 467; *Gullick v. Tremlett*, 20 W. R. 358; *Broder v. Saillard*, 2 Ch. D. 692.

*Noisy entertainments, collecting disorderly crowds.*—*Walker v. Brewster*, 5 Eq. 25; *Inchbald v. Robinson*, 4 Ch. 388; *Bostock v. N. Staff. Ry. Co.*, 5 D. & S. 590; 3 Sm. & G. 283; *Crofts v. Hume*, V.-C. B., 6 Mar. 1885, A.; *Cox v. Baker*, V.-C. B., 11 June, 1886 (noisy exhibition in Edgware Road); *Allen v. Vokes*, 15, 31 Aug. 1888, *ex relatione* orders not drawn up; 32 Sol. Journ. 734 (noisy entertainment, swings, rifle gallery); *Phillips v. Thomas*, 62 L. T. N.S. 693 (noisy show in market square); *Jenkins v. Jackson*, 40 Ch. D. 71 (dancing in room over that of Plt).

*Use of garden as a skittle or bowling alley.*—*Barham v. Hodges*, V.-C. H., 2 July, 1876, A. 1391; W. N. (76) 234.

*Use of a rifle-range so as to be a nuisance to adjoining houses.*—*Banister v. Bigge*, 34 Beav. 287; *Darvall v. Dougall*, *sup.* Form 10, p. 523. See, however, *Hawley v. Steele*, 6 Ch. D. 521, that the reasonable use for military purposes of land acquired by authority of Parliament, and vested for such purposes in the War Secretary, will not be restrained.

*Urinal.*—*Vernon v. St. James' Vestry*, 16 Ch. D. 466; *Sellors v. Matlock Bath Local Board*, 14 Q. B. D. 928; *Chidnall v. Paul*, 29 W. R. 536 (where the Deft, by so disposing his premises as tacitly to invite the nuisance, was held responsible).

No legal right under the Prescription Act (as in the case of obstruction of light) can be acquired in respect of noise; *Sander v. Manley*, W. N. (78) p. 181; but the right to an injunction against nuisance may, as in other cases, be lost by acquiescence (*e.g.*, by allowing expense to be incurred, or a trade to be carried on, without taking proceedings): *Swaine v. Great Northern Ry. Co.*, 4 D. J. & S. 211; *Gaunt v. Fynney*, 8 Ch. 8; and see *Turner v. Mirfield*, 34 Beav. 390.

; But acquiescence in the erection of works which, though noxious in themselves, produce but little injury at first, does not warrant their development

to the extent of causing great damage: *Bunkart v. Houghton*, 27 Beav. 425; *Sturges v. Bridgman*, 11 Ch. Div. 852; and see *Baxendale v. McMurray*, 2 Ch. 790.

The lessor or reversioner of property cannot, it seems, though his tenants the actual occupiers might, maintain an action in respect of a merely temporary nuisance, e.g., from smoke or noise: *Jones v. Chappell*, 20 Eq. 539; *Simpson v. Savage*, 1 C. B. N.S. 347; *Mott v. Shoolbred*, 20 Eq. 22; *Cooper v. Crabtree*, 19 Ch. D. 193; *Sandford v. Clarke*, 21 Q. B. D. 398; but where, from change of interest by letting the property since action brought, the Plts have become reversioners, amendment by adding the new tenants as co-Plts has been allowed: *House Property Co. v. H. P. Horsenail Co.*, 29 Ch. D. 190.

In the case of apprehended nuisance, Plt seeking an injunction must prove imminent danger of a substantial kind, or that the injury, if it does come, will be irreparable: *Fletcher v. Bealey*, 28 Ch. D. 688.

Although persons entrusted with statutory powers are bound to exercise them so as not unnecessarily to create a nuisance (*Geddis v. Bann Reservoir*, 3 App. Cas. 430), yet where the user of premises in a particular way is incidental and necessary to that which the statute authorizes, such user cannot be restrained on the ground of nuisance: *L. B. & S. C. Ry. v. Truman*, 11 App. Cas. 45, where a railway co. were held justified in using land as a depôt for cattle as being incidental to the authorized use of their railway for cattle traffic; and see *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409; but persons authorized by statute to erect a small pox hospital could not do so in a place where a nuisance would be caused to the neighbourhood: *Met. Asylums v. Hill*, 6 App. Cas. 193; nor a vestry the like as to a urinal: *Vernon v. Vestry of St. James'*, 16 Ch. Div. 449; and see other cases, *sup.*

Where an Act of Parliament contains a special provision for the protection of an individual, he may sue without joining the A. G., or showing particular damage: *Mayor of Devonport v. Plymouth Tram. Co.*, 52 L. T. N.S. 161.

The Public Health Act, 1875 (38 & 39 V. c. 55, s. 91), defines nuisances (see also Nuisances Removal Act, 1855, 18 & 19 V. c. 121, s. 8; Sanitary Act, 1866, 29 & 30 V. c. 90, s. 19), which may be dealt with summarily by the local authority in the manner provided by the Act (sects. 94—106). If such summary proceedings would afford an inadequate remedy, proceedings may be taken in the Superior Courts to enforce the abatement or prohibition of any nuisance under the Act, or for the recovery of any penalties, or for the punishment of persons offending against the Act (sect. 107).

Actions cannot be brought by a local board in respect of a public nuisance under the last-mentioned section, except with the sanction of the A. G., or by some person who has suffered damage: *Wallasey Local Board v. Gracey*, 36 Ch. D. 593. Without evidence of actual injury an action may be maintained by the A. G., and injunction obtained, restraining illegal acts tending to the injury of the public: *A. G. v. Shrewsbury, &c. Bridge Co.*, 30 W. R. 916.

The provisions of the Act relating to nuisances are to be in addition to, "and not to abridge or affect any right, remedy, or proceeding under any other provisions of the Act, or under any other Act, or at law or in equity"; but no person shall be punished for the same offence both under the Act and under any other law or enactment (sect. 111).

By the Arbitration Act, 1889, s. 13, which is substituted for part of sect. 56 of the Jud. Act, 1873, questions may be referred for inquiry and report to any official or special referee; and, at the trial or hearing, the assistance as assessors of persons specially qualified may be obtained under sect. 56. For the exercise of this power in nuisance, ancient light, and mineral trespass cases, see *Broder v. Saillard*, *sup.* p. 362; *Cartwright v. Last*, *sup.* p. 362; *Craven v. Kaye*, *sup.* p. 362; *Bendelow v. Wortley Union*, 57 L. J. Ch. 762, *sup.* p. 521. And see *sup.* Chap. XXVI., "ARBITRATIONS."

A surveyor so appointed acts in a quasi-judicial capacity, and is not subject to examination as a witness: *Broder v. Saillard*, 24 W. R. 456.

In cases of nuisance, unless it plainly appears that the conclusion of the Court below upon the evidence was wrong, the Appeal Court is unwilling to reopen the investigation by directing an issue or employing experts to examine and report: *Salvin v. North Brancepeth Co.*, *sup.*; and see *Inchbold v. Robinson*, 4 Ch. 388.

In an action to restrain sewage nuisance, a general order as to documents

in the possession of the Deft board was refused, but an order was made limited to certain resolutions and correspondence with the Local Government Board: *Downing v. Falmouth United Sewerage Board*, 37 Ch. Div. 234.

As to the liability of a landlord for nuisance committed by his tenant, see *Jenkins v. Jackson*, 40 Ch. D. 71; and that an action for an injunction to restrain the fouling of a stream cannot be maintained against executors in respect of acts done by their testator more than six months before his death, see *Kirk v. Todd*, 21 Ch. Div. 484.

Where an inquiry as to damages was directed as well as an injunction, the Plt had the general costs, but the costs of the inquiry were reserved, so that the Judge might exercise control over them if unreasonably exaggerated: *Slack v. Midland Ry. Co.*, 16 Ch. D. 81.

As to the form of the order, and that the Court will not thereby, as in the case of breach of covenant, specify the particular acts to be restrained, see *Walker v. Brewster*, 5 Eq. 25.

For a collection of cases relating to nuisances, see Chambers' Public Health, &c. Act, Digest of Cases, 526—572; Kerr, 166—294; Joyce, 99—130.

## (II.)—POLLUTION OF WATER.

### 1. *Injunction restraining Pollution of River by Town Sewage.*

LET the Defts, the mayor &c., of the borough of &c., their servants &c., be restrained by injunction, from and after the second day after the close of the parliamentary session for the year 1871, from causing or permitting the sewage of the borough of Leeds or any part thereof to flow or pass through their main sewer or any other outfall into the river Aire in the information (statement of claim) mentioned, unless and until the same shall be sufficiently purified and deodorised so as not to be or create a nuisance, or become injurious to the public health; And Let the Defts, the said mayor &c., be perpetually restrained by injunction from causing or permitting any new outfall to be made for the conveyance of the sewage of the said borough or any part thereof into the river Aire, or any new sewer or drain to be made to communicate with their said main sewer, or any communication to be made with such main sewer, or any of the Defts' other sewers and drains whereby any sewage may be discharged or find its way into the said river Aire.—Defts to pay the relator's costs of suit, including the costs of the motion for an injunction.—Liberty to apply.—*A. G. v. Leeds Corporation*, V.-C. J., 2 March, 1870, A. 527; L. J., 9 June, 1870, A. 1493; 5 Ch. 583.

For order restraining Defts from making any further connection of any drain with either their H. or M. sewer until the hearing, &c.; that part of the motion which sought an immediate injunction against causing any sewage to pass down the H. and M. sewer into the river L. being directed to stand over until the hearing, on an undertaking by Defts, by dredging or other proper means, to keep the river L. free from all obstructions to navigation caused by an increased deposit of sewage matter, with liberty to apply especially in respect of any injury that might be apprehended from unhealthy effluvia, see *A. G. v. Metropolitan Board of Works*, 1 H. & M. 298, V.-C. W., 5 June, 1863, A. 1031.

For injunction to restrain local board from "directing or authorizing" the discharge of sewage from new houses in their district into a natural water-course, the lower portion of which was a sewer vested in the Metropolitan Board of Works, see *A. G. v. Acton Local Board*, 22 Nov. 1882, A. 2196; 22 Ch. D. 221.

For injunction to restrain local board from discharging, or causing or

permitting to be discharged, sewage or other offensive matter into a brook or watercourse so as to cause nuisance to the Plt (it being shown that it was possible for the board to abate the nuisance by physical means), see *Charles v. Finchley Local Board*, 23 Ch. D. 767.

As to whether the expression "permitting" can be rightly used in these cases, see notes, *inf.* p. 532.

## 2. Similar Order.

LET the Defts, the mayor &c., of H—, their servants &c., be restrained by injunction from causing or permitting to be made any new outfall into the brook H—, or any new sewer communicating with any outfall into such brook, or any drain or other communication with any such sewer, whereby any sewage water may pass into the H— brook; And Let also the said Defts, their servants &c., be (from and after the — day of June, 1870,) restrained by injunction from causing or permitting the sewage of the borough of H— to flow or pass through outfall sewer A— or outfall sewer B— in the (information and bill) mentioned, or any new outfall into the said brook, unless and until the same shall be sufficiently purified and deodorised.—Defts to pay costs of suit.—*A. G. v. Halifax Corporation*, V.-C. J., 8 July, 1869, A. 2040; 17 W. R. 1088. (See words added in *A. G. v. Corporation of Leeds*, *sup.* Form 1.)

The form of this order has been often adopted in similar cases: see *North Staffordshire Ry. Co. v. Tunstall Local Board*, 39 L. J. Ch. 131.

For an interlocutory injunction against opening any new drains by which any additional matter may be brought down, and from executing any works whereby the damage may be increased, see *A. G. v. Luton Board*, V.-C. W., 2 Jur. N.S. 180.

For order to restrain Defts from allowing any sewage to pass into the stream or otherwise, so as to become a nuisance, the operation of the order being suspended, see *A. G. v. Heath*, V.-C. W., 25 Nov. 1867, A. 3087.

For order restraining a local board from allowing any fresh communications to be made with a sewer constructed by their predecessors in office, which caused a nuisance to the inhabitants of the adjoining parish by draining into a stream flowing through their parish, unless such drainage should have been first purified from sewage matter, so as not to occasion any pollution to the stream in its passage through such parish, see *A. G. v. Richmond*, 2 Eq. 306.

For injunction to restrain the corporation of Bradford from causing or permitting any new outfall into the Bradford beck, or any new sewer communicating with any outfall into it, "whereby any sewage not effectually defecated shall pass into the river Aire so as to be a nuisance to the Plt," see *Stansfield v. Corporation of Bradford*, M. R., 5 March, 1875, B. 492.

For the like order restraining a local board from causing or permitting any sewage, filth, or offensive matter, solid or liquid, to be discharged, or to flow or pass into a brook—through any sewer, drain, or culvert within the district—to the injury of, or which may be or become a nuisance to Plts, see *Birmingham Canal Co. v. Burman*, V.-C. B., 25 Nov. 1872, B. 3032 (operation of order suspended for two months); and see *S. C.*, before Kay, J., 63 L. T. N.S. 670.

For the like order, see *Harrold v. Markham* (Northampton case), V.-C. J., 16 July, 1869, A. 2411 (operation suspended until 1st June, 1870).

For the like order on motion for decree, see *Bidder v. Richards*, V.-C. W., 14 Jan. 1862, A. 109 (Croydon case).

For like injunction against the Governors of the County Lunatic Asylum at Colney Hatch, see *A. G. v. The Colney Hatch Asylum*, C. A., 22 Dec. 1868, A. 3187; 4 Ch. 146.

For injunction to restrain Defts from permitting the drainage from

additional cottages or any buildings other than four old cottages to drain into a brook, see *Metropolitan Board of Works v. L. & N. W. Ry. Co.*, 14 Ch. D. 521; C. A., 17 Ch. Div. 246.

For injunction in the terms of an agreement by which the Defts agreed with Plt that they would not after the — day of —, “cause or permit the drains of the district under their control, or any of them, to discharge, nor shall they after that date discharge into the stream or watercourses flowing into the Oak beck, as in the pleadings mentioned, or into the said Oak beck, any sewage, sewage matters, or foul water whatsoever, or otherwise foul or pollute the water of the Oak beck,” with inquiry as to damages occasioned to Plt in the operation of bleaching, and directions for payment of amount ascertained, and costs of suit, see *Wood v. Harrogate Commissioners*, V.-C. B., 3 June, 1874, B. 2497.

An inquiry, as in *Heath v. Wallington*, V.-C. W., 3 July, 1865, A. 1639, how the sewage can be dealt with so as not to occasion a nuisance to Plt, should not, it seems, be directed: see *A. G. v. Colney Hatch Lunatic Asylum*, 4 Ch. p. 162.

For dismissal of action for injunction in respect of apprehended nuisance, but without prejudice to the right of the Plt to bring another action thereafter, in case of actual injury or imminent danger, see *Fletcher v. Bealey*, 28 Ch. D. 688.

### 3. Pollution of Stream by Manufacturing Works.

LET the Defts, The S. Papermaking Co. (Limited), their servants &c., be perpetually restrained by injunction from discharging from their works in the Plt's (bill) mentioned into the river or stream in the said (bill) also mentioned (so as to cause it to flow to the Plt's lands, messuages, and mills therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the Plt), any such refuse or other matter as was discharged by the Defts from their said works into the said river or stream previously to the (filing of the said bill) or any noxious fluid or other foul matters whatsoever.—*Lingwood v. Stowmarket, &c. Co.*, V.-C. W., 15 Nov. 1865, B. 2220; 1 Eq. 77.

On motion to commit in this case inquiries were subsequently directed for the purpose of ascertaining whether the pouring into the stream, at the point where Deft's drain entered it, of a liquid of the same composition as that analysed by Dr. S. on behalf of Plt, would be sufficient to cause the pollution of water complained of at Plt's mill: *S. C.*, 24 Jan. 1868, B. 255.

For order to stay pollution of stream above or within the limits of Plt's land, see *Crossley v. Lightowler*, L. C., 2 May, 1867, A. 1259, 2 Ch. 478.

For declaration that the Defts' Act did not legalise the fouling of a stream below a reservoir or store of water thereby authorized, and for injunction to stay them from so storing and discharging the water as to foul the water of the stream to the damage or injury of the owners and occupiers of Plt's dye works, see *Clowes v. South Staffordshire Waterworks*, 8 Ch. 125.

### 4. Inquiry as to Pollution from a given Date.

LET the following &c.: 1. An inquiry whether the matters now passing into T— brook from the M— mills cause any and what greater pollution, to the injury of the Plt, than was caused to the then owner of S— mills by the matters passing into the brook from M— mills immediately before the — day of—. 2. An inquiry whether Plt is entitled to any and what compensation in damages from Deft in respect of any nuisance occasioned to Plt before the completion of

Deft's recent works by matters passing from the M— mills in excess of the matter passing into the brook from the M— mills immediately before the said — day of —.—Adjourn &c.—*Cummins v. Herron*, V.-C. W., 10 Dec. 1872, A. 3130.

For leave to apply in case of any subsequent pollution of a canal by sewage, Defts having, since information filed, diverted the sewage from the canal, and inquiry as to damages, see *A. G. v. Basingstoke Corp.*, V.-C. H., 31 May, 1876, A. 1462; 24 W. R. 817.

## NOTES.

The jurisdiction of restraining by summary order offences in respect of river pollution was by the Rivers Pollution Prevention Act, 1876 (39 & 40 V. c. 75), ss. 10, 11, for the first time given to the county courts. But the jurisdiction which has been largely exercised by the Court of Chancery (and now by the Ch. Div.) of restraining the pouring of sewage and other filth or refuse into a river so as to create a nuisance, has not been materially affected.

Injunctions have been obtained on behalf of the public (by information): see *A. G. v. Leeds Corporation*, 5 Ch. 583, *sup.* Form 2, p. 529.

—on behalf of the public, and also of a riparian owner (by information and bill): see *A. G. v. Halifax Corporation*, 17 W. R. 1088, *sup.* Form 2; *A. G. v. Birmingham Council*, 4 K. & J. 528; *A. G. v. Luton Board*, 2 Jur. N.S. 180;

—or on behalf of the riparian owner alone (by bill): *Goldsmid v. Tunbridge Wells Commrs.*, 1 Eq. 161; 1 Ch. 349; *Spokes v. Banbury Board*, 35 L. J. Ch. 105; *Crosley v. Lightowler*, 3 Eq. 279; 2 Ch. 478; *Baxendale v. McMurray*, 2 Ch. 790; *Holt v. Rochdale Corporation*, 18 W. R. 885; *Bidder v. Croydon Local Board*, 6 L. T. N.S. 778.

If the effect of drainage works has been to pollute the stream into which they fall, the fact that the local authority (or person) are using the best means in their power, or known to science, for purifying and deodorising the sewage or filth before passing it into the stream, has not saved them from the operation of an injunction, although their efforts to neutralize the evil have been taken into favourable consideration upon applications to suspend the operation of the injunction, or even upon motion to commit for breach of the injunction: *A. G. v. Birmingham Council*, 4 K. & J. 528; *S. C.*, in a subsequent suit, 19 W. R. 561; *A. G. v. Bradford Canal*, 2 Eq. 71; *A. G. v. Leeds Corporation*, 5 Ch. 583; *Bidder v. Croydon Local Board*, 6 L. T. N.S. 778.

In the absence of express power to create a nuisance, public bodies executing drainage works for the benefit of their district were bound to construct them so as not to create any nuisance nor to interfere with the right of the riparian owner to the enjoyment of pure water: *A. G. v. Colney Hatch*, 4 Ch. 146; *A. G. v. Halifax Corporation*, 17 W. R. 1088; *Goldsmid v. Tunbridge Wells Commrs.*, 1 Eq. 161; 1 Ch. 349; *Cator v. Lewisham Local Board*, 5 B. & S. 115; *Geddis v. Bann Reservoir*, 3 App. Cas. 430.

And see Public Health Act, 1875, s. 17 (re-enacting, with additions, Local Government Amendment Act, 1861 (24 & 25 V. c. 61), s. 4), to the effect that local authorities are not authorized to send sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity or quality of the water in such stream, &c.

Under this enactment a local board has been restrained by information from transgressing their powers by discharging sewage into a stream so as to affect the water at the point of outfall, although no case of actual nuisance had been established: *A. G. v. Cockermouth Local Board*, 18 Eq. 172. And see *A. G. v. Shrewsbury, &c. Bridge Co.*, 30 W. R. 916, as to the right of action by A. G. on behalf of public to restrain illegal acts tending to injury of public, without evidence of actual injury.

But if parliamentary powers to drain, &c. cannot be executed without

causing some nuisance, the Court has declined to interfere (*A. G. v. Thames Conservators*, 1 H. & M. 1), unless the works, though within the statutory powers, occasion injury from their negligent and unskilful construction: *A. G. v. Metropolitan Board of Works*, 1 H. & M. 298. Where the nuisance has not been caused or increased by any act on the part of the local board, but has arisen merely from delay or neglect in providing a proper system of drainage, the remedy is not by injunction indirectly, but by *mandamus* directly compelling a performance of the statutory powers: *Glossop v. Heston Local Board*, 12 Ch. Div. 102; *A. G. v. Dorking Guardians*, 20 Ch. Div. 595; *Warwick and Birmingham Canal Navigation v. Burman*, 63 L. T. N.S. 670.

And the Court refused to restrain a local board from "permitting" sewage to pass into a natural watercourse, where such an injunction might compel them to stop up drains or sewers which had been made from houses in their district: *A. G. v. Acton Local Board*, 22 Ch. D. 221; *secus*, where the board had power physically to stop the flow of sewage complained of: *Charles v. Finchley Local Board*, 23 Ch. D. 767.

A prescriptive right to drain through a sewer does not confer a right to pour in as much sewage as the sewer will hold, and an excessive user may be restrained: *Metropolitan Board of Works v. L. & N. W. Ry. Co.*, 17 Ch. Div. 246; and see *A. G. v. Acton Local Board*, *sup.*; *Charles v. Finchley Local Board*, *sup.*

The duty of a local board to keep their sewers so as not to be a nuisance is not absolute, but they are bound to use all reasonable care and diligence: *Bateman v. Poplar Board of Works*, 37 Ch. D. 272; and an injunction will not be granted if they could not, with reasonable care, have discovered that a drain was a sewer for which they were responsible: *S. C.*

Considerations of expense and inconvenience to the local board, or the interests of a large and increasing population, as contrasted with the health and property of individual owners, have not been allowed to affect the right to relief by injunction. A local board, in performing their statutory duties, must do so without doing injury to their neighbours, or throwing upon them any additional burden: *A. G. v. Acton Local Board*, 22 Ch. D. 222. And if, after all possible experiments, the town or district cannot be drained without causing private injury, the local board must, it has been stated, apply to Parliament for further powers, authorizing them to take the land of the person injured, or to commit the nuisance: see *A. G. v. Colney Hatch*, *sup.*; *A. G. v. Luton Board*, 2 Jur. N.S. 180; *A. G. v. Birmingham Council*, *sup.*; *A. G. v. Metropolitan Board of Works*, 1 H. & M. 298; *Spokes v. Banbury Local Board*, 1 Eq. 42.

But to induce the Court to interfere, on the ground of individual injury, with the carrying out a great public undertaking, such as the drainage of a town, there must be a case of serious and permanent damage, actual or imminent: *A. G. v. Gee*, 10 Eq. 131; *Lillywhite v. Trimmer*, 15 W. R. 763; *A. G. v. Sheffield Gas Co.*, 3 D. M. & G. 304; *A. G. v. Dorking Guardians*, 20 Ch. Div. 595, 607; *Glossop v. Heston Local Board*, 12 Ch. Div. 102; and see *Earl of Ripon v. Hobart*, 3 My. & K. 179; and not merely probable or apprehended: *A. G. v. Kingston-on-Thames Corporation*, 13 W. R. 888; but where the Defts insist upon a right to continue the injury in future an injunction may be granted, though no substantial damage is shown: *A. G. v. Acton Local Board*, *sup.*

Injunction, and not damages, is the proper relief in river pollution cases, distinguished in this respect from ancient light cases, where damages represent the depreciation in value of the property affected: see *Pennington v. Brinsop Coal Co.*, 5 Ch. D. 769.

The remedy by injunction of private persons injured was not superseded by the right of prosecution, under direction of the Home Secretary, given by the Metropolitan Local Management Amendment Act, 1858 (21 & 22 V. c. 104), s. 31: *A. G. v. Metropolitan Board of Works*, 1 H. & M. 298.

And the right to obtain summary relief by injunction against a local board is not affected by the absence of one month's notice before taking proceedings, required by 25 & 26 V. c. 102, s. 106 (re-enacted in substance by Public Health Act, 1875, s. 264): *A. G. v. Hackney Local Board*, 20 Eq. 626; *Bateman v. Poplar Board of Works*, 33 Ch. Div. 630; *Chapman v. Auckland Union*, 23 Q. B. Div. 94; unless the remedy sought is substantially damages, and not an injunction: *Flower v. Leyton Board*, 5 Ch. D. 347; and still



remains unaffected under the new procedure: *Baker v. Wisbech Corporation*, W. N. (77) 56.

And where the action is substantially for an injunction, the Court can give damages in lieu; but *quære* whether damages for the past can be given in the absence of the notice: *Chapman v. Auckland Union, sup.*

And sect. 107 of the Act empowering a local board to "cause any proceedings to be taken" for repression of nuisance does not enable them, in absence of special damage, to sue in respect of a public nuisance without the A. G.: *Wallasey Local Board v. Gracey*, 36 Ch. D. 393; distinguishing *Nuneaton Local Board v. Gen. Sewage Co.*, 20 Eq. 127.

Injunctions against a public body (restraining river pollution) do not run with the land, so as to justify an action for a declaration that, as against the parliamentary successors of the former Defts, Plts are entitled to the benefit of the former order (of which no breach was alleged): *A. G. v. Birmingham Drainage Board*, 17 Ch. Div. 685; *A. G. v. Guardians of Dorking*, 20 Ch. Div. 595.

By the Public Health Act, 1875, s. 69, local authorities may, "with the sanction of the A. G.," "take proceedings by indictment, bill in Chancery, action, or otherwise, for the purpose of protecting any watercourse within their jurisdiction from pollutions arising from sewage either within or without their district"; and the costs of such proceedings, including costs to be awarded to Deft, "shall be deemed to be expenses properly incurred by such authority in the execution of the Act."

The restrictions imposed on proceedings under Part III. of the Act (in respect of manufacturing and mining pollutions), are new. Proceedings to obtain summary relief have hitherto been taken by persons affected by the nuisance, without the intervention of a sanitary authority, without the necessity of obtaining the consent of the Local Government Board, and without any preliminary investigation as to the possibility of rendering harmless the manufacturing discharge, or consideration of the industrial interests involved in the case.

For instances of such proceedings, see *Baxendale v. M'Murray*, 2 Ch. 790; *Crossley v. Lightowler*, 2 Ch. 478; 3 Eq. 279; *Clowes v. Staffordshire, &c. Co.*, 8 Ch. 125; *Lingwood v. Stowmarket Co.*, 1 Eq. 77.

And see *Hipkins v. Birmingham Gas Light Co.*, 6 H. & N. 250; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160; *Reg. v. Stephens*, L. R. 1 Q. B. 702.

With respect to gas pollution, a penalty of £200 is imposed by the Public Health Act, 1875, s. 68, for every offence of causing water to be fouled by gas washings, or any act connected with the making or supplying of gas, with the further penalty, after twenty-four hours' notice from the local authority or person to whom the water belongs, of £20 for every day during which the offence is committed, or during the continuance of the act whereby the water is fouled.

"Circumstances and requirements of the locality" have been taken into consideration by the Courts in cases of nuisance in manufacturing districts; though not to the extent of exempting persons carrying on the trade or manufacture by which the nuisance is created from liability in respect of substantial injury to property: see this question discussed in *Salvin v. North Brancepeth Co.*, 9 Ch. 705; *St. Helen's Co. v. Tipping*, 11 H. L. C. 642.

And see *Crossley v. Lightowler, sup.*, that the fact that a stream has been fouled by others in the district (manufacturing) is no defence to a suit to restrain the fouling by one; as the riparian owner may take action against each contributor singly: *Blair v. Deakin*, 57 L. T. N.S. 522.

The fact that the local authority complaining may have contributed to the existence of the nuisance does not prevent proceedings by them under 18 & 19 V. c. 121, s. 12, in respect of a discharge of chemical matter into a public sewer, the effect of which is to produce sulphuretted hydrogen gas: *St. Helen's Co. v. St. Helen's Corporation*, 1 Ex. Div. 196.

In granting injunctions against river pollution, the practice has been to grant an immediate injunction restraining any new communications, but as to existing drains, to suspend the operation of the order for a longer or shorter period, to enable the Defts to comply with the order by altering their works.

In *Spokes v. Banbury Local Board* the operation of the order was suspended from 6th March to 1st July, 1865: *Goldsmid v. Tunbridge Wells Commrs.*, 1 Eq.

161; 1 Ch. 349 (from 24th November, 1866, to 31st January, 1868); *A. G. v. Bradford Canal*, 2 Eq. 71 (eight months); *A. G. v. Colney Hatch Asylum*, 4 Ch. 146 (five months); *A. G. v. Halifax Corporation*, 17 W. R. 1088 (8th July, 1869, to 1st June, 1870); *A. G. v. Leeds Corporation*, 5 Ch. 583 (2nd March, 1870, to end of the Parliamentary Session of 1871); *A. G. v. Birmingham Council*, 19 W. R. 561 (9th of March, 1871, to 2nd seal day in Michaelmas Term); *Pennington v. Brinsop Coal Co.*, 5 Ch. D. 769 (three months).

Liberty to apply for a further suspension of the injunction is sometimes reserved: see *A. G. v. Colney Hatch*, *sup.*

And if not reserved, further time is usually granted on the terms of paying the costs of the application.

Non-compliance with the order, after reasonable time has been given to the Defts, has been punished as contempt of Court by sequestration: *Spokes v. Banbury Local Board*, 1 Eq. 42; *Heath v. Wallington*, V.-C. W., 17 Jan. 1867, A. 210; *Goldsmid v. Tunbridge Wells Commrs.*, M. R., 1 Aug. 1867, A. 2538.

In this case the order for sequestration, after having been suspended during the progress of the Defts' works in order to prevent the nuisance, was supplemented by an order declaring that the Defts were liable to make good all damage occasioned to Plt's estate since the date of the injunction, caused by the discharge or flow from the town, &c., into the brook or stream, &c., of sewage or other offensive matter, with a direction that the amount be ascertained, and paid by Defts to Plt: *S. C.*, 2 July, 1872, A. 3293; W. N. (72) 163.

## SECTION VI.—TRADE MARKS, LABELS, AND NAMES.

### 1. *Interim Order restraining Use of Trade Mark registered under the Trade Marks Registration Act, 1875.*

USUAL undertaking as to damages—Let the Deft E. be restrained by injunction until the — day of —, or until further order, from infringing the Plt's trade marks registered in pursuance of the (Trade Marks Registration Act, 1875), or either of them, and from selling or offering for sale any tea in, or from otherwise using, wrappers, having imprinted thereon any imitation, or colourable imitation, of the Plt's trade marks, or either of them.—*Mickle v. Emery*, M. R., 18 March, 1876, B. 427.

### 2. *Using Trade Marks as to Tools or Cutlery.*

LET the Defts W. &c., respectively (and every and each of them) and the respective servants &c., of the said Defts (and of every and each of them), be restrained by injunction from stamping, cutting, or engraving, or causing or permitting to be stamped, cut, or engraved, upon any tools or other articles manufactured for, or bought, procured, or sold by them, the words, "Collins & Co., Hartford, Cast Steel, Warranted," or any other words similar to, or only colourably differing from such words, or any words or marks so contrived as to represent, or lead to the belief, that the said tools or other articles were the

manufacture of the said Collins & Co. ; And from affixing or causing to be affixed to any tools or other articles manufactured for, or bought, procured, or sold by them, or otherwise using or employing, or causing or permitting to be used or employed, any labels containing the words &c. (*as above*), or any label or labels similar to or only colourably differing from the labels made or used by the said co. as in the Plt's (bill) mentioned, or so contrived and prepared as to represent, or lead to the belief, that the tools or other articles manufactured or sold by the Defts were the manufacture of the said co. ; And also from selling, exporting, consigning, or otherwise disposing of any tools or other articles having or bearing thereon any such words, marks, or labels, as in the said (bill) mentioned, or any other words, marks, or labels, only colourably differing from the said marks and labels of the said co. ; until &c.—*Collins v. Walker*, V.-C. W., 21 July, 1857, A. 1702; *The Collins Company v. Brown*; *The same v. Cowen*, 3 K. & J. 423—428.

### 3. *Selling and making Secret Preparations and using Recipes and Trade Marks.*

LET the Deft G., her servants &c., be perpetually restrained by injunction from selling, or causing or procuring to be sold, and also from using, or causing or procuring to be used, for the purposes of her business in the (bill) mentioned, under the title or designation of any of the preparations in the (bill) respectively mentioned and described as H.'s preparations, any preparations or compositions for the hair or skin made and compounded by the Deft, or by or under her order or direction, and from selling and exposing for sale, or procuring to be sold, any preparation or composition for the hair described as or purporting to be H.'s preservative balm &c., or contained in bottles having affixed thereto respectively any of such imitation labels as in the (bill) mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the preparations made and sold by the Deft, or any of such preparations, to be the same as the said six preparations or any of them lately made and sold by the said H., and now made and sold by the Plt; and also from making or compounding any preparations for the hair or skin made, or professed to be made, according to any of the recipes or secret methods which were used for that purpose by the said H. in her lifetime; and from in any manner using the secret of compounding the said preparations or any of them, and from continuing to publish the advertisements and circulars in the (bill) respectively mentioned, or any other advertisements or circulars representing that the business lately carried on by the said H. at &c., or the manufacture of the aforesaid preparations called H.'s preparations, is now being carried on by the said Deft, or has been removed to her place of business.—Deft to pay Plt's costs of suit.—*Ansell v. Gaubert*, V.-C. W., 5 June, 1858, A. 1178; following *Morison v. Moat*, 9 Ha. 241; and see *Croft v. Day*, 7 Bea. 90.

#### 4. *Infringing Registered Trade Mark—"Chartreuse."*

THIS Court doth order and adjudge that the Deft Z., his servants and agents, be perpetually restrained by injunction from selling or offering, or advertising for sale, under the name of "Chartreuse" or under any other description of which the name "Chartreuse," forms part, any liqueur which has not been or shall not be manufactured by the Plt G. or his assignor L., at the Monastery of La Grande Chartreuse in France, and from infringing the registered trade marks of the Plt or any of them, or from enabling or otherwise encouraging other persons to improperly use the said name of "Chartreuse," or to infringe such trade marks or any of them; And Let the Deft Z. forthwith deliver up upon oath to the Plts and — all bottles, liqueur labels, and circulars in their possession or power, having thereon the name of "Chartreuse," and not being or referring to bottles or liqueur manufactured by the Plt G. or his assignor L.—Deft to pay costs of action.—*Grezier v. Ziemer*, Kay, J., 3rd June, 1890, A. 757.

#### 5. *Shipping Goods with Plts' Trade Marks.*

LET the Defts J. and N., and each of them, their servants &c., be perpetually restrained by injunction from affixing or applying, or causing to be affixed or applied, to any goods manufactured, sold, shipped, or supplied by them any mark, and especially the figure of &c., so contrived as by colourable imitation, or otherwise, to represent the goods manufactured, sold, shipped, or supplied by the Defts as being standard Spanish stripes &c., or other woollen goods manufactured or shipped by or for the Plts, and from selling, exporting, or shipping, or causing or allowing to be shipped or exported, or otherwise disposing of, any goods manufactured by or for the Defts to which any such mark has been or shall be affixed or applied.—Defts to pay Plts' cost of suit.—*Henderson v. Jorss*, V.-C. W., 21 June, 1861, A. 1814.

For interim order restraining Deft from passing into the market from St. Katharine's Docks a case containing boxes of German cigars bearing a fraudulent imitation of Plt's trade mark and label, see *Rivero v. Norris*, V.-C. G., 30 July, 1868, B. 2151; and made perpetual, *S. C.*, 21 Feb. 1870, B. 435.

For the like orders, see *Upmann v. Elkan*, V.-C. J., 15 July, 1869, B. 3299; *S. C.*, 12 Eq. 140; 7 Ch. 130; *Del Valle v. Mayer*, V.-C. J., 20 Jan. 1870, A. 121.

#### 6. *Injunction against Use of Trade Mark—Account of Profits.*

REVERSE decree—And Let the Defts, their agents &c., be perpetually restrained by injunction from applying the mark or title "Eureka" to any shirts manufactured by the Defts, or to any shirts sold by them, unless such shirts be manufactured by the Plt, and from selling or disposing of any shirts already marked with the mark or title "Eureka," unless such mark shall have been applied by the Plt, and with his sanction, and from issuing any boxes or packages containing

shirts upon or in which the mark or title "Eureka" shall be applied to shirts not of the Plt's manufacture, and from affixing or using any label, card, or other mark containing the word "Eureka" to or with any shirts not of the Plt's manufacture; And Let an account be taken of the profits made by the Defts in manufacturing and selling, and in selling shirts under the mark or title of "Eureka," since the — day of —, the date of the (filing of the Plt's bill); And Let the Defts F. &c., within (fourteen) days from the date of the chief clerk's certificate, to be made pursuant to this order, pay to the Plt the amount which, upon taking such account, shall be certified to be payable by the Defts to the Plt; and within (seven) days after service of this order repay to the Plt the sum of —, being the amount of the taxed costs pursuant to the said decree, paid by the Plt to the Defts.—Defts to pay Plt's costs of suit (including the costs of the interlocutory orders) other than his costs occasioned by the appeal.—Liberty to apply.—*Ford v. Foster*, L. J., 11 June, 1872, A. 1478; 7 Ch. 611.

For injunction restraining Deft from continuing to use, and from exhibiting or using, the name of "The Pall Mall Guinea Coal Co.," in Pall Mall, see *Lee v. Haley*, 5 Ch. 155.

For injunction to restrain the use of the words "Carriage Bazaar," and "opposite Madame Tussaud's," for the purpose of describing Deft's shop in Baker Street, on the ground that the title "Carriage Bazaar" had been sufficiently appropriated by Plts in reference to their business in a part of the Baker Street Bazaar, see *Boulnois v. Peake*, V.-C. G., 19 March, 1868, A. 729; W. N. (68) 95.

For injunction against using the word "Glenfield" in or upon any labels affixed to packets of starch manufactured by or for Deft, and from in any other way representing, &c., that starch manufactured by or for him is Glenfield starch, or starch manufactured by Plts, see *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 523.

Against the use of the words "United Service" in connection with soap, *Field v. Lewis*, V.-C. W., 3 Aug. 1867, A. 2235.

For injunctions against using trade marks or names as to "Harvey's Sauce," see *Lazenby v. L.*, M. R., 17 March, 1858, B. 674; *Lazenby v. White*, M. R., 18 Nov. 1870, B. 2901.

Against use of the word "Original," as applied to Reading Sauce, *Cocks v. Chandler*, 11 Eq. 446; *James v. J.*, M. R., 23 Feb. 1872, A. 550; 13 Eq. 421.

And against using labels containing any inscription intending or appearing to designate pins manufactured by Defts as being made by T. & Co., or by Plts, *Edelsten v. Vick*, 11 Ha. 86.

For decree for account of the gains and profits made by Deft's sale of wire having tallies or labels attached thereto with Plt's trade mark, or any mark in imitation of, or only colourably differing from that of Plt, stamped or impressed thereon; and for an injunction and delivery up of such tallies or labels to be cancelled, see *Edelsten v. E.*, 1 D. J. & S. 185, 189; affirmed on appeal, *Ib.* 204; and as to the form of the account, see *Lever v. Goodwin*, C. A., 36 Ch. Div. 1.

For an order (by consent) that the Defts should deliver over to the Plts, upon oath, all labels and cards having the word "Apollinaris" written upon them, and for a perpetual injunction to restrain the Defts, &c., from selling or advertising, or offering for sale, any mineral or other waters not being the genuine Apollinaris Water under the name of "Apollinaris Water," or under any other name of which the word "Apollinaris" so forms part as to be calculated to deceive the public, or from in any manner infringing or interfering with the Plts' right to the exclusive sale in Great Britain of Apollinaris Water, and to the exclusive use of the word "Apollinaris" for describing the mineral water sold by them, see *Apollinaris Co. v. Edwards*, V.-C. B., 13 July, 1876, A. 1300.

For interim order restraining the Defts from selling, &c., any bottles of

brandy, not being brandy bottled by the Plts at their establishment at C., &c., as the Plts' case brandy; and appointing two persons on behalf of Plts to inspect the Defts' premises, and any such cases and bottles, and to take samples of the contents, see *Hennessy v. Rohmann & Co.*, V.-C. M., 25 Jan. 1877, A. 152; 25 W. R. 14.

*7. Imitation of Wrapper used by Plts—Account.*

LET the Defts, their agents and servants, be restrained from selling, offering for sale, or disposing of any soap not being manufactured for or by the Plts in the wrapper, and of the form of any one of the three exhibits admitted in this action to have been issued by the Defts, and marked &c., or in any wrapper, or in any form calculated or intended to pass off, or to enable others to pass off, such soap as or for the goods of the Plts; And Let the following &c.:—An account of the profits made by the Defts in selling or disposing of soap made by or for the Defts in any wrapper such as that contained in the said exhibits marked &c., and in the form of those exhibits.—*Lever v. Goodwin*, Chitty, J., 8th Dec. 1886, B. 1475; affd. C. A. 25 May, 1887, B. 688; 36 Ch. Div. 1; following *Edelsten v. E.*, 1 D. J. & S. 189; affd. on appeal, *ib.* 204.

*8. Injunction against representing Defts as being Successors in Business of the Plts, and from making up their Goods so as to appear like those of the Plts.*

UPON the appeal &c., Let the Defts, the X. Co., Limited, their servants, workmen, agents, travellers, and representatives respectively, be perpetually restrained by injunction from selling, exporting, or shipping, or causing, or procuring, or allowing to be sold, shipped, or exported, and from in any manner representing, or causing or procuring to be represented any goods manufactured or sold by the Deft Co. as the manufacture or goods of the late A. B., or of the Plts, his trustees and successors in business, and also from in any manner representing, or causing or procuring to be represented, or doing anything which shall lead to the belief that the Deft Co. have been or are carrying on the business of the late A. B., or are the successors in business of the late A. B., and also from affixing, or permitting or causing to be affixed, to any goods or articles, manufactured or bought, or procured or sold, or shipped or exported, by the Deft Co., or otherwise using or employing, or permitting to be used or employed, any labels, wrappers, or marks similar to or only colourably differing from the labels, wrappers, or marks used by the late A. B. and the Plts, his trustees and successors in business, or so contrived and prepared as to represent or lead to the belief that the goods or articles manufactured or sold, or shipped or exported, by the Deft Co., are the goods or manufacture of the late A. B., or of the Plts, his trustees and successors in business, and also from employing, using, or circulating, or causing to be employed, used, or circulated, any business pamphlets, notices, or advertisements similar to or only colourably differing from the business pamphlets, notices, or advertisements of the late A. B. or of the Plts

as his trustees and successors in business, or which shall in any manner represent or lead to the belief that the Deft Co. have been or are carrying on the business of the late A. B., or that they are his successors in business.—*Thorley's Cattle Food Co. v. Massam*; *Massam v. Thorley's Cattle Food Co.*, C. A., 27 April, 1880, B. 991; S. C., 14 Ch. Div. 781.

### 9. *Use of Trading Name restrained.*

LET the Defts Robert Joseph James and Southee, their servants &c., be restrained by injunction from using the names of Robert James singly instead of the names of Robert Joseph James or R. J. James as part of, or in connection with, any labels affixed upon any pots of ointment in the (bill) mentioned, sold by the Defts or either of them or on behalf of them or either of them, and also from stating or inserting in their advertisements or circulars any words or expression asserting or suggesting that the ointment manufactured and sold by the Plts is spurious and not genuine.—No costs on either side.—*James v. J.*, M. R., 23 Feb. 1872, A. 550; S. C., 13 Eq. 421.

For an interlocutory injunction to restrain Defts from issuing or publishing any advertisements, &c., in any way stating or representing, or tending to represent, that the Defts, or any of them, or their co., are the successors or representatives of the Plts' co. (the Christy Minstrels), or are connected with the Plts' co. otherwise than as performers employed thereby, or that Plts, or either of them, ever have or has belonged to or had any connection with the Defts' co., or have ceased to belong thereto, or to have any connection therewith, see *Montague v. Moore*, V.-C. W., 1 Mar. 1865, B. 249.

For order restraining Deft from representing his business as that of Plt, and from using any name, inscription, or device calculated or likely to deceive and mislead the public into the belief that Deft's shop is that of Plt, or to secure for Deft custom intended for Plt, see *Cave v. Myers*, V.-C. G., 3 Dec. 1868, A. 2832.

For injunction against publishing a newspaper under the name or style of "Penny Bell's Life, or Sporting News," or any name or style in which "Bell's Life" shall form part, or in any way occur, see *Clement v. Maddick*, 1 Giff. 101.

For injunction restraining publication of the "Real John Bull" or the "Old Real John Bull," as and for a continuation of Plt's newspaper called the "Real John Bull," see *Edmonds v. Benbow*, V.-C. of E., 20 Feb. 1821, A. 572.

For injunction restraining on terms publication of the "London Daily Journal," at suit of the owner of "London Journal," who had purchased that paper from the Deft with a restrictive covenant, see *Ingram v. Stiff*, 5 Jur. N.S. 947.

Restraining publication of the "Wonderful Magazine, New Series Improved," as a continuation of Plt's "Wonderful Magazine," *Hogg v. Kirby*, 8 Ves. 215.

For injunction against publishing, &c., a book by the name of "The Children's Birthday Scripture Text Book," or any other title containing as part thereof the words "Birthday Text," or any book or publication so printed, bound, arranged, or contrived as by colourable imitation or otherwise to represent or lead the public to believe that such book, &c., was or is the same as the book called the "Birthday Scripture Text Book," published and sold by the Plts, see *Mack v. Petter*, M. R., 29 July, 1872, B. 2325; 14 Eq. 431.

For an interlocutory injunction restraining Deft from carrying on, &c. the "Temple Bar" magazine; but the order to be without prejudice to the publication of the said magazine until the hearing of the cause, so as the

name of "Bentley" does not appear either in the title-page or in any other part of the said publication, or in any advertisement of the said publication, and without prejudice to the right (if any) of the Plt to damages or profits in respect of any publication of the work, see *Ainsworth v. Bentley*, V.-C. W., 16 Mar. 1866, A. 519; 14 W. R. 630.

For injunction restraining the use of the word "*frigidomo*" as trade mark for any baize or other material intended to be used for horticultural or similar purposes, and not manufactured by or for the Plts, or selected by them, see *Re Edgington, E. v. E.*, 61 L. T. N.S. 323.

For order restraining continuance of threats of legal proceedings under the Patents, Designs and Trade Marks Act, 1883 (46 & 47 V. c. 57), s. 32, see *Driffeld Linsed Cake Co. v. Waterloo Mills Cake Co.*, V.-C. B., 31 Ch. D. 638; 34 W. R. 360; and *v. inf.* p. 549.

For injunction restraining the use of the name "Radstock Colliery Proprietors," &c., see *Braham v. Beachim*, Fry, J., 12 Feb. 1878, A. 260; 7 Ch. D. 848.

### 10. *Use of Title of Newspaper restrained.*

UPON the usual undertaking as to damages—"Let the Deft H., his agents, servants, and workmen, be restrained until judgment in this action, or until further order, from further issuing, printing, publishing, selling, advertising for sale, or otherwise disposing of or causing or permitting to be further issued, printed, published, sold, advertised for sale, or otherwise disposed of, a paper or publication recently issued, printed, and published, and now being issued, printed, and published and sold by the Deft under the name or title of *The Times*, and from printing or publishing, or causing or permitting to be printed or published, or continuing to print or publish, or to cause or permit to be printed or published, any newspaper or publication in the nature or form of a newspaper of whatever date, with or under the name or title of *The Times*, and from using or causing or permitting to be used the said name or title of *The Times*, with or without any merely colourable variation thereof, by way of name or title, to any newspaper or such other publication as aforesaid, and from doing any other act or thing in invasion or infringement of the Plt's right and interest in the said name or title of *The Times*.—Deft to pay Plt's costs of appeal.—*Walter v. Head*, C. A., 29 July, 1881, B. 1531.

### 11. *Issue of Policies under Word forming part of Plts' Title.*

UPON appeal from the order dated the 18th July, 1884, by counsel for the Defts, and upon hearing counsel for the Plts, and upon reading &c., Let the said order dated the 18th July, 1884, be discharged; And Let the Defts be perpetually restrained by injunction from issuing policies in their present name or any other name in which the words "The Accident" come first; And the Defts by their counsel undertaking to call the requisite meetings for the purpose of passing a resolution for altering their present name into "The Disease, Accident and General Insurance Corporation, Limited," or to some other name in which the words "The Accident" shall not be the two first words; Let the Defts pay Plts' costs of appeal.—Stay all proceedings.—*The Accident Ins. Co.*,



*Lim. v. The Accident, Disease and General Ins. Corp., Lim., C. A.,*  
9 August, 1884, A. 1337.

## NOTES.

## PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883.

By the Patents, Designs and Trade Marks Registration Act, 1883 (46 & 47 Vict. c. 57), the Trade Marks Registration Acts of 1875, 1876 and 1877, are by sect. 113 repealed, with the usual saving clause; by Part IV. of the Act, sects. 62—71, provision is made for the registration of trade marks (as to which, *v. inf.* Chap. LIII., "PATENTS"), and by sect. 77, "a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark unless, in the case of a trade mark capable of being registered under the Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or, in the case of any other trade mark in use before the 13th of August, 1875, registration thereof under this part of this Act, or of an enactment repealed by this Act, has been refused," and the comptroller is empowered to grant a certificate that such registration has been refused.

The effect of this section is, that in the case of a trade mark which is capable of registration, and which has not been registered, no action for an injunction or damages for infringement will lie: *Goodfellow v. Prince*, 35 Ch. Div. 9; but the Act in no way interferes with the exercise by a Court of equity of its established jurisdiction in respect of an actionable infringement or unfair use of a trade mark or name: see *Mitchell v. Henry*, 15 Ch. Div. 181; and see *Jay v. Ladler*, 40 Ch. D. 649; *Hart v. Colley*, 44 Ch. D. 193.

## INFRINGEMENT OF TRADE MARK—RIGHT TO INJUNCTION.

The principle on which Courts of Equity have interfered to protect the use of a trade mark is, that when one man has established a trade in an article, for which he has been the first to appropriate some particular—it may be fanciful or geographical—name (*M'Andrew v. Bassett*, 4 D. J. & S. 380), or some particular mark or label under which the article has acquired reputation, another man will not be allowed to sell a similar article under the same or a closely resembling title, so as to deceive the public into the belief that they are buying from the man who has first acquired reputation for his goods under the particular title, *i.e.*, one man will not be allowed to pass off his goods as those of another: see *Perry v. Truefitt*, 6 Bea. 73; *Millington v. Fox*, 3 My. & Cr. 338; *Singer Manufacturing Co. v. Loog*, 18 Ch. Div. 395; 8 App. Cas. 15, 29; *Turton v. T.*, 42 Ch. Div. 128. But a name which has acquired reputation in the market may be used by a subsequent manufacturer for the purpose of showing that his goods are manufactured on the same principle, provided he announces the goods as of his own manufacture, and does not lead the public to believe that they have been made by the original inventor of the name, or his successors in trade: *Singer Co. v. Loog*, *sup.*; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748; *Singer Co. v. Wilson*, 2 Ch. Div. 434; and see *Edelsten v. Vick*, 11 Ha. 71; *Hirst v. Denham*, 14 Eq. 542; *Young v. Macrae*, 9 Jur. N.S. 322; *Liebig, &c. Co. v. Hanbury*, 17 L. T. N.S. 298; and a word which is merely descriptive of the articles sold may be used by any trader, provided he does not lead the public to think that the articles so described are the manufacture of another trader: *Re Leonard and Ellis' T. M.*, 26 Ch. Div. 288.

In order to obtain protection, there must have been exclusive public user of the trade mark or name, though not necessarily for any long period: see Sebastian on Trade Marks, 94; Kerr, 395; but now, by the Patents, &c. Act, 1883, s. 17, application for registration of a trade mark is to be deemed equivalent to public use of the trade mark, and the date of the application is, as from the 1st of January, 1876, to be deemed to have been the date of registration; and by sect. 76 of the Act of 1883 (in continuation of sect. 3 of the Act of 1875), the registration of a person as proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of the trade mark, and shall, after five years from registration, be conclusive evidence of his right to such exclusive use, subject to the provisions of the Act. The

effect of these enactments is not to give an exclusive right of user by five years' registration, but to relieve the proprietor in an action for infringement from adducing evidence of exclusive user: *Edwards v. Dennis*, 30 Ch. Div. 454; *Re Wragg's T. M.*, 29 Ch. D. 551; *Re Palmer's Application*, 21 Ch. Div. 47; *Re Hudson's T. M.*, 32 Ch. Div. 311.

The exclusive right (when established) to the use of a particular name or mark in connection with a particular class of goods will, as property, be protected by injunction: *Hall v. Barrows*, 4 D. J. & S. 150; *Ainsworth v. Walmesley*, 1 Eq. 508; *Anglo-Swiss Milk Co. v. Metcalf*, 31 Ch. D. 454; and the injury to the owner's trade by the wilful and fraudulent adoption of his name or mark, or by such a description by the Deft of his goods as to induce the belief that they are goods manufactured by the Plt, will also be compensated by relief in damages or an account of profits: *Ford v. Foster*, 7 Ch. 611; *Edelsten v. E.*, 1 D. J. & S. 185; *Lee v. Haley*, 5 Ch. 155; *Seizo v. Provezende*, 1 Ch. 192; *Burgess v. B.*, 3 D. M. & G. 896; and for a general discussion of the principles on which relief is granted in these cases, see *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434; 3 App. Cas. 376; *Goodfellow v. Prince*, 35 Ch. Div. 9.

It is material (especially on motion for interlocutory injunction: *Browne v. Freeman*, 12 W. R. 305), but not essential (*Johnston v. Orr-Ewing*, 7 App. Ca. 219), that the public has been actually deceived; it is sufficient if it be shown that the particular name or mark has been adopted with an intention to deceive, or that the use of it is calculated to deceive uncautious purchasers: *Johnston v. Orr-Ewing*, *sup.*; *Singer Co. v. Loog*, 18 Ch. D. 395, 413; *S. C.*, 3 App. Ca. 15; *Cope v. Evans*, 18 Eq. 138; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Hirst v. Denham*, 14 Eq. 542; *Woollam v. Ratcliff*, 1 H. & M. 259; *Singer Manufacturing Co. v. Wilson*, *sup.*; *Bradbury v. Beeton*, 18 W. R. 33; as the principle is that a man is responsible for the reasonable consequences of his action: *Hendriks v. Montague*, 17 Ch. Div. 638; but if a substantial and material part of another's trade mark has been appropriated, the appropriator is bound to take such precautions as will avoid the reasonable probability of deception, and the onus lies on him to show that purchasers will not be deceived: *Orr-Ewing v. Johnston*, 13 Ch. Div. 434; *S. C.*, 3 App. Ca. 15.

The fact that the name used is the name of the place at which the goods are manufactured or sold will not avail as a defence if the user has been adopted under circumstances calculated to deceive: *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. D. 35; and original honesty of intention does not protect continued user if such user is found to deceive or is calculated to deceive: *Mitchell v. Henry*, 15 Ch. Div. 181; *Orr-Ewing v. Johnston*, 13 Ch. Div. 434; *S. C.*, 7 App. Ca. 219; *Singer Co. v. Wilson*, 3 App. Ca. 376.

And the use, for the sale of a man's goods, of bottles, &c., indelibly stamped with the name of a manufacturer of similar goods, will be restrained, even though the man so using such bottles places on them his own label: *Rose v. Loftus*, 47 L. J. Ch. 576; and see *Jay v. Ladler*, 40 Ch. D. 649, that an injunction will be granted to restrain a tradesman from advertising his goods as those of another, though it has not been proved that any one has been deceived.

And although there is no actual assumption by the Deft of any mark or name, or individual thing in which the Plt has a monopoly, yet if he uses such a combination as to constitute a "fraudulent dress" calculated to deceive purchasers (*ex. gr.*, by selling soap in packets closely resembling those in which the soap of the Plt is sold), an injunction will go to prevent him from passing off his goods as those of the Plt: *Lever v. Goodwin*, 36 Ch. Div. 1.

But in *Farina v. Silverlock*, 6 D. M. & G. 214, the possible use for a legitimate purpose of spurious trade labels manufactured by Deft was held ground for dissolving the injunction, with liberty to Plt to bring an action.

And see *Delondre v. Shaw*, 2 Sim. 237, that fraud "will not be intended where none is alleged."

The fact that one person has been deceived is not conclusive as to misrepresentation: *Coles v. Civil Service Assoc.*, 13 Ch. D. 512.

Where there has been delay by Plt, clearer proof of fraudulent intent and of actual injury will be required: *Rodgers v. R.*, 22 W. R. 887; but see *Fullwood v. F.*, 9 Ch. D. 176, that the right, being a legal right, capable of

being enforced by action of deceit, mere delay short of the statutory period will not affect the right to an injunction.

And in order to establish the right to relief, it is not necessary to show that the Deft has made a false representation to the immediate purchaser (*ex. gr.*, retail dealers to whom the goods have been supplied); it is sufficient that he has enabled such purchaser to deceive the ultimate customer: *Singer Co. v. Loog*, 18 Ch. Div. 395, 413; *S. C.*, 8 App. Ca. 15; *Lever v. Goodwin*, 36 Ch. Div. 1; *Orr-Ewing v. Johnston*, 13 Ch. Div. 434, 453; *S. C.*, 7 App. Ca. 219; *Condy v. Taylor*, 56 L. T. N.S. 891; *Edelsten v. E.*, 1 D. J. & S. 185; *Sykes v. S.*, 3 B. & C. 541; and accordingly he must account for profits made by his sale of the articles calculated to deceive, irrespectively of whether the actual purchasers were deceived: *Lever v. Goodwin*, *sup.*

Where a trade mark or name had been used in ignorance of the right of the first appropriator, an injunction was granted, but not an account of profits or compensation in damages, except in respect of user by Deft after knowledge of Plt's prior right: *Edelsten v. E.*, 1 D. J. & S. 185; *Moet v. Couston*, 33 Beav. 578 (reversing in this respect *Cartier v. Carhiale*, 31 Beav. 292).

Though a trade mark or name has been used in ignorance of the right of the first appropriator, an injunction may be granted: *Millington v. Fox*, 3 My. & C. 358; *Welch v. Knott*, 4 K. & J. 747; it not being necessary to aver or prove fraud in order to obtain protection for a trade mark: *Singer, &c. Co. v. Wilson*, 3 App. Ca. 376, 391; and however honest or inadvertent the original use of another's mark may have been, the continued use after complaint made is sufficient proof of fraudulent intention: *Orr-Ewing & Co. v. Johnston*, 13 Ch. Div. 434; 7 App. Ca. 219.

Past user, discontinued long before action, of infringing machines found not to work well, is not evidence of intention to infringe again: *Proctor v. Bayly*, 42 Ch. Div. 390; distinguishing *Millington v. Fox*, 3 My. & Cr. 338; *Geary v. Newton*, 1 D. G. & S. 9.

Mere length of adverse user will not make a mark *publici juris*, when such user was originally fraudulent and is still calculated to deceive: *Re Heaton's T. M.*, 27 Ch. D. 570; and as to inadmissibility to registration of marks calculated to deceive, *v. inf.* Chap. LII., "PATENTS."

By the Act of 1883, s. 65, a trade mark must be registered for particular goods or classes of goods, and the registration of a mark for one class will not entitle the proprietor to restrain the use of the mark in connection with goods in a different class: *Hart v. Colley*, 44 Ch. D. 193; where, however, an injunction was granted to restrain the Deft from passing off his goods as those of the Plt.

Although similarity of colour will not be taken into consideration in deciding questions of piracy of trade marks (*Nuttall v. Vining*, 28 W. R. 300), the fact that colour was not protected by the Act of 1875, was important upon the question of registration: *Re Worthington's T. M.*, 14 Ch. D. 8, and *v. inf.* Chap. LII., "PATENTS"; and the understanding of the trade and evidence of experts must be taken into consideration upon questions of infringement: see *Mitchell v. Henry*, 15 Ch. Div. 181.

#### MISREPRESENTATIONS BY PLAINTIFF.

Misrepresentations on his label have been held to disentitle a Plt to relief against infringers: see, on this question, *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523; *Flavel v. Harrison*, 10 Hare, 467; *Edelsten v. Vick*, 11 Hare, 78; *Pidding v. Howe*, 8 Sim. 477; *Perry v. Truefitt*, 6 Beav. 66; *Morgan v. M'Adam*, 36 L. J. Ch. 228; *Lamplough v. Balmer*, W. N. (67) 293 (unauthorized use of words "Patent" or "Royal Letters Patent"); *Cheavin v. Walker*, 5 Ch. D. 850; *Newman v. Pinto*, 57 L. T. N.S. 31.

But the misrepresentation may be condoned by long usage and reputation in the trade; *e.g.*, the use of the word "patent" to describe articles known under that title by trade usage, or articles for which the patent has expired: *Marshall v. Ross*, 8 Eq. 651.

And see this question discussed in *Ford v. Foster*, 7 Ch. 611, where that which is merely a collateral misrepresentation is distinguished from false representation in the mark or fraud in the trade itself, which, if systematic

and intentional, would disentitle Plt to relief: *Lee v. Haley*, 5 Ch. 155; *Morgan v. M'Adam*, *sup.*

Where the Plt failed to establish any title to relief, and the substances used by both parties were intended to be used to deceive the public, no costs were given to the Deft: *Estcourt v. Estcourt Hop Co.*, 10 Ch. 276; *Merchant Banking Co. v. Merchants' Joint Stock Co.*, 9 Ch. D. 560.

And now, by the Patents, &c. Act, 1883, s. 73 (as amended by Patents, &c. Act, 1888, s. 15), it shall not be lawful to register as part of, or in combination with, a trade mark any words the use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of justice, or any scandalous designs.

#### PARTIES ENTITLED TO SUE.

A part-owner of trade marks can sue alone for injunction, erasure, and his share of profits: *Dent v. Turpin*, 2 J. & H. 139; and an assignee can sue before the assignment has been registered: *Ihlee v. Henshaw*, 31 Ch. D. 323.

A foreign manufacturer may obtain an injunction for the infringement of his trade marks in this country, and an account: *Collins Co. v. Brown*, 3 K. & J. 423; *secus*, persons who have merely obtained an exclusive right to sell the goods in England: *Richards v. Butcher*, 62 L. T. N.S. 867.

But the use of a trade mark affixed to goods imported, and not manufactured, by Plt, who is not shown to have an exclusive contract for their supply, will not be restrained by interlocutory injunction: *Hirsch v. Jonas*, 45 L. J. Ch. 364.

A trade name does not exist "in gross," so as to give the purchasers from the trustee of a bankrupt of his interest in a sauce, the secret of which they did not acquire, any right to restrain the original inventor from manufacturing the sauce, of which he alone knows the recipe, under the original title: *Cotton v. Gillard*, 44 L. J. Ch. 90.

And where the secret of a recipe has been acquired by a person without unfair means, he will not be restrained from selling the compound under the original title, so long as he does not lead the public to believe that his preparation is the only genuine one: *James v. J.*, 13 Eq. 421; or prepared by the successors in business of the original discoverer: *Massam v. Thorley's Cattle Food Co.*, 6 Ch. D. 574; 14 Ch. D. 748; but after the death of his employer, from whom he has learnt the secret, he has no exclusive right to the use of the name: *Hovenden v. Lloyd*, 18 W. R. 1132.

Upon the question whether, on the sale of a business and goodwill, the trade marks will pass, see *Shipwright v. Clements*, 19 W. R. 599; *Hall v. Barrous*, 4 D. J. & S. 150; *Bury v. Bedford*, 4 D. J. & S. 352.

The mortgagee of a business, and the right to use the trade name, who has never used the name cannot restrain purchasers of the business from the mortgagor from using the name: *Beazley v. Soares*, 22 Ch. D. 660.

An action for infringement of trade mark, account, and damages may be continued by the exors of the proprietor after his death: *Oakey and Sons v. Dalton*, 35 Ch. D. 700.

And by the Patents, &c. Act, 1883, s. 65, a trade mark must be registered for particular goods or classes of goods, and (by sect. 70) when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with that goodwill.

Upon the dissolution and sale of a partnership business, the purchaser may be restrained from using the outgoing partner's name as part of the style of the firm, unless the outgoing partner is dead or a bankrupt: *Scott v. Rowland*, 20 W. R. 508; *Banks v. Gibson*, 34 Beav. 566.

And as to the right of the owner of a business, after sale or assignment of the goodwill, to carry on the similar business, provided that he does not represent that he is carrying on or continuing the identical business sold, or from which he has retired, *v. inf.* Sect. X., "PARTNERS."

#### ACCOUNT—DAMAGES.

With respect to the account and damages, special damage must be proved; it will not be held that goods sold by the Deft would, in the absence of such

user, have been sold by Plt: *Leather Cloth Co. v. Hirschfeld*, 1 Eq. 299; and the inquiry is "What damage, if any," &c.; not, as in patent cases, "What damage," &c.: see *Davenport v. Rylands*, 1 Eq. 308; followed in *Fritz v. Hobson*, 14 Ch. D. 542.

Discovery as to sales by Deft, and production of his books, will not be granted until the Plt has made his election between damages and an account of profits: *Fennessy v. Clark*, 37 Ch. Div. 184, and *v. sup.* Chap. VII., p. 78.

## COSTS.

The duty of an innocent consignee of goods bearing a spurious label, and the steps he should take to avoid liability to costs in a suit by the injured owner, are discussed in *Upmann v. Elkan*, 12 Eq. 140; 7 Ch. 130. And see *Burgess v. Hills*, 26 Beav. 244; *Hunt v. Manière*, 34 Beav. 157.

Such a consignee, being a wrongdoer, must pay the costs of the action, though he disclaims all intention of selling, and offers all the relief asked immediately on being served with the writ: *Upmann v. Forester*, 24 Ch. D. 231; *Fennessy v. Day*, 55 L. T. N.S. 161; and see *Adair v. Young*, 12 Ch. Div. 13; *Neilson v. Betts*, L. R. 5 H. L. 1; *Cooper v. Whittingham*, 15 Ch. D. 501.

Innocent consignees of goods bearing a spurious label or trade mark are entitled to a lien on the goods for their charges in priority to any claim of Plts (the owners of the trade mark) for their costs: *Moet v. Pickering*, 8 Ch. Div. 372 (reversing 6 Ch. D. 770); and see *Ponsardin v. Peto*, 33 Beav. 642.

## TRADE NAME.

As to the distinction between trade mark and trade name, see *Goodfellow v. Prince*, 35 Ch. Div. 9; *Borthwick v. Evening Post*, 37 Ch. Div. 449; and that the owner of a publication claiming an injunction to restrain the issue of another publication with a similar name, must show probability not only of the public being deceived, but of injury to himself from such deception, see *Borthwick v. Evening Post*, *sup.*; and see *Walter v. Emmot*, 54 L. J. Ch. 1059.

The right of a man to use his own name in trade cannot be interfered with merely because the public may probably be misled by reason of its similarity to, or identity with, the name of another trader engaged in the same business: *Turton v. T.*, 42 Ch. Div. 128; *Tussaud v. T.*, 44 Ch. D. 678; but a man will not be permitted to lend his name to a new co. for the purpose of carrying on a business similar to an old-established business carried on under the same name: *Tussaud v. T.*, *sup.*; and whether a man can for valuable consideration, or otherwise, confer on others the right to use his name for a business which he has never carried on, and in which he has no interest, *quære*: *Ib.*; and see *Burgess v. B.*, 3 D. M. & G. 896.

That there cannot be copyright in a name, *v. inf.* p. 577.

As to the right of a tradesman to use a name, although he is aware that a neighbouring tradesman intends to use that name, see *Coles v. Civil Service Assoc.*, 13 Ch. D. 512; and that the assumption of the patronymic name of another family will not be restrained unless it has been exclusively used in connection with a particular business, see *Du Boulay v. D.*, L. R. 2 P. C. 430.

An injunction cannot be granted where there is no attempt to interfere with trade, and no legal injury done, but simply inconvenience caused, *ex. gr.*, to restrain the use of a cypher address for telegrams which had been long used by Plts: *Street v. Union Bank of Spain*, 30 Ch. D. 156, citing *Day v. Brownrigg*, 10 Ch. Div. 294.

Recent cases in which an injunction against the use of particular names has been granted are:—*M'Andrew v. Bassett*, 4 D. J. & S. 380 (*Anatolia Liquorice*); *Seixo v. Provezende*, 1 Ch. 192 (*Crown Seixo Port*); *Braham v. Bustard*, 1 H. & M. 447 (*Excelsior Soap*); *Cocks v. Chandler*, 11 Eq. 446 ("Original" Reading Sauce); *Wotherspoon v. Currie*, L. R. 5 H. L. 508 (*Glenfield Starch*); *Lee v. Haley*, 5 Ch. 155 (*Pall Mall Guinea Coal Co.*); *Radde v. Norman*, 14 Eq. 348 ("Leopoldshall"); *Hirst v. Denham*, 14 Eq. 542 (*Turin, Sefton, &c., Cloths*); *Croft v. Day*, 7 Beav. 84 (*Day & Martin's Blacking*); *Stephens v. Peel*, V.-C. W., 21 Mar. 1867, L. 621 ("Stephens' Writing Fluid" changed by Deft into "Steelpen's Writing Fluid"); *Kinahan*

*v. Bolton*, 15 Ir. Ch. 75 (LL Whiskey); *Schweizer v. Atkins*, 16 W. R. 1080 (Cocoatina); *Apollinaris Co. v. Norrish*, 33 L. T. N.S. 242 (London Apollinaris Water); *Sigert v. Findlater*, 7 Ch. D. 801 (Angostura Bitters); *Braham v. Beacham*, 7 Ch. D. 848 (the Badstock Colliery Proprietors); *Grillon v. Guenin*, W. N. (77) 14 (Tamar Indien Lozenges); *Moet v. Clybourn*, M. R., 19 Jan. 1878, B. 86 (selling champagne in bottles with corks or labels bearing the brand or letters M. & C.); *Reinhardt v. Spalding*, 49 L. J. Ch. 57; 28 W. R. 300 (Family Salve); *Tussaud v. Tussaud*, 44 Ch. D. 678 (Louis Tussaud & Co.); *Borthwick v. Evening Post*, 37 Ch. Div. 447 ("Evening Post" Newspaper); *Massam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748 ("Thorley's Food for Cattle"); *Thompson v. Montgomery*, 41 Ch. D. 35 ("Stone" Ale); *Sanitas Co. v. Condy*, 56 L. T. N.S. 621 ("Sanitas," "Condi-Sanitas"); *Edgington v. E.*, 61 L. T. N.S. 323 ("Frigidomo"); *Blair v. Stock*, 51 L. T. N.S. 12 ("Strathmore" Whiskey).

Refused:—*Raggett v. Findlater*, 17 Eq. 29 (Nourishing Stout); *Liebig, &c. Co. v. Hانبury*, 17 L. T. N.S. 298 (Liebig's Extract of Meat); *Batty v. Hill*, 1 H. & M. 264 (Prize Medal Pickles); *Cope v. Evans*, 18 Eq. 138 (Prairie Cigar Brand); *Ainsworth v. Walmsley*, 1 Eq. 518; *Blackwell v. Crabb*, 36 L. J. Ch. 504 (Picalillie); *Bradbury v. Beeton*, 18 W. R. 33 ("Punch-and-Judy"); *Singer Co. v. Wilson*, 2 Ch. D. 434; 3 App. Ca. 376 (Singer Sewing Machines); *Hirsch v. Jonas*, 45 L. J. Ch. 364; *Lea v. Millar*, M. R., 26 July, 1876, B. 1507 (Worcestershire Sauce); *Linoleum Co. v. Nairn*, 7 Ch. D. 834 (Linoleum); *Kelly v. Byles*, 13 Ch. D. 682 (Post Office Bradford Directory); *Coles v. Civil Service Supply*, 19 Ch. D. 512 ("Civil Service Boot Supply"); *Singer Co. v. Loog*, 18 Ch. Div. 395; 8 App. Ca. 15 ("Singer" Sewing Machine); *Street v. Union Bank of Spain*, 30 Ch. D. 156 (Telegraphic cypher address, "Street, London"); *Symington v. Footman, Pretty & Co.*, 56 L. T. N.S. 696 ("Guaranteed Corset"); *Re Leonard and Ellis*, 26 Ch. Div. 288 ("Valvoline").

And for instances of names and words which have been held incapable of registration as being "calculated to deceive," *v. inf.* Chap. LIII., "PATENTS."

A former partner or assistant will be restrained from using the name of the firm with which he has been connected so as to mislead the public into the belief that his shop is the shop of his former employers or partners: *Hookham v. Pottage*, 8 Ch. 91; *Glenny v. Smith*, 2 Dr. & Sm. 476; *Condy v. Mitchell*, 26 W. R. 269; *Dence v. Mason*, 41 L. T. N.S. 573; but so long as he does not attempt to mislead the public into the belief that articles sold by him are in reality manufactured by the Plt., a former partner will not, after dissolution, be restrained from selling articles under the name and labels used by the firm before dissolution: *Condy v. Mitchell*, 26 W. R. 269; *Dence v. Mason*, W. N. (78) 42.

The use of a particular name as applied to a house or property will not be protected: *Day v. Brownrigg*, 10 Ch. Div. 294.

The assumption of the patronymic name of another family will not be restrained unless it has been exclusively used in connection with a particular business: *Du Boulay v. D.*, L. R. 2 P. C. 430.

By the Companies Act, 1862, s. 20, no co. shall be registered under a name identical with that by which a subsisting co. is already registered, or so nearly resembling the same as to be calculated to deceive; and an application for registration under a name so similar to that of another co. (though unregistered) as to be calculated to deceive will be restrained: *Hendriks (Universal Life Assee. Soc.) v. Montagu (Universee Life Assee. Association, Limited)*, 17 Ch. Div. 638.

Injunctions against the use by a co. of a name in colourable imitation of, or so much of a name as was identical with that of Plt co. have been—

Granted in—*The Accident Insur. Co. (Limited) v. The Accident, Disease and General Insur. Corp. (Limited)*, 54 L. J. Ch. 104; 51 L. T. N.S. 597; and see *Guardian Fire and Life Assee. Co. v. Guardian and General Insur. Co. (Limited)*, 50 L. J. Ch. 253.

Refused in—*Colonial Life Assee. Co. v. Home and Colonial Assee. Co.*, 33 Beav. 548; *London Assee. v. London and Westminster Assee. Corp. (Limited)*, 32 L. J. Ch. 664; *The Merchant Banking Co. of London v. The Merchants' Joint Stock Bank*, 9 Ch. D. 560; *Australian Mortgage Land and Finance Co. v. Australian and New Zealand Mortgage Co.*, W. N. (80) 6.

The addition of the words "co., limited," is not sufficient to entitle a Deft to appropriate a trade name which has been used by Plt: *Hoby v. Grosvenor Library Co. (Limited)*, 28 W. R. 386.

#### DESTRUCTION OF FRAUDULENT MARKS.

By the Merchandise Marks Act, 1887 (50 & 51 V. c. 28), s. 2, every person who forges any trade mark, or falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or applies any false trade description to goods, or makes or disposes of dies, &c., for forging trade marks; and (subject to certain exceptions) every person who sells, &c., goods to which any forged or false mark or false description is applied, is guilty of an offence; and by sect. 12 provision is made for the seizure and forfeiture of goods or things by means of or in relation to which an offence has been committed, and any goods or things forfeited may be destroyed or otherwise disposed of as the court of summary jurisdiction by which the same are forfeited directs; and the court may, out of any proceeds realized by disposition, award to any innocent party any loss he may have innocently sustained in dealing with such goods.

Independently of the statute, Courts of Equity have long exercised jurisdiction to order the delivery up and destruction of counterfeit labels: *Edelsten v. Vick*, 11 Ha. 86; *Farina v. Silverlock*, 4 K. & J. 650; and of articles made in infringement of a patent: *Betts v. De Vitre*, 34 L. J. Ch. 289; *Tangye v. Stott*, 14 W. R. 386; and by analogy to order the destruction of bank-notes of a foreign State made in this country for insurgents, and cancellation of the plates: *Emperor of Austria v. Day*, L. J., 12 June, 1861, A. 1243; 3 D. F. & J. 217.

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### SECTION VII.—INFRINGEMENT OF LETTERS PATENT.

#### 1. *Interlocutory Order to restrain Infringement of Patent.*

ON usual undertaking as to damages [Form 1, p. 452]—Let the Deft T. be restrained by injunction until further order from manufacturing any tube expanders similar to the tube expander which has been purchased by the Deft B., as in the Plt's statement of claim mentioned, or otherwise constructed so as to imitate or resemble the roller expanding tool, described in the specification in the Plt's letters patent in the statement of claim mentioned, and to restrain the Defts T. and B., their agents &c., from selling or offering for sale, or otherwise parting with the custody of, any tube expanders, or parts of any tube expanders, which have been so manufactured by the said Deft T. —Liberty to either party to apply to expedite the hearing.—See *Dudgeon v. Thomson*, M. R., 24 March, 1874, A. 723.

#### 2. *The Like Order.*

ON usual undertaking as to damages—"Let the Defts S. and C., their servants &c., be restrained by injunction until judgment in this action or until further order, from either directly or indirectly making, using, or putting in practice the invention described in the specification and drawings filed under the letters patent, granted to N., dated

the &c., and numbered 2190, and now vested by assignment in the Plt, or any part thereof, except as to any skates made by the Plt, or his agent or agents."—*Plimpton v. Spiller*, M. R., 16 March, 1876, B. 424.

For the like injunction made perpetual by consent, see *March v. Bird*, M. R., 3 July, 1876, B. 1379.

### 3. *Interlocutory Injunction for Infringement refused on Terms.*

UPON motion &c., for injunction to restrain &c.; And the Deft by his counsel undertaking to keep an account of all moneys received or to be received by him, by reason of the sale or use of the parlour or roller skates in the (bill) mentioned, this Court doth not think fit to make any order upon this motion, but doth order that the costs of this motion be costs in the cause.—*Plimpton v. Malcolmson*, M. R., 4 March, 1875, B. 421.

### 4. *Perpetual Injunction against Infringement of Letters Patent.*

UPON the appeal of the Plts &c., and upon hearing counsel for the appellants, and for the Defts, Let the Defts A., B., and C., their several agents and workmen, be restrained during the continuance of the letters patent, No. &c., from manufacturing, selling, letting on hire, supplying or using any incandescent electric lamps, manufactured according to or in the manner described in the specification, filed in pursuance of such letters patent, or according to or in any manner only colourably differing from the same, and generally from infringing the rights of the Plts in respect of such letters patent.—*Edison and Swan United Electric Co. v. Holland*, C. A., 18 Feb. 1889, A. 443; 41 Ch. Div. 28.

### 5. *The like Judgment.*

UPON the appeal of the Plts from the order of &c., and upon hearing counsel for the appellants and for the Defts, Let the Defts A., B., their servants and agents, be perpetually restrained by injunction from manufacturing, selling, or exposing for sale, bustles or dress improvers in infringement of the Plts' patent, No. &c., or from making, selling, or exposing for sale, articles in colourable imitation of the articles manufactured by the Plts under the said letters patent.—*American Braided Wire Co. v. Thomson*, C. A., 2 Feb. 1888, A. 200; 5 R. P. C. 375; affd. in H. L., 3 June, 1889; 6 Rep. Pat. Cas. 518.

### 6. *Against Infringement of Letters Patent—Mechanical Equivalents.*

THIS action coming on for trial &c., in the presence of counsel for the Plt and the Defts, and upon reading &c., Let the Defts A., B., and C., their agents, servants, and workmen, be restrained during the continuance of the letters patent, No. &c., from using or permitting to be used the invention described in the specification and drawings, No.



&c., filed by the Plt, or any part or parts of the same invention, and from using and permitting to be used in the manufacture of iron and steel forgings any appliances or means, being the same as the appliances or means now or lately used by the Defts as mentioned in the said particulars of breaches, or which, as to any part or parts thereof, are arranged or constructed according to the said invention, or any part thereof, or differ therefrom only colourably, and by the substitution of *mere* mechanical equivalents.—*Siddell v. Vickers*, Kekewich, J., 21 Dec. 1887, B. 2863, P. ; 39 Ch. Div. 93 ; 15 App. Ca. 496.

#### 7. *Account of Goods manufactured and Profits.*

UPON motion &c., by way of appeal &c., by counsel for the Defts, and upon hearing &c., for the Plts, Let the judgment, dated &c., be varied by substituting for the account thereby directed the following account, viz., an account of all iron and steel forgings manufactured by the Defts by the use of the Plt's invention as described in figure 2 of the specification in the said judgment mentioned, and also of the profits made by the Defts by reason of such use, otherwise affirm judgment.—*Siddell v. Vickers*, C. A., 18 May, 1888, B. 830 ; 5 Rep. Pat. Cas. 434.

#### 8. *Interim Injunction against Threats of Legal Proceedings.*

UPON motion &c., by counsel for the Plts, and upon hearing &c., for Defts, Let the Defts A., B., their officers, servants, and agents, be restrained until judgment in this action, or further order, from threatening the Plts, their customers, or any other person or persons, with legal proceedings or liability in respect of an alleged infringement of the letters patent, No. &c.—*Kensington and Knightsbridge Electric, &c. Co., Limtd. v. The Lane Fox Electrical Co., Limtd.*, Stirling, J., 24 April, 1891, A. 613 ; (1891) 2 Ch. 573.

#### 9. *Perpetual Injunction against Threats of Legal Proceedings.*

THIS action coming on for trial &c., in the presence of counsel for the Plts and Defts, Let the Defts A. and B., their servants and agents, be perpetually restrained from making or continuing threats of legal proceedings or liability by circulars, advertisements, or otherwise, in respect of the alleged infringement by the Plts of the several letters patent, No. &c.—*Driffield, &c. Co. v. Waterloo, &c. Co.*, Bacon, V.-C., 10 Feb. 1886, A. 194 ; 31 Ch. D. 638.

#### NOTES.

##### INFRINGEMENT—RIGHT TO INJUNCTION.

An interlocutory injunction will be granted where the patent is old, and there has been long and undisturbed enjoyment, and evidence of actual public user ; or where its validity has been established elsewhere, and the Court sees no reason to doubt the result ; or where the conduct of the Deft has been such that as against him there is no reason to doubt the validity of

the patent: *Dudgeon v. Thomson*, 22 W. R. 464; *Plimpton v. Malcolmson*, 20 Eq. 37.

In support of these propositions, see also *Hill v. Thompson*, 3 Mer. 622; *Bacon v. Jones*, *Collard v. Allison*, 4 My. & Cr. 433, 487; *Stevens v. Keating*, 2 Ph. 335; *Bridson v. M'Alpine*, 8 Beav. 229; *Bridson v. Benecke*, 12 Beav. 1; *Newall v. Wilson*, 2 D. M. & G. 282; *Plimpton v. Spiller*, 4 Ch. D. 286.

Length of enjoyment is material: *Davenport v. Richard*, 3 L. T. N.S. 503; *Betts v. Menzies*, 3 Jur. N.S. 357; and although the mere recency of a patent does not prevent an interlocutory or even an *ex parte* injunction (*Gardner v. Broadbent*, 2 Jur. N.S. 1041; *Clark v. Fergusson*, 1 Giff. 184), there must, in a case of a patent of no great age, be at least a fair *prima facie* case of validity: *Renard v. Levinstein*, 10 L. T. N.S. 177.

Actual public user of the patent must also be shown: *Plimpton v. Malcolmson*, 20 Eq. 37.

As a matter of pleading, the absence of an express averment of the novelty of the invention did not prevent an injunction from being granted: *Amory v. Brown*, 8 Eq. 663.

But the legal title of Plt, the novelty of the invention, and the validity of the patent, must be clearly and accurately set forth in the affidavits: *Whitton v. Jennings*, 1 Dr. & Sm. 110; *Gardner v. Broadbent*, 2 Jur. N.S. 1041; *Sturz v. De La Rue*, 5 Russ. 329; and there must also be clear evidence of the alleged infringement: *Hill v. Thompson*, 3 Mer. 624; *Mayer v. Spence*, 1 J. & H. 87; *Renard v. Levinstein*, 10 L. T. N.S. 177; *Betts v. Willmott*, 6 Ch. 239.

An injunction may, however, be obtained to restrain a threatened, as distinguished from an actual, infringement of a patent: *Frearson v. Loe*, 9 Ch. D. 48.

Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process, and the patentee can only claim to work out his process by means of materials known at the date of the patent: *Badische, &c. Fabrik v. Levinstein*, 24 Ch. D. 156; but see *S. C.*, 29 Ch. Div. 366; 12 App. Cas. 710.

It is not a correct test of utility that an invented product at the time of the patent was likely to be in commercial demand, or capable of profitable manufacture: *S. C.*, 12 App. Cas. 710.

The sale of articles to be used in producing a patented article (the elements of which afterwards enter into the combination for which the patent has been obtained) will not be restrained as an infringement: *Townsend v. Haworth*, 12 Ch. D. 831, n.; and see *Sykes v. Howarth*, *Ib.* 826.

The importation and sale in this country of articles made abroad according to a process patented here will be restrained by injunction: *Elmslie v. Boursier*, 9 Eq. 217; *Von Heyden v. Neustadt*, 14 Ch. D. 230; and see *Wright v. Hitchcock*, L. R. 5 Ex. 37; *Walton v. Lavater*, 8 C. B. N.S. 162; *Betts v. Willmott*, 6 Ch. 239. As also the user in this country, by sending to an English port for shipment to foreign customers, and not for consumption in England, bottles covered with capsules made abroad in imitation of the patented process: *Neilson v. Betts*, L. R. 5 H. L. 1; 3 Ch. 429.

To the same effect, see *Caldwell v. Vanvlissengen*, 9 Ha. 415.

User of a patented article for purposes of experiment by, and instruction of, pupils is an infringement: *United Telephone Co. v. Sharples*, 29 Ch. D. 164; and an injunction was granted against the master of a ship exclusively fitted up with pumps which were an infringement of a patent: *Adair v. Young*, 12 Ch. Div. 13; so, also, the mere possession of an infringing machine, dismantled by removing the infringing elements, which, however, were kept stored, was held to be an infringement: *United Telephone Co. v. Globe Telegraph Co.*, 26 Ch. D. 766; but though the importation from abroad of a foreign infringement may be restrained, the mere acting as Custom House agents for persons importing the foreign infringement in order to export it is not an infringement: *Nobel's Explosive Co. v. Jones, Scott & Co.*, 17 Ch. Div. 721; 8 App. Cas. 1.

Where the experimental use of infringing machines had been abandoned three years before action brought, and no intention to resume the user was shown, an injunction was refused: *Proctor v. Bayley*, 59 L. J. Ch. 12.

And as to the distinction between merely selling an article to others to be used for the purpose of infringing a patent, and employing a person as the

agent of the seller to use the article, and that the one is not, and the other may be, an infringement, see *Sykes v. Howarth*, 12 Ch. D. 826.

The sale of goods piratically made during the term may be restrained after its expiration: *Crosley v. Beverley*, 1 R. & M. 166, n.

The right of the Crown to make use of patented inventions does not enable private contractors for the sale to the Crown for the public service of goods made under the patent, to use the patented process without licence or payment of royalties, or protect them against claims in respect of the infringement of the patent: *Dixon v. The London Small Arms Co.*, 1 App. Ca. 632 (reversing 1 Q. B. D. 384, and restoring L. R. 10 Q. B. 130); and see *Feather v. Reg.*, 6 B. & S. 257.

#### COUNTY COURT JURISDICTION.

The right or privilege granted by letters patent is a "franchise" within sect. 56 of the County Courts Act, 1888, and an injunction to restrain the infringement of a patent is therefore excluded from the jurisdiction of the County Court by the Patents, &c. Act, 1883: *Reg. v. Judge of Halifax County Court*, (1891) 2 Q. B. 263.

#### PARTIES.

An injunction to restrain infringement may be obtained by an exclusive licensee of a patent: *Renard v. Levinstein*, 2 H. & M. 628; but an exclusive licence, limited to a specified district, not being equivalent to a grant of the whole letters patent, does not entitle the licensee to sue in his own name without joining the patentee: *Heap v. Hartley*, 42 Ch. D. 461. A licence to manufacture abroad under a foreign patent does not entitle the licensee to sell in this country in violation of the licensor's English patent: *Societe, &c. de Glaces v. Tilghmann's Sand Blast Co.*, 25 Ch. Div. 1.

One of several co-owners of a patent can sue for an injunction and account: *Sheehan v. G. E. Ry. Co.*, 16 Ch. D. 59.

But a mere agent to introduce, sell, and grant licences for the use of a foreign patent in this country is not entitled to take proceedings to restrain infringement and obtain damages: *Adams v. North British Ry.*, 29 L. T. N.S. 367.

The legal pers. represve of an inventor who has died before taking out a patent is not entitled to patent the invention, nor to sue in respect of any infringement thereof: *Dalton v. Saville St. Foundry Co.*, 39 L. T. N.S. 97.

#### NOVELTY—PUBLICATION.

Prior user of a patent within the colonies is not user "within the realm" sufficient to invalidate the title of a patentee as true and first inventor: *Rolls v. Isaacs*, 19 Ch. D. 268.

He who imports a novel invention into this country is true and first inventor within 21 Jac. 1, c. 3; *Re Avery's Patent*, 36 Ch. Div. 307; *Plimpton v. Malcolmson*, 3 Ch. D. 531; *Plimpton v. Spiller*, 6 Ch. Div. 412; *Nickels v. Ross*, 8 C. B. 679, 723; and a patent for a communication from abroad will not be invalidated for want of novelty by prior publication; and the process cannot be infringed, unless there has been actual publication of the information in a book publicly circulated in this country. The sending over to the English Patent Office Library a single copy of a foreign scientific work, and of a book of illustrations describing and containing a drawing of the invention afterwards here patented, was held not to make the foreign invention "part of the public possession, and part of the public knowledge," so as to amount to prior publication: *Plimpton v. Malcolmson*, 3 Ch. D. 531; *Plimpton v. Spiller*, 6 Ch. Div. 412; nor the simple fact that a treatise containing a description of the invention was to be found in the inner library of the British Museum: *Otto v. Steel*, 31 Ch. D. 241; and see *Stead v. Williams*, *Stead v. Anderson*, 2 Web. Pat. Ca. 126, 147; affirmed 6 Ch. Div. 412; *Re Lamenaude's Patent*, 1b, 169; *Househill Co. v. Neilson*, 1 Web. Pat. Ca. 673; *secus*, where the specification in a foreign language is to be found in a free public library, such as that of the Patent Office, unless it is proved that the existence of it was not known: *Harris v. Rothwell*, 35 Ch. Div. 416, 435; or where the foreign work

had been sent over to a bookseller in this country for the purpose of being sold: *Lang v. Gisborne*, 31 Beav. 135 (and see observations of M. R. on this case, 3 Ch. D. 561, 562); or a witness had seen in a German journal in a public library a description of an invention which he, though ignorant of German, could make out from plates and technical words: *United Telephone Co. v. Harrison*, 21 Ch. D. 720; and a report to a public office by referees specially appointed under Act of Parliament is public property: *Patterson v. Gas Light and Coke Co.*, 3 App. Cas. 239; and where there is such publication the patent is avoided, though it is not shown that the invention has been put in use: *S. C.* But the patentee of an invention communicated from abroad is bound to tell the public all he knows; while, on the other hand, insufficiency of specification will avoid the patent: *Wegmann v. Corcoran*, 13 Ch. Div. 65.

#### PATENT FOR COMBINATION.

A new combination, application, or arrangement of materials or principles, in themselves old, so as to produce a new result, may be the subject of a valid patent: *Cannington v. Nuttall*, L. R. 5 H. L. 205; *Murray v. Clayton*, 7 Ch. 577; *Foxwell v. Bostock*, 12 W. R. 725; *Lister v. Leather*, 8 E. & B. 1004, 1031; *Wright v. Hitchcock*, L. R. 5 Ex. 37; *Harrison v. Anderston, Foundry Co.*, 1 App. Ca. 574; and see *Otto v. Linford*, 46 L. T. N.S. 33. *Secus*, a combination of two prior inventions which any person of ordinary knowledge would be able to effect by only placing the two inventions side by side: *Saxby v. Gloucester Waggon Co.*, 7 Q. B. D. 305. According to the latest authorities, a patent for a combination of several improvements or materials will not be infringed by a new combination of some only of those improvements or materials: *Clark v. Adie*, 10 Ch. 667; 2 App. Ca. 315; *Murray v. Clayton*, 10 Ch. 675, n.; and see *Dudgeon v. Thomson*, 3 App. Ca. 34; or by the use of any particular part which is not novel: *Parkes v. Stevens*, 5 Ch. 36; 8 Eq. 358; and see *Thorn v. Worthing Rink Co.*, 6 Ch. D. 415; but may be by a combination of mechanical equivalents with additions and omissions, if the substance of the patented invention is taken: *Proctor v. Bennis*, 36 Ch. Div. 740. Where a combination is claimed it is not essential that the specification should show how far novelty is claimed for particular parts: *S. C.*; and see *Ehrlich v. Ihlee*, W. N. (88) 50; *Morgan v. Windover*, W. N. (87) 143; W. N. (88) 80.

#### SUFFICIENCY OF SPECIFICATION.

A specification is insufficient if a skilled mechanic would not, without performing a series of experiments, be able to construct the patented machine from the description: *Wegmann v. Corcoran*, 13 Ch. Div. 65; or if one of the materials to be used is described by a generic term comprising others, most of which would be unsuitable: *S. C.*; and see *Badische, &c. v. Levinstein*, 29 Ch. Div. 366; 12 App. Cas. 710; or if the manner in which the patented process is to be performed is not sufficiently described: *Bailey v. Robertson*, 3 App. Cas. 1055; or if it fails to point out the distinction between the patented invention and one previously patented, although under a patent unknown to the Plt: *Eades v. Starbruck Waggon Co.*, W. N. (81) 160. It is sufficient if the complete specification describes something which, though not specifically referred to, is within the general description contained in the provisional specification: *Siddell v. Vickers*, 39 Ch. Div. 92; and see *United Telephone Co. v. Harrison*, 21 Ch. D. 720; and a patent for colouring matters for dyeing and printing by a chemical process was upheld, notwithstanding a failure to discriminate between isomeric substances, only one of which would produce a useful result: *Badische, &c. Fabrik v. Levenstein*, 12 App. Cas. 710; but the rule that the patentee must not withhold information does not entitle him to put into his final specification an invention of which he was ignorant when he filed his provisional specification: *Edison and Swan Electric Light Co. v. Woodhouse*, 32 Ch. D. 520; and as to the effect of want of conformity between provisional and final specification, see *Bailey v. Robertson*, *sup.*; *Moseley v. Victoria Rubber Co.*, 57 L. T. N.S. 142; *Woodward v. Sansum*, 56 L. T. N.S. 347; Patents, &c. Act, 1883, s. 9; and *inf.* Chap. LII., "PATENTS."

## THREATS AGAINST ALLEGED INFRINGERS.

Formerly, a patentee was not liable in damages for issuing circulars threatening legal proceedings against infringers and purchasers from them, which he did not follow up by action for infringement, provided he issued the circulars *bonâ fide* in assertion of his supposed legal rights; though he might have been liable to be restrained from continuing to issue the circulars, if, knowing that his patent was invalid, or that it had not been infringed, he continued to do so: *Halsey v. Brotherhood*, 15 Ch. D. 514; and see *Azmann v. Lund*, 18 Eq. 330; *Rollins v. Hincks*, 13 Eq. 355 (there considered); and generally the Plt in an action to restrain threats was bound to prove that the statements complained of were false, and made *malâ fide*: *Burnett v. Tak*, 45 L. T. N.S. 743; and see *Wren v. Weild*, L. R. 4 Q. B. 730; *Household v. Fairburn*, 51 L. T. N.S. 498.

Now by the Patents, Designs and Trade Marks Act, 1883 (46 & 47 V. c. 57), s. 32, "where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats; provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

In order to bring a case within the section, the threat must be in reference to an act done by the person threatened; not a mere general warning *bonâ fide* given against piracy: *Challender v. Royle*, 36 Ch. Div. 425 (*per* Bowen, L. J.). A letter saying that proceedings will be instituted has been held to be a threat: *Driffield v. E. Riding Linseed Cake Co.*, 31 Ch. D. 638; *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.*, 42 Ch. D. 665; and see *Barrett v. Day*, 43 Ch. D. 435, 444; *Day v. Foster*, 7 R. P. C. 64.

The person applying for an injunction ought to make out a *prima facie* case, that the matter to which the threats related was not in fact an infringement: *Challender v. Royle*, *sup.*; *Barney v. United Telephone Co.*, 28 Ch. D. 394; but as to an interim injunction, see *Walker v. Clarke*, 56 L. J. Ch. 239. The Deft is not bound to assert his rights by defence or counter-claim, but is entitled to bring a separate action for infringement; but if he does so, arrangements ought to be made for a stay of the one action to abide the result of the trial in the other: *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.*, *sup.*

If in opposition to a motion for injunction a case of alleged infringement is raised, an injunction will not be granted, although the Deft declines to take legal proceedings: *Barney v. United Telephone Co.*, *sup.*

That an interim injunction will not be granted, unless some right is shown by the Plt, however much the balance of convenience may be in favour of granting it, see *Societe, &c. de Glaces v. Tilghmann's Sand Blast Co.*, *sup.*; but the balance of convenience and inconvenience will not be disregarded; *Walker v. Clarke*, 56 L. J. Ch. 239.

In an action under the section the validity of the Deft's patent may be called in question: *Challender v. Royle*, *sup.*; and see *Kurtz v. Spence*, 36 Ch. Div. 770.

Persons who are simply entitled in equity to an assignment of a patent upon certain terms are not persons having "legal rights" within the meaning of the section: *Kensington and Knightsbridge Electric Co. v. Lane Fox Electrical Co.*, (1891) 2 Ch. 573.

The proviso has been held to be satisfied if the action for infringement is honestly brought with reasonable diligence against any of the persons who have been threatened: *Challender v. Royle*, *sup.*; if the infringement is of the same character as that in respect of which the threats were made: *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.*, *sup.*; but the proviso does not apply where the threats are made by persons entitled in equity only, and the action is brought by the legal owner: *Kensington, &c. Co. v. Lane Fox, &c. Co.*, *sup.*

An action against an exclusive licensee of the Plt's patent, as well as of a subsequent patent belonging to another patentee, for a declaration that articles sold under that patent were an infringement of the Plt's, and to restrain the sale without payment of royalties to the Plt, is an action for infringement within the section: *Barrett v. Day, sup.*

If the proviso takes effect the case is relegated to the old law, and the statutory right of action is taken away: *Challender v. Royle, sup.*; *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co., sup.*, in which case the threats action was, under the circumstances, dismissed without costs.

As to what is "due diligence" within the meaning of the proviso, see *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co., sup.*; *Barrett v. Day, sup.*; *Colley v. Hart*, 44 Ch. D. 179. In order to satisfy the proviso it is not necessary that the infringement action should be prosecuted up to judgment; the protection will not be lost by reason of the action being discontinued on its being discovered that there is no cause of action: *Colley v. Hart, sup.* The Deft in the threats action is entitled to wait for a reasonable time for the delivery of the statement of claim with a view to raising the question of infringement inexpensively by means of a counter-claim: *Id.*

In a cross action for infringement, leave to amend specification by way of disclaimer may be granted, notwithstanding that the threats action is not concluded: *Re Hall*, 21 Q. B. D. 137.

#### 10. *Order for Trial of Issues—Particulars of Breaches and Objections—Inspection.*

LET the following questions of fact be tried on the — day of —, before &c., by a special jury of the county of M., that is to say,

1. Whether the invention in the pleadings mentioned was the working or making of any manner of new manufacture, which others at the time of making the letters patent of the — day of — in the pleadings mentioned, did not use (within this realm).
2. Whether the grantees of the said letters patent were the true and first inventors of the said new manufacture.
3. Whether the specification particularly described and ascertained the nature of the invention for which the said letters patent were granted, and the manner in which the same is to be performed.
4. Whether the said Deft J. has infringed the said letters patent—

And Let the Plts, on or before &c., deliver to the solr of the Deft J. particulars in writing of the breaches complained of; And Let the Deft J. on or before the — day of — (or within ten days after the receipt of such particulars) deliver to the Plt's solr particulars in writing of any objections (to the validity of the said letters patent), on which he means to rely at the trial hereby directed; And Let the Plts and the Deft J. by their solrs and scientific witnesses be at liberty from time to time, upon giving three days' notice of their intention so to do, mutually to inspect the machines heretofore used by the Plts and the said Deft in the manufacture of chenille; And Let the same machines be put to work upon such inspection; And Let the Plts and the said Deft, by their said witnesses and solrs, be at liberty to take samples of the chenille made or to be made upon the said machines, and be at liberty upon the like notice to inspect the machines, or exhibits marked Y and Z1, produced by the said Deft, and referred to as exhibits to the affidavits of &c., and to put the last-mentioned

machines to work, and to take samples of the product thereof.—*Davenport v. Jepson*, V.-C. W., 20 Dec. 1862, A. 2399; 1 N. R. 307.

For same form of issues, see *Hincks v. Safety Lighting Co.*, M. R., 24 Feb. 1876, A. 444.

In *Simpson v. Holliday*, V.-C. W., 28 March, 1863, B. 2487, the words "within this realm" were inserted in the first issue as above.

For like order, see *Morgun v. Fuller*, V.-C. W., 18 Jan. 1866, B. 928.

### 11. *Another Form of Issues—where Part disclaimed.*

1. WHETHER the invention, the subject of the letters patent of the — day of — (as altered by disclaimer or memorandum of alteration), was or was not at the date of the said letters patent, new as to the public use thereof by others within this realm. 2. Whether the Plt was the true and first inventor of the said invention. 3. Whether the specification of the said letters patent in the pleadings mentioned (as altered by the disclaimer or memorandum of alteration) does or does not particularly describe the nature of the said invention, and in what manner the same is to be performed, pursuant to the proviso in that behalf contained in the said letters patent. 4. Whether the Defts have or have not infringed the said letters patent in or by any or either and which of the apparatus manufactured by them as in their answer filed in this cause mentioned, or in any other manner.—*Cunningham v. Colling*, V.-C. W., 13 June, 1864, A. 1240. (In this case the issues were inserted in a schedule to the order.)

### 12. *Another Form.*

1. WHETHER J. and F., the grantees of the letters patent in the pleadings mentioned, and numbered &c., were the first and true inventors of the alleged invention or improvements for which the said letters patent were granted.

2. Whether the undisclaimed portions of the said alleged invention were used in the United Kingdom at the date of the said letters patent.

3. Whether the Defts, or any or either and which of them, have infringed the said letters patent.—*Batley v. Kynock*, V.-C. B., 31 July, 1874, A. 2680.

In *Simpson v. Holliday*, *sup.*, and *Renard v. Levinstein*, V.-C. W., 1864 (see 11 L. T. N.S. 766), this additional issue was directed:—

"Whether the said invention was, at the date of the said letters patent, and whether the same is now, of public utility."

And in *Morgan v. Fuller*, V.-C. W., 18 Jan. 1866, B. 100, the terms were "whether the alleged invention was a useful invention."

And as to the form of issues in a patent suit, see *Spencer v. Jack*, 3 D. J. & S. 346; *Curtis v. Platt*, 11 L. T. N.S. 250; *Morgan v. Fuller*, 2 Eq. 296 (where Deft was refused leave to add a totally new issue of fact not raised by his answer and particulars, and inspection, and putting the machinery in motion, were directed): *S. C.*, *sup.*; *Penn v. Bibby*, V.-C. W., 20th July, 1865; *S. C.*, on motion for a new trial, 2 Ch. 128; *Needham v. Oxley*, 8 L. T. N.S. 532.

13. *Questions of Fact for Trial before the Court without a Jury, in a Suit relating to a Patent communicated from Abroad.*

1. WAS N. the first importer into her Majesty's realm of the invention for which the letters patent of the —, 1865, were granted.

2. Was the invention new within her Majesty's realm at the date of the letters patent.

3. Did the specification particularly ascertain and describe the nature of the invention, and in what manner the same was to be performed.

4. Has the Deft wrongfully, and in contravention of the said letters patent, used the said invention.—*Plimpton v. Malcolmson*, M. R., 24 June, 1875, B. 1152.

14. *Order for Trial of a Representative Case for the Purpose of determining the Question of Validity.*

AND the Plt F. by his counsel undertaking to be bound by the result of the trial hereinafter directed, and the several above-mentioned Defts by their respective counsel admitting that the letters patent in the pleadings mentioned are duly vested in the Plt, and consenting to be bound by the result of the trial hereinafter directed, and that the said trial shall be conducted by B., G., B., and W., four of the above-named Defts, on behalf of and as representing all the Defts in the said suits; Let, by consent of all the said several Defts in the above-mentioned suits, the said Defts B., G., B., and W., be the Defts in the said trial; And Let the said Defts B., G., B., and W., on or before the — day of —, pursuant to the statute, deliver to the Plt their objections to the validity of the said patents; And Let, by the consent of the Plt and the said Defts, the following question be tried before his Lordship without a jury, that is to say: Whether the patent in the pleadings mentioned, dated &c., is a valid patent; And the Plt is to proceed to such trial on such day &c.—Adjourn the consideration of the costs of the several applications to the Judge and to his Lordship until after the said trial; And Let all further proceedings in the above-mentioned causes be stayed until after the said trial; And any of the Defts in any suits commenced by the Plt with respect to infringement of the said patent are to be at liberty to apply to be made parties to this order.—*Foxwell v. Webster*, and eighty other titles, L. C., 7 Dec. 1863, A. 2391; 4 D. J. & S. 77.

TRIAL OF QUESTIONS OF FACT.

A Deft was not entitled, under 21 & 22 V. c. 27, as of right, to have issues of fact in a patent case tried by a jury; but the Court would not, in doubtful cases, where there was a question really to be tried, or where charges against the Deft not raised by the pleadings were opened at the hearing, refuse an application for a jury: *Davenport v. Goldberg*, 2 H. & M. 282; *Bovill v. Hitchcock*, 3 Ch. 417; *Tangye v. Stutt*, 14 W. R. 128.

And see *Eaden v. Firth*, 1 H. & M. 673; *Roskell v. Whitworth*, 5 Ch. 549; *Henderson v. Runcorn Soap Co.*, 19 L. T. N.S. 277.



The practice in Equity, in the absence of special circumstances, has been to try the ordinary issues in a patent suit before the Court without a jury: *Patent Marine Inventions Co. v. Chadburn*, 16 Eq. 447.

And see *Young v. Fernie*, 1 D. J. & S. 353; *Fernie v. Young*, L. R. 1 H. L. 63.

Under O. xxxvi. 3, 1875, in all cases a Deft might insist on a trial before a Judge and jury, even where the action would be best tried by a Judge with assessors: *Sugg v. Silber*, 1 Q. B. D. 362; but now, under O. xxxvi. 2, 10, the mode of trial is in the discretion of the Judge.

A judgment establishing the validity of a patent does not conclude a Deft in subsequent proceedings from contesting the novelty of the invention: *Bovill v. Goodier* (2), 2 Eq. 195; but he will be restrained in the meantime from infringement.

And see *Newall v. Elliot*, 1 H. & C. 797.

In the case of numerous suits for infringement of the same patent, the suits have been consolidated, and a trial directed in a selected suit for the purpose of determining, as between the Plt and the several Defts, the validity of the patent: *Foxwell v. Webster*, 4 D. J. & S. 77, *sup.* Form 14; and see *Bovill v. Crate*, 1 Eq. 388.

It has been suggested that in patent actions the question of validity of specification may be tried, after the writ of summons has been issued, as a question of law, without the delay of obtaining any evidence upon a special case stated for the opinion of the Court under O. xxxiv. 1: see *Bolivian Republic v. Nat. Bol. Nav. Co.*, 24 W. R. 361.

And *v. sup.* Chap. XXII., "Issues."

#### 15. *Order for Delivery of further Particulars of Breaches.*

LET the Plts within — days from the date of this order deliver to Messrs. —, solrs for the Defts, further and better particulars in writing of the breaches alleged to have been committed by the Defts upon which the Defts intend to rely on the trial of the questions directed to be tried by the said order dated &c., specifying by reference to the pages and the lines the parts of the Plts' specification in respect of which such alleged breaches have been committed; And Let the time within which the Defts are to deliver to the Plts' solrs particulars in writing of the objections to the letters patent in the Plts' bill mentioned, be enlarged until the 21st day after the delivery of such further and better particulars.—Costs of application to be costs in the cause.—*Lamb v. The Nottingham Manufacturers' Co., Lim.*, M. R., 14 March, 1874, B. 776.

For a similar form of order, see *Wren v. Weild*, L. R. 4 Q. B. 213.

#### 16. *Order for Delivery of further Particulars of Objections.*

LET the order dated &c., whereby it was ordered that the Defts should on or before &c., deliver to the Plts further and better particulars of objections, stating therein the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which the process of &c., was known and publicly practised in England before the &c. (*date of letters patent*); and that in default thereof the words from and after the words "in a dry state," in the sixth par. of the statement of defence which had been delivered in this action, to the end of the said sixth par., should be struck out; and in that case no evidence should be given by the Defts on the

trial of this action of such prior publication, and that the Defts should pay to the Plts their costs of the application, to be taxed &c., be varied, and as varied be as follows:—Let the Defts on or before the — deliver to the Plts further and better particulars of objections under the — par. of the statement of defence on which they mean to rely at the trial, stating therein the place or places at or in which and in what manner the process of printing upon tin or metal surfaces by direct impression by means of damp stones is alleged to have been used or published prior to &c.—See *Flower v. Lloyd*, C. A., 2 Aug. 1876, A. 1523; 25 W. R. 17 (varying order of V.-C. B., 6 July, 1876, A. 1252).

It was held not to be a sufficient compliance with this order, after giving the names and addresses of three persons, to say, "and by other persons in Birmingham and London respectively:" *S. C.*, 29 Aug. 1876, A. 1783; 20 S. J. 860.

For order giving Deft liberty to deliver further particulars of prior user and publication, on which he intended to rely on the new trial of issues in a patent suit, see *Bovill v. Goodier*, 36 L. J. Ch. 360.

For liberty on payment of costs of application to re-amend the particulars of objection by inserting further specified instances of alleged prior user, see *Penn v. Bibby*, V.-C. W., 1 Eq. 548.

For liberty, on payment of all costs thereby occasioned, to amend particulars of objection, and adduce new evidence in support, upon special application by Deft during the trial of a patent suit after Plt's case was closed, see *Renard v. Levinstein*, V.-C. W., 13 W. R. 229; but see *Moss v. Malings*, 33 Ch. D. 603.

For further order that insufficient objections be struck out, and further and better particulars be delivered, see *Morgan v. Fuller*, V.-C. W., 28 Apr. 1866, B. 928; 2 Eq. 297.

For order that either side be at liberty to apply in Chambers to settle the particulars of objections to the patent on which Deft meant to rely on the trial, and also of particulars of breaches complained of by Plt in case the parties differed, see *Simpson v. Holliday*, V.-C. W., 28 May, 1863, B. 2487.

#### 17. *Order for Delivery of further and better Particulars of Objections* —46 & 47 V. c. 57, s. 29 (2).

UPON motion &c., by counsel for the Defts that the order dated &c. might be discharged, and upon motion &c. by counsel for the Plt to vary the said order, Let the Defts, on or before &c., deliver to the Plt further and better particulars in writing, striking out all particulars which are relied on merely to prove the state of knowledge in and before the years 1874 and 1877, and giving further and better particulars of the alleged anticipation on which they rely, specifying where in particular the anticipation is to be found; And Let the Plt deliver his reply in this action within fourteen days after the delivery to him of such further and better particulars.—*Holliday v. Heppenstall*, C. A., 27 March, 1889, A. 719; *S. C.*, 41 Ch. Div. 109.

#### 18. *To strike out Objections in default of Delivery of better Particulars.*

UPON the application of the Plts, and upon hearing the solrs for the applicants and for the Defts, and upon reading &c.; And the Judge

being of opinion that the particulars of objections delivered by the Defts with their statement of defence are insufficient; Let the Defts, the E. Co., on or before &c., deliver to the Plts further and better particulars, in writing, of their objections, by supplying in every case in which they have not already done so, the number of the page and paragraph in each specification and publication mentioned in the said particulars of objections, and in default of such delivery, Let the Defts' objections, so far as they relate to such specifications and publications, be struck out.

19. *Order giving leave to amend Particulars of Objection unless Plts within specified Time elect to discontinue Action.*

UPON motion &c., on behalf of the Defts—Let the Plt Co. within one month from the date of this order elect whether they will discontinue this action, and if the Plt Co. shall elect to discontinue this action and shall give notice thereof to the Defts within one month from the date of this order, Let it be referred to the taxing master to tax the Defts their costs of this action up to and including the date of the delivery of the particulars of objection, and to tax the Plts' costs of this action subsequently to the said — to the date of this order; And the taxing master is to set off the said costs of the Plts and of the Defts to be so respectively taxed, and certify to which of them the balance after such set off is due; And Let such balance be paid by the party from whom to the party to whom the same shall be certified to be due; And if the Plts shall not give notice to the Defts of their discontinuance of this action within the time aforesaid, Let the Defts be at liberty to amend their particulars of objections as set forth in the copy of the proposed amended particulars of objections already delivered to the Plts, and signed by the registrar.—Defts, the I. Co., to pay to the Plts, the E. Co., their costs of this application to be taxed &c.—Liberty to apply.—*The Edison Telephone Co. v. The India-Rubber, &c. Co.*, V.-C. B., 11 March, 1881, A. 673; 17 Ch. D. 137; following *Baird v. Moule's Earth Closet Co., Lim.*, M. R., 3 Feb. 1876, A. 231; 17 Ch. D. 139, n.

For similar order, see *Ehrlich v. Ihlee*, 56 L. T. N.S. 819, 821.

PARTICULARS OF BREACHES AND OBJECTIONS.

By the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 V. c. 57), s. 29, particulars of breaches complained of by Plt, and particulars of any objections to the validity of the patent on which Deft relies in support of his defence, must be delivered, with the statements of claim and defence respectively; and at the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged infringement, or objection of which particulars are not so delivered. If the Deft disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him. Particulars delivered may be from time to time amended by leave of the Court or a Judge.

The principle is that, on the one hand, the Deft shall have full, fair, and

distinct notice of the case to be made against him: *Needham v. Orley*, 1 H. & M. 248; *Batley v. Kynock*, 19 Eq. 229; and, on the other, that the Plt may not be surprised by production on the trial of evidence of prior user or publication of which he has had no notice: *Curtis v. Platt*, 8 L. T. N.S. 657; *Daw v. Eley*, 1 Eq. 38; and see *Curtis v. Platt*, 35 L. J. Ch. 852, 868; *S. C.*, L. R. 1 H. L. 337; *Talbot v. La Roche*, 15 C. B. 310; *Ledgard v. Bull*, 11 App. Ca. 648; *United Telephone Co. v. Smith*, 61 L. T. N.S. 617.

Where the answer admitted a sale by Deft to a person not named in the particulars of breach, Plt was allowed to give evidence relating to the transactions with such third person: *Sykes v. Howarth*, 12 Ch. D. 826, 830.

The Deft alleging prior user by other persons was required to set forth the names of some of those persons: *Crossley v. Tomey*, 2 Ch. D. 533; and to state the names and addresses of the persons by whom prior user was alleged, as well as the places where such prior user had taken place: *Birch v. Mather*, 22 Ch. D. 629; *Flower v. Lloyd*, 20 Sol. J. 860.

Where issues had been refused, and pleadings closed, the Deft was not required to deliver particulars of objection: *Bovill v. Goodier*, 1 Eq. 35; and, notwithstanding the statutory provisions for particulars, either party is, in a proper case, entitled to discovery by interrogatories: *Birch v. Mather*, 22 Ch. D. 629.

If the Deft's objection is grounded on nonconformity between the provisional and complete specifications, he must state wherein the difference consists: *Anglo-American Brush Light Co. v. Crampton*, 34 Ch. Div. 152.

After a patent suit has been set down for hearing, leave has been given to Deft to file an affidavit of alleged prior user discovered since the closing of the evidence, Plt having one week within which to file evidence in reply: *Wilson v. Gann*, 23 W. R. 546.

In an action for threats of an indefinite character, an order on the Plts for delivery of particulars of objections was made conditionally upon discovery being first given up by the Defts: *Union Electrical, &c. Co. v. Electrical Storage Co.*, 38 Ch. Div. 325.

An application at the trial after the Plt's cross-examination for postponement and leave to amend particulars of objections, on the ground that new facts had been discovered showing want of novelty, no affidavit being tendered, but leave sought to recall the Plt, was refused: *Moss v. Malings*, 33 Ch. D. 603; distinguishing *Renard v. Levinstein*, 13 W. R. 229; 11 L. T. N.S. 555.

Where Deft, after a day fixed for the hearing, applies for leave to amend his particulars of objection, the Court will place the Plt in the same position as to discontinuing the action, or disclaiming a part of his invention, as if the amended particulars had been those originally delivered: see *Edison Telephone Co. v. India Rubber Co.*, 17 Ch. D. 137; *Form 16, inf.*; *Ehrlich v. Ihlee*, 56 L. T. N.S. 819; and the same practice has been followed in an action for infringement of a registered design: *Morris, Wilson & Co. v. Coventry Machinist Co.*, W. N. (91) 112.

Where one Deft severed, and delivered particulars denying validity of the patent, and his co-Deft merely denied infringement, the patent proving invalid, the action was dismissed as against both Defts: *Smith v. Cropper*, 10 App. Ca. 249; reversing *Cropper v. Smith*, 26 Ch. Div. 700.

In giving particulars of alleged prior user, it is not sufficient, as was formerly held (*Palmer v. Wagstaffe*, 8 Ex. 840; *Bulnois v. Mackenzie*, 4 Bing. N. C. 132; *Bentley v. Keighley*, 7 M. & G. 652), to give the names of the places in which, without furnishing the names of the persons by whom, the invention is alleged to have been used: see *Flower v. Lloyd*, 29 Aug. 1876, Field, J., for V.-C. B., 20 S. J. 860; see also *Plimpton v. Spiller*, *Id.* 859; *Morgan v. Fuller*, 2 Eq. 297; *Penn v. Bibby*, 1 Eq. 348.

Where Deft alleges general user before the date of the patent, he may be compelled to give discovery of names and addresses of persons so using the invention as alleged: *Alliance Pure White Lead Syndicate v. MacIvors*, 39 W. R. 487.

Under notice of objection by Deft that the invention is not new, he can at the trial show that one of two inventions described in the specification is not new, and therefore that the patent is bad: *Gregg v. Silber*, 2 Q. B. Div. 493.

Where want of novelty is set up, particulars need not be given of publications relied on simply as proving the state of general public knowledge,

but specifications of previous patents must not be simply referred to; the nature of the anticipations relied on must be stated, and the places in the specifications (though not necessarily by page or line) where they are to be found: *Holliday v. Heppenstall*, 41 Ch. Div. 109; Form 17, *sup.*; and see *Fowler v. Gard*, 3 Rep. Pat. Cas. 247.

Where the Deft relies on common knowledge, as distinguished from anticipation, it should be distinctly pleaded: *Phillips v. Joel Cycle Co.*, 62 L. T. N.S. 392.

As to certificate of reasonableness of particulars with a view to costs, *v. inf.* p. 570.

## 20. Order for Inspection of Deft's Process by Experts.

LET I. and C. of &c., be at liberty at all seasonable times, and as often as requisite, on giving three days' notice to the Defts, to enter into the business premises of the Defts, where the process of decorating or printing tin and metal plates is carried on by the Defts, as stated in the Plt's statement of claim, and mentioned in the said affidavits or some of them, and to inspect and examine there the whole of the process by which such printed and decorated tin and metal plates are manufactured by the Defts, and to take, on paying the reasonable charges of the Defts for the same, samples of such plates, and upon and during such inspection to make such observations as may be necessary and expedient for the purpose of obtaining full information and evidence of the mode by which such plates are manufactured by the Defts.—*Flower v. Lloyd*, C. A., 5 July, 1876, A. 1254.

The above direction, that the inspection should be "at all seasonable times," was disapproved of, and it was said that the number of times when inspection is to be made should be named in the order: *per Jessel, M. R.*, at Chambers, *Heathfield v. Braby*, 15 May, 1879, A. 1051.

In the order as drawn up, the words "under the obligation of confidence," used by their Lordships, were not inserted, and on mentioning the matter to the Court their Lordships stated that all they meant was that the inspectors were not to communicate to the Plts any special or secret process which Defts might be using, but were to be at liberty to report to the solrs whether the process used was or was not in their opinion an infringement of Plt's patents, and state whether it was the ordinary process of lithography or not which Defts used.

For the like order for Plt to be at liberty personally, and also by his solrs and two scientific witnesses to be named before inspection, not exceeding three times in all, upon giving three days' notice, to inspect the works of the Defts whilst the processes therein used are in actual operation, see *Henderson v. Runcorn, &c. Co.*, V.-C. W., 19 Dec. 1867, A. 3050.

For order, upon interlocutory motion for inspection, and directing Deft to verify by affidavit the several kinds of machines which he had sold or exposed for sale since (the date of Plts' last disclaimer), and to produce at his solr's office one of each class for inspection by Plts' solr, and by two of his scientific witnesses, see *Singer Co. v. Wilson*, V.-C. W., 23 March, 1865, B. 900; 13 W. R. 560.

For order that Plts deliver to the solrs of the Defts a statement in writing of the particulars of the alleged breaches by the Defts, and that Defts within twenty-one days after delivery of such statement deliver to the solrs of the Plts a statement in writing of any objections on which the Defts respectively mean to rely at the trial directed, &c., and refusing any inspection of the Defts' manufactory as asked in Plts' notice of motion, see *Bailey v. Kynock*, V.-C. B., 12 Nov. 1874, A. 3157.

21. *Order for Inspection of Process of Working*—46 & 47 V.  
c. 57, s. 30.

UPON motion &c., by counsel for the Deft, and upon hearing counsel for the Plts, Let A. B. and one other indifferent person appointed by him, and C. D., one of the Deft's solrs, be at liberty at such times and as often as in the opinion of the said A. B. be requisite, on giving three days' notice to the Plts, to enter into some business premises to be selected by the Plts where the process or mode of working referred to in the specification mentioned in the statement of claim can be seen at work, and to inspect and examine there the whole of the machinery fitted in such mill, and to take such samples of the finished and unfinished products of the working of such machinery as in the opinion of the said A. B. may be necessary for the purposes of this action; And Let such machinery be put to regular work upon such inspection.—Let costs of application be costs in the action.—*Germ Milling Co. v. Robinson*, Kay, J., 17 Dec. 1885, A. 1818.

INSPECTION AND DISCOVERY.

By the Patents, &c. Act, 1883, s. 30, "in an action for infringement of a patent, the Court or a Judge may, on the application of either party, make an order for an injunction, inspection, or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or a Judge may see fit." This section is in substitution for 15 & 16 V. c. 83, s. 42, which was in similar terms, and which vested in the Courts of Common Law a jurisdiction which had previously existed in Equity exclusively. See, on the interpretation of this section at law, *Holland v. Fox*; *Vidi v. Smith*, 3 El. & Bl. 969, 977; *Patent Type Co. v. Lloyd*, 5 H. & N. 192.

The established rule in Equity has been, that where a Plt is unable to obtain clear and satisfactory evidence of infringement, the Court, upon a fair *prima facie* case being made out, will order Deft to permit an inspection to be made of his premises and machinery, by proper persons named on behalf of Plt: *Davenport v. Jepson*, 1 N. R. 308; *Bennitt v. Whitehouse*, 28 Beav. 121; *Singer Machine Co. v. Wilson*, 13 W. R. 560.

But the Court must be satisfied that there is really a case to be tried at the hearing, and that the inspection is essential for the proof of the Plt's case: *Batley v. Kynock*, L. R. 19 Eq. 90; *Piggott v. Anglo-Am. Tel. Co.*, 19 L. T. N. S. 46.

Inspection and delivery of samples for purposes of analysis have been ordered on interlocutory motion, notwithstanding laches which would have barred the right to an interlocutory injunction: *Patent Type Co. v. Walter*, Joh. 727; though the order was refused at law: *Patent Type Co. v. Lloyd*, 5 H. & N. 192.

Where the Plts obtained an order against the Defts for inspection of process and samples, the Defts were entitled to like order against the Plts, so that they might be in a position at the hearing to describe the process actually carried on under the patent: *Germ Milling Co. v. Robinson*, 55 L. J. Ch. 287.

And now by O. L. 3, power is given to the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for inspection, and "to authorize any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence."

The Court has no power to order inspection of articles not in the Deft's possession, though intended to be produced at the hearing in support of an

allegation of prior user: *Garrard v. Edge*, 50 L. J. Ch. 397; 60 L. T. N.S. 537; 37 W. R. 501.

Deft in a patent suit will not be compelled before decree to give discovery not material to the question to be tried at the hearing: *De la Rue v. Dickinson*, 3 K. & J. 388; but the ordinary rules of discovery being applicable to patent actions, the Plt is entitled to interrogate as to names and addresses of persons alleged by the particulars of objections to have used the invention at places named: *Birch v. Mather*, 22 Ch. D. 629.

But where such information is material to establish the Plt's case at the hearing, the Deft may be required to set out the names and addresses of all persons, whether in England or abroad, from whom he had received money for the use of articles alleged to be made in infringement of the patent: *Crossley v. Stewart*, 1 N. R. 426; *Howe v. M'Kernan*, 30 Beav. 546.

And see *Murray v. Clayton*, L. R. 15 Eq. 115, *inf.* Form 29, as to the extent of the discovery required from a Deft after decree for injunction with inquiry as to damages.

As to the right of a Deft to discovery of the names and addresses of persons alleged to have been induced to purchase the goods of the Deft as and for the goods of the Plt, see *Humphries v. Taylor Drug Co.*, 39 Ch. D. 693.

Where Deft alleged that his process was secret, he was bound to answer whether he used the materials mentioned in the specification, and whether he used any additional materials, but not to disclose the proportions in which he used the specified materials, or what the additional materials were: *Renard v. Levinstein*, 3 N. R. 665.

An answer as to documents which claimed privilege but did not discriminate between communications between Plt and his solr as such, and between him and the solr in his capacity of patent agent, was held insufficient: *Moseley v. Victoria Rubber Co.*, 56 L. T. N.S. 482.

22. *Leave to amend Specification by way of Disclaimer, but same not to be receivable as Evidence.*

UPON motion &c., by counsel for the Plt, and upon hearing &c. for the Deft, Let the Plt be at liberty to apply to the Patent Office for leave to amend his specification on which his letters patent of the — day of &c., numbered &c., in the pleadings mentioned, were granted, and his specification on which his letters patent of the — day of &c., numbered &c., in the pleadings mentioned, were granted by way of disclaimer, providing that the specifications as amended shall not be receivable in evidence in this action, and the costs of and occasioned by any such application of the Plt are to be borne by the Deft in any event.—Costs of motion costs in action.—*Bray v. Gardner*, Stirling, J., 16 Dec. 1886, A. 1811.

23. *Leave to apply to amend Specification of Patent—46 & 47 V. c. 57, s. 19.*

UPON motion &c., by counsel for the Plts, and upon hearing counsel for the Defts, Let the Plts be at liberty to apply at the Patent Office for leave to further amend the specification of the patent No. &c. by striking out the second claim thereof, and by making such other alterations (if any) as will be rendered necessary thereby; And Let, after such amendment has been made, the Plts be at liberty, within fourteen days, to amend their statement of claim so as to limit this action to the amended specification of the said patent; And in default

thereof dismiss action with costs.—Let the costs of the Defts of this application and of and occasioned by such amendment be their costs in any event and be borne by the Plts.—*Haslam, &c. Co. v. Goodfellow, Kay, J.*, 2nd Dec. 1887, A. 1727.

24. *Leave to amend Specification by way of Disclaimer and to use same as amended in Evidence.*

UPON the appeal of the Plts from &c., and upon hearing counsel for the Appellants and for the Deft, Let the order dated &c. be varied, and as varied be as follows, that is to say, that the Plts be at liberty to apply at the Patent Office for leave to amend their specification filed in pursuance of their letters patent numbered &c., by way of disclaimer, and that the said specification when so amended as aforesaid be used in evidence on the hearing of this action, the Plts by their counsel waiving all claim for damages or relief in respect of infringements prior to the amendment of the said specification.—Liberty to Deft within fourteen days after notice of the amendments made in the said specification to amend their defence and particulars of objection.—Plts to pay costs of action up to this date on the lower scale.—*Gaulard v. Lindsay, C. A.*, 1 Feb. 1888, A. 155.

DISCLAIMER PENDING ACTION.

After disclaimer, under 15 & 16 V. c. 83, s. 39, the Court would not entertain the question of enforcing an interdict previously granted, infringement of the patent as altered being matter for a new action: *Dudgeon v. Thomson*, 3 App. Cas. 34, 39.

By the Patents, &c. Act, 1883, s. 19, "in an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a Judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a Judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

This section applies to an action for infringement which was pending at the commencement of the Act (1st Jan. 1884): *Singer v. Hasson*, 50 L. T. N.S. 326; and does not affect the jurisdiction of the Master of the Rolls to allow an amendment in a specification filed under sects. 27 and 28 of 15 & 16 V. c. 83: *Re Gore's Patent*, 26 Ch. D. 105.

An action for infringement after judgment is not "pending" within sect. 18 of the Act of 1883 (providing for amendment of specification), and therefore in such a case that section is applicable, and an application may be made to the comptroller to amend the specification by way of disclaimer: *Cropper v. Smith*, 28 Ch. D. 148.

The fact that an action for threats under sect. 32 was not concluded, did not prevent the Court from exercising the powers of sect. 19 in a cross action for infringement: *Re Hall*, 21 Q. B. D. 137; and see now 51 & 52 V. c. 50, s. 5.

In exercising the powers of the section, the Court has imposed the condition that the amended specification should not be receivable in evidence in the action: *Bray v. Gardner*, 34 Ch. Div. 668 (see Form 22, *sup.*); but in particular cases less stringent terms may be required: *S. C.* Thus, where the action had not proceeded beyond writ, the terms were that the Plts should pay Defts' party and party costs up to and consequent on disclaimer: *Fusee Vesta Co. v. Bryant & May*, 34 Ch. D. 458; and for a like order at a later stage of an action, see *Haslam Foundry v. Goodfellow*, 37 Ch. D. 118;



Form 23, *sup.*; and in *Gaulard v. Lindsay*, 38 Ch. Div. 38 (see Form 24, *sup.*), leave was granted to give the amended specification in evidence at the trial on terms of the Plts paying all costs down to leave given, and waiving damages for previous infringements: and see *Lang v. Whitcross Co.*, 62 L. T. N.S. 119. The Judge in Chambers has full discretion as to terms of amendment: *Ib.*

25. *Judgment, after refusal of Motion for New Trial, for Injunction as to Patented Articles (Pulleys), and for delivery up of the Articles made by Deft, to be specified by Affidavit.*

LET the Deft S. be restrained by injunction during the continuance of the letters patent, and any extension of the term thereof, from using or exercising &c., and from in any manner infringing the rights and privileges granted by the said letters patent; Deft within seven days to specify by affidavit what apparatus constructed or arranged according to the said invention and improvements, or only colourably differing from those described in the said specification and drawing, have been manufactured by, or by the order or for the use of, the said Deft as in the (bill) mentioned, and are in the possession, custody, or power of the said Deft or his servants or agents; Deft within (seven) days after filing such affidavit to deliver up to the Plts all such pulleys or apparatus.—See *Tangye v. Stott*, V.-C. W., 12 Feb. 1866, B. 461.

26. *Like Judgment after Trial without Jury as to Patented Skates, with Account of Sales and Profits—Discovery, Delivery up, or Destruction.*

LET the Deft, his servants &c., be restrained by injunction during the continuance of the said letters patent granted to N., dated &c., from using or exercising, or causing or permitting to be used or exercised, the invention described in the hereinbefore-mentioned specification and drawings of the said N., and from selling, letting for hire, or making any profitable use, or permitting the sale, letting for hire, or profitable use of any roller or runner skates not made by the Plt or his licensees, and having applied thereto rollers or runners in manner described, and for the purposes mentioned in the said specification, or fitted with any apparatus for causing the skate to run in a curved line in the manner described in the said specification and drawings, or differing therefrom only colourably, and by the substitution of mere mechanical equivalents; And Let an account be taken of all roller skates being the same as the skates sold by the Deft to G. as in the pleadings mentioned, or otherwise made in infringement of the said letters patent, which have been manufactured, or sold, or let for hire, by or by the order, or for the use or profit of the Deft, and also of the gains and profits made by the Deft by reason of such manufacture, sale, or letting for hire; And Let the Deft within (seven) days after the service upon him of the chief clerk's certificate of the result of such account, pay to the Plt the amount of such gains and profits; And Let

the Deft forthwith upon oath deliver up to the Plt, or break up, or otherwise render unfit for use all roller skates, or parts of roller skates so manufactured, or let for hire, by or by the order or for the use of the Deft in infringement of the said letters patent as aforesaid, which are in the possession, custody, or power of the Deft or his servants or agents.—Deft to pay to the Plt costs of suit.—*Plimpton v. Malcolmson*, M. R., 28 Jan. 1876, B. 381.

*27. Inquiry to ascertain Profits of User.*

THE application of the Plt, which upon hearing &c., in Chambers, was adjourned &c., and upon hearing counsel for the Plt and the Deft; And this Court being of opinion that for the purpose of ascertaining the profits made by reason of the use of the Plt's invention pursuant to the said judgment it is necessary to inquire what was the cost of forging iron and steel forgings manufactured by the Deft prior to the use of the said invention, and also what was the cost of forging like forgings manufactured by the Deft during such use; Let the Deft, on or before &c., bring in a further and better account, giving such information accordingly.—*Siddell v. Vickers*, Kekewich, J., 22 June, 1889, B. 906; S. C., 61 L. T. N.S. 233.

*28. Inquiry as to Articles in Defts' Possession, and Direction for their Destruction.*

LET an inquiry be made whether the Defts or any of them have in their possession or power any or what articles manufactured in violation of Plt's patent; And Let all articles which shall be certified to have been so manufactured, and to be in the possession of the Defts or any of them, be destroyed in the presence of C. the Plt's manager, and K. the Defts' manager, and the respective solrs of the Plt and Defts.—*Betts v. De Vitre*, V.-C. W., 25 Jan. 1865, A. 119.

*29. Order for Discovery by Defts of the Names and Addresses of their Customers, after Judgment for perpetual Injunction, in aid of Inquiry as to Damages.*

UPON the application of the Plt &c., it is ordered that the Defts do within four days after service of this order make and file an affidavit or affidavits stating the number of brick-cutting machines made or caused to be made by them since &c., the date of the Plt's letters patent mentioned &c., and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same have been purchased (and the names of the agents concerned in the transactions), and the number of the machines now in course of construction, and of the licences granted by the said Defts or either of them, to any persons to make or use the said machines, with the names and addresses of the said persons to whom such licences have been

granted, and the number of licences granted by the Defts, or either of them, to any persons to use the said machines, together with their names and addresses, and the places where the said machines are respectively licensed to be used, and the amount of royalties received and to be received by or for the use of the said Defts, or either of them, for the granting of such licences in respect thereof.—*Murray v. Clayton*, V.-C. B., in Chambers, 16 July, 1872, B. 1998 (varied by V.-C. in Court, 16th Nov. 1872, B. 2947, by striking out the words—"and the names of the agents concerned in the transactions:" L. R. 15 Eq. 115).

### 30. *Inquiry as to Damages in Patent Case.*

AN inquiry what sum of money is fit to be awarded to the Plt to be paid by the Defts in respect of any damage sustained by the Plt from the sale or use by the Defts of the Plt's said invention, or any apparatus in imitation of or being only a colourable deviation from the Plt's said invention.—Defts to pay to the Plt—such sum of money as upon such inquiry shall be found fit to be awarded to the Plt for such compensation as aforesaid, within twenty-one days after the filing of the chief clerk's certificate of the result of the said inquiry.—*Cunningham v. Colling*, V.-C. W., 20 Dec. 1864, A. 2508.

That Plt, according to recent decisions of the House of Lords, is not entitled both to an account of profits and compensation in damages, see *Notes, inf.*

### 31. *The like Inquiry.*

Inquiry whether any and what damages have been sustained or incurred by the Plt, and to what amount, by reason of the Defts' infringement of the said patent.—Adjourn further consideration.—*Betts v. Noel*, V.-C. W., 18 Nov. 1869, A. 946.

### 32. *Certificate (embodied in Judgment) that Validity of Patent was in Question at the Trial—Patents, &c. Act, 1883, s. 31.*

AND this Court certifies, pursuant to the 31st section of the Patents, Designs, and Trade Marks Act, 1883, that upon the trial of this action the validity of the Plt's letters patent, No. —, dated &c., came into question.

### 33. *Like Certificate as to Proof of Particulars of Breaches—Patents, &c. Act, 1883, s. 29.*

AND this Court certifies, pursuant to the 29th section of the Patents, Designs, and Trade Marks Act, 1883, that in the trial of this action the Plt proved the particulars of breaches delivered by him.

#### HEARING OF ACTION.

As to the procedure on hearing *in camerâ* where the Deft denies infringement, but objects to state in open Court the process he actually adopts, on

the ground that it is the subject of a valuable secret, of the benefit of which he would be deprived by disclosure, see *Badische, &c. Fabrik v. Levinstein*, 24 Ch. D. 156.

Where there is contradictory evidence on a scientific point, the Court is at liberty to obtain independent scientific assistance to give advice upon which the judgment may be founded: *S. C.*

An objection for want of parties ought not to be postponed to the hearing when no impediment exists to raising it earlier: *Sheehan v. G. E. Ry. Co.*, 16 Ch. D. 59.

On dismissing action, the Court declined to insert a declaration of infringement "if the patent were valid": *Blakey v. Latham*, W. N. (88) 126.

As to the position of third parties in an action for infringement of patent, see *Edison v. Swan United Electric Co.*, 41 Ch. Div. 28.

As to giving certificate as to validity of patent being called in question, and as to reasonableness of particulars of breaches and objection, *v. p.* 570.

#### ACCOUNT OR DAMAGES.

It is now conclusively settled that a patentee is not entitled, since 21 & 22 V. c. 27, both to an account of profits (which amounts to a condonation of the infringement) and an inquiry as to damages, but must elect which he will take: *De Vitre v. Betts*, L. R. 6 H. L. 319; *Neilson v. Betts*, L. R. 5 H. L. 1; *Needham v. Oxley*, 11 W. R. 852; *United Horse Shoe Co. v. Stewart*, 13 App. Cas. 401; *Watson v. Holliday*, 30 W. R. 747.

In *Hill v. Evans*, Jan. 29, 1862, A. 293, it appears that the order was for an injunction, an account of profits, "and of such other compensation as is fit to be awarded in respect of such making, use, and exercise"; but according to the report of this case (4 D. F. & J. 288), the account was directed unless the Plt preferred liberty to bring an action for damages.

And see *Betts v. Vitre*, 11 Jur. N.S. 9, where it was said that if the Plt chose to waive the account of profits, he was to be at liberty to proceed at law for damages; though in *Betts v. Neilson*, 3 Ch. 429, the right of Plt to the double relief had been affirmed on the authority of the decree in *Hill v. Evans*, *sup.*

At law damages were considered as compensation for the loss of profits prior to the action: see *Holland v. Fox*, 3 El. & Bl. 977, where after final judgment, the account of profits was limited to profits made by Deft pending the action, and after notice that such account would be required: *Vidi v. Smith*, *Ib.* 969, where the account directed, pending the action of all future sales by Deft, was "on condition of Plt agreeing to waive all claim for more than nominal damages at the trial of the action, and on condition of, in case verdict and judgment were for Defts, Plt undertaking to pay to Defts the expense of keeping such account."

And see *Walton v. Lavater*, 8 C. B. N.S. 162; *Elwood v. Christy*, 18 C. B. N.S. 498, for form of rule or order for account at law.

After judgment restraining infringement, with inquiry as to damages, there is no power to direct a trial by jury on the question of damages: *American Braided Wire Co. v. Thompson*, 5 Rep. Pat. Cas. 538.

Where sales have been made by the Defts, and the Plts have reduced their prices in consequence of such competition, the measure of damages to the Plts is the amount of profits which would have been made by them if all the sales had been made by them at original prices, after making allowance for the increased sales attributable to the connection and exertions of the Defts, and to the reduction in prices: *American Braided Wire Co. v. Thomson*, 44 Ch. Div. 274; distinguishing *United Horse Shoe Co. v. Stewart*, 13 App. Cas. 401, where the reduction of prices was due to the competition of others besides the Defts, and therefore the Plts were not entitled to additional damages in respect of the reduction.

Defts are not entitled to set off the value of infringing articles delivered up after judgment, nor sums recovered in previous actions by Plts from manufacturers from whom the Defts bought: *United Telephone Co. v. Walker*, 56 L. T. N.S. 508.

Where Deft admitted some infringements and denied others, on the Plt moving for judgment on admissions the inquiry was confined to damages

arising from the admitted infringements: *United Telephone Co. v. Donohoe*, 31 Ch. Div. 399.

In aid of the account, an order may be made on Defts for production and inspection of their books: *Sarby v. Easterbrook*, L. R. 7 Ex. 207.

The account under a patent being incident to the right to an injunction against future infringement might be lost by its expiration or by delay: *Smith v. L. & S. W. Ry.*, Kay, 408; *Price's Patent Co. v. Bauwen's Pat. Co.*, 4 K. & J. 727; *Baily v. Taylor*, 1 R. & M. 73.

By the Patents, &c. Act, 1883, s. 17, sub-s. 4 (b), if any proceeding is taken in respect of an infringement of patent committed after a failure to make any payment within the prescribed time, and before enlargement thereof, the Court may refuse to give any damages in respect of such infringement; and by sect. 20, where an amendment by way of disclaimer, correction, or explanation has been allowed, no damages shall be given in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee satisfies the Court that his original claim was framed in good faith, and with reasonable skill and knowledge.

And though the expiration of the patent during the litigation will not deprive the Plt of his relief in damages or by account (*Davenport v. Rylands*, 1 Eq. 302; *Fox v. Dellestable*, 15 W. R. 194), the Court refused to entertain a bill for the mere purpose of damages where it was filed so immediately before the patent expired that no interlocutory injunction could have been obtained: *Betts v. Gallais*, 10 Eq. 392.

For the distinction between the form of inquiry in a patent suit, "What damages the Plt has sustained," and in a trade mark case, "What damages, if any, the Plt has sustained," see *Davenport v. Rylands*, L. R. 1 Eq. 302; and as to the measure of damages, *Penn v. Jack*, 5 Eq. 81.

There is no right of account between two or more persons to whom a patent is granted jointly: *Mathers v. Green*, 1 Ch. 29 (reversing *S. C.*, 34 Beav. 170).

In aid of the inquiry as to damages directed by the decree for a perpetual injunction, the Deft must give full discovery, and will be required to set out the names and addresses of the persons to whom machines, made in infringement of the patent, have been sold; but not the names of the agents concerned in the transactions, where there is nothing to show that any agents have been employed: *Murray v. Clayton*, 15 Eq. 115, *sup.* Form 29, p. 566.

In taking the account against a licensee of all articles made by him under his licence, he is not to adduce documentary evidence for the purpose of showing that the patent was bad for want of novelty: *Adie v. Clarke*, 24 W. R. 1007; *affd.* 2 App. Cas. 423; *Crossley v. Dixon*, 10 H. L. C. 293; *Noton v. Brookes*, 7 H. & N. 499; though he is not, it seems, after his licence has expired, estopped from disputing the validity of the patent: *Dangerfield v. Jones*, 13 L. T. N.S. 142.

The right of a patentee to an account of profits is not a demand "in the nature of unliquidated damages arising otherwise than by reason of contract," within the Bankruptcy Act, 1869, s. 31 (see now 46 & 47 V. c. 52, s. 37, sub-s. 1), so as to be incapable of being proved in the bankruptcy of the infringer: *Watson v. Holliday*, 20 Ch. D. 780.

The Palatine Court of Lancaster had no jurisdiction to give damages in lieu of injunction: *Proctor v. Bayley*, 59 L. J. Ch. 12; but see now 53 & 54 V. c. 23, s. 3.

#### COSTS.

The costs in patent actions are regulated by the Patents, &c. Act, 1883, providing, by sect. 29, sub-sect. 6, that in taxation regard shall be had to the particulars delivered by the Plt and Deft, and that they respectively shall not be allowed any costs, in respect of any particular delivered by them, unless the same is certified by the Court or a Judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case. By sect. 31, the Court or a Judge in an action for infringement may certify that the validity of the patent came in question, and if the Court or a Judge so certifies, then in any subsequent action for infringement the Plt in that action, on obtaining a final order or judgment in his favour, shall have his

full costs, charges, and expenses as between solr and client, unless the Court or Judge trying the action certifies that he ought not to have the same.

As to the meaning of "full costs," see *Avery v. Wood*, 39 W. R. 577 (decided under Copyright Act, 1842, s. 26).

Section 31 of the Act of 1883 is substituted for sect. 43 of 15 & 16 V. c. 83, which, however, required that the Judge should certify "on the record," and under that section the certificate was indorsed on a copy of the pleadings, and was signed by the Judge, but now the certificates under sects. 29 (sub-sect. 6) and 31 of the Act, of 1883, are embodied in the judgment or order of the Court: *v. sup.* p. 567, Forms 32 and 33.

Under the former section, it was held that, notwithstanding the provision entitling the Plt to costs, the decree or order should contain an express direction for taxation of the costs as between solr and client: see *Lister v. Leather*, 4 K. & J. 425; *Hill v. Evans*, 4 D. F. & J. 288, 309; *Needham v. Osley*, 11 W. R. 852 (and see under the recent Act, *United Telephone Co. v. Patterson*, 60 L. T. N.S. 315); and that to obtain the certificate of the Judge the validity of the patent must have been actually contested, and the result must not merely be in favour of Plt on verdict taken by consent: *Stocker v. Rodgers*, 1 C. & K. 99; and see *Greaves v. E. C. Ry. Co.*, 1 Ell. & E. 961; *Bovill v. Hadley*, 17 C. B. N.S. 435; nor, on the other hand, in favour of Deft on election by Plt to be non-suited: *Honiball v. Bloomer*, 10 Ex. 538; and without the certificate no costs in respect of his particulars of objection can be allowed: *S. C.*

But the rule has been held inapplicable to the case of Plt dismissing his own bill before the hearing: *Batley v. Kynock*, 20 Eq. 632; and see *Parnell v. Mort, Liddell & Co.*, 29 Ch. Div. 325, where it was held that the Court had power to allow costs of witnesses brought up to support particulars of objections, but not called because the Plts had virtually been non-suited.

And after the validity of the patent has once been established, and certificate given, a patentee is entitled to full costs in any subsequent proceedings to protect his rights, although the validity of his patent is not disputed: *Davenport v. Rylands*, 35 L. J. Ch. 204; 1 Eq. 302.

The certificate under sect. 31 is not a judgment or order appealable under sect. 19 of Jud. Act, 1873: *Haslam Foundry v. Hall*, 20 Q. B. Div. 491.

The certificate under sect. 29, sub-sect. 6, will not be granted unless the Court is satisfied, upon knowledge derived from the trial of the action, that the particulars are reasonable and proper: *Germ Milling Co. v. Robinson*, 55 L. T. N.S. 282; and where the Plt's case breaks down at the opening, so that it is not necessary to go into the Deft's case, the Court will not, it seems, go into the particulars merely for the purpose of certifying, and the Deft, for whom judgment is given with costs, will not get the costs of them: *Longbottom v. Shaw*, 43 Ch. D. 46; and see *Oddy v. Smith*, 5 Rep. Pat. Cas. 503. Where, the question of invalidity of patent not having been gone into, no certificate is given as to particulars of objections to validity, and the costs thereof are consequently disallowed, the Plt is not entitled to set off, as against costs payable by him, costs incurred in consequence of the particulars; and the taxing master cannot, under O. LXV. 27 (20, 21), enter into the question whether the particulars were improper: *Garrard v. Edge*, 44 Ch. Div. 224.

The Court of Appeal has jurisdiction to grant a certificate under the section: *Cole v. Saqui*, 40 Ch. Div. 132; *q. v.* for observations as to the effect of the section in throwing an unnecessary duty upon the Court.

As to the allowance of remuneration to scientific witnesses, and the expense of preparing a model, as proper items of cost in a patent suit, see *Batley v. Kynock*, 20 Eq. 632; and see *Smith v. Buller*, 19 Eq. 473 (disallowing as "luxuries" drawings of exhibits, for the purpose of being attached to the margin of the briefs); and *Automatic Weighing Co. v. Knight*, W. N. (88) 250 (that only one scientific witness need be called if able to give sufficient evidence); and *v. sup.* Chap. XVII., "Costs," pp. 258—265.

Where the Plt failed in establishing validity, but succeeded on infringement, he paid the general costs, but had a set-off for costs occasioned by the issue of infringement: *Badische Anilin v. Levinstein*, 29 Ch. Div. 366.

Where the Deft denied infringement, which issue was decided against him, but judgment went for him on the ground of want of novelty, he was

not entitled to the costs of the issue of infringement: *Phillips v. Ivel Cycle Co.*, 62 L. T. N.S. 392.

As to the allowance of costs on the higher scale where scientific witnesses are necessarily called, see *Ellington v. Clark*, 58 L. T. N.S. 40, 818; and *sup.* Chap. XVII., p. 265.

## SECTION VIII.—INFRINGEMENT OF COPYRIGHT.

### 1. *Judgment for perpetual Injunction against Infringement of Copyright.*

LET the Deft M., his workmen &c., be perpetually restrained by injunction from publishing, printing, selling, delivering, or otherwise disposing of, or causing or (knowingly) permitting to be published, printed, sold, delivered or otherwise disposed of, any copies or copy of his book in the Plt's (bill) mentioned, called "The Imperial Directory of London for 1866," containing the divisions headed—"Streets"—"Official"—"Parliamentary"—"Court"—&c., or any or either of them, or any part of them respectively—Deft to pay Plt's costs of suit to be taxed—all further proceedings except for executing the decree to be stayed.—See *Kelly v. Morris*, V.-C. W., 8 March, 1866, A. 779; 1 Eq. 697.

### 2. *Interlocutory Injunction against Infringement of Copyright—without specifying Pirated Parts.*

LET the Deft, his servants &c., be restrained by injunction from further printing, publishing, selling, or otherwise disposing of any copy or copies of a book called, "A New and Comprehensive Gazetteer," containing any article or articles, passage or passages, copied, taken, or colourably altered from a book called "The Topographical Dictionary of England," published by the Plts; until &c.—See *Lewis v. Fullarton*, M. R., 16 July, 1839; S. C., 2 Beav. 6.

The usual undertaking as to damages would now be required.

For the like order against publishing a book containing specified parts taken from Plt's work, or any passages, copied, taken, or colourably altered therefrom, see *Jarrold v. Houlston*, 3 K. & J. 722.

### 3. *Injunction staying Infringement, and specifying Pirated Parts.*

USUAL undertaking.—Let the Defts, their workmen &c., be restrained by injunction from publishing, selling, or advertising for sale the work called &c., in the (bill) mentioned, or any words containing the extracts in the — paragraph of the (bill) mentioned, or any of them, and from parting with the possession of any copies of the said work now in their possession or under their control; until &c.—See *Smith v. Chatto*, V.-C. H., 18 Dec. 1874, B. 3463; 23 W. R. 290.

4. *Perpetual Injunction against Printers and Publishers of Pirated Directory—Account of Copies sold and unsold—Delivery up of the latter—Payment of Net Profits of the former.*

LET the Defts, their manager, canvassers, agents, clerks, compositors, printers, workmen, and servants, be perpetually restrained by injunction from further printing, publishing, selling, delivering, or otherwise disposing of the book called "The Architect's &c. Directory," alleged to be copied and pirated by the Deft W., as in the (bill) mentioned, or any copy or copies thereof, and any future edition thereof, and from copying or pirating from any edition of any of the Plt's Directories in the (bill) mentioned, and every part thereof respectively, and any copy thereof and extract therefrom respectively, and (from copying, &c. from) the Defts' Directory and every part thereof so alleged to have been copied and pirated as aforesaid, and (from) the copy and manuscript from which the same was printed, and (from) every copy thereof and extract therefrom, in the preparation of, or for the purpose of assisting in the preparation of, any future edition of the Defts' said Directory, or any other Directory; And Let the following &c. 1. An account of the number of copies of the Defts' Directory so printed, and of the number thereof so published by the Deft W. as aforesaid, which the Defts or any other person &c. by their or any of their order, or for their or any of their use, have sold or disposed of; and the number of copies now remaining on hand unsold, or undisposed of. 2. An account of all and every sum or sums of money received by the Defts, and each of them, or by any other person &c. upon or by the sale of such copies as have been sold or disposed of as aforesaid, and also in respect of the extra lines and advertisements contained in the Defts' said Directory, and of the profits made by the Defts arising out of their printing and publishing their (said) Directory; And Let the Defts pay to the Plt K. what upon taking the said accounts shall be certified to be the net profit arising from the printing and publication of the Defts' (said) Directory; And Let all copies of the Defts' (said) Directory which remain unsold and are in the possession or power of the Defts or any or either of them, and all printed sheets forming or intended to form part of the same, be delivered up by the Defts to the Plt for destruction—Liberty to apply.—*Kelly v. Hodge*, V.-C. J., 11 Jan. 1870, A. 121.

5. *Another Form of delivery up.*

AND if on taking the said account it shall appear that there are any such net profits, Let the Defts, B. A. & Co., within fourteen days after the date of the chief clerk's certificate, deliver to the Plts, H. and L., all copies of the said book which remain unsold and are in the possession or power of the Defts or any of them, and all printed sheets and illustrations forming or intended to form part of the same; but if on taking the said accounts it shall appear that there are no such net



profits, Let the said Defts, B. A. & Co., within fourteen days after the date of the said chief clerk's certificate deliver to the Plts, H. and L., for destruction, the copies remaining unsold of the said book, and all printed sheets and illustrations forming or intended to form the original drawings and blocks used for the illustration of the said book, and all blocks and plates in their possession or power taken from the original drawings or any of them.—Defts to pay Plts' costs.—*Hole v. Bradbury*, Fry, J., 28 July, 1879, A. 1673; 12 Ch. D. 886.

For injunction against publishing the play "Never too Late to Mend," without first omitting all scenes and passages identical with or only colourably differing from scenes and passages in the Plt's play of "Gold," with leave to Plt to bring an action as to Deft's alleged infringement of his novel founded on "Gold," from which novel, Deft alleged, he had adapted his play, see *Reade v. Lacy*, 1 J. & H. 524.

For injunction against publishing a dramatised version of "Lady Audley's Secret" and "Aurora Floyd," see *Tinsley v. Lacy*, 1 H. & M. 747.

And against publishing separately articles written by Plt for a periodical which Defts had purchased, Plt having reserved his copyright, see *Mayhew v. Maxwell*, 1 J. & H. 312.

For injunction against publication in a provincial newspaper of articles taken *verbatim* from a magazine, see *Maxwell v. Somerton*, 22 W. R. 313.

For injunctions against publishing an abridgment of "Cook's Voyages," see *Nicol v. Keursley*, L. C., 16 Aug. 1784, B. 461; the "Edinburgh Review," *Longman v. Murray*, L. C., 6 May, 1807, B. 510; the report of the Privy Council's inquiry into the conduct of the P. of W., *A. G. v. Blagdon*, L. C., 11 March, 1808, A. 269.

For order for injunction to stay Defts from printing, publishing, and selling, or causing, or being in any way concerned in printing, &c., or exposing for sale, or otherwise disposing of, any copy or copies of a third or any subsequent edition of the Plt's book, called "The Practice of Photography, &c."; and that the Defts deliver up to the Plt the unsold copies of the work, and pay the sum agreed on as the profits of the copies sold, and his costs of suit to be taxed, see *Delfe v. Delamotte*, V.-C. W., 5 Aug. 1857, A. 1709; S. C., 3 K. & J. 581.

For similar order for the delivery up, and destruction by the Clerk of Record and Writs, of pirated copies, see *Prince Albert v. Strange*, 2 D. & S. 717.

For injunction to restrain the Defts from printing, publishing, selling, or otherwise disposing of, and from offering or exposing for sale, a bird's-eye view or plan of Paris and its fortifications; and the Defts to deliver up to the Plts all unsold copies of the said view or plan now in their possession or power, with inquiry as to damages, and Defts to pay costs, see *Stannard v. Harrison*, V.-C. B., 19 Nov. 1870, B. 2882; 19 W. R. 811.

For the principle upon which in a suit to stay piracy of parts of the Plt's work by the subsequent author of a book on the same subject damages should be assessed, see *Pike v. Nicholas*, 5 Ch. 260, n. (though on appeal the order was reversed).

For injunctions to restrain an infringement of copyright in a popular song, see *Chappell v. Sheard*; *C. v. Davidson*, 8 D. M. & G. 1; 2 K. & J. 117, 123.

#### 6. *Injunction against Piracy of original Notes in an English Edition of an American Work.*

USUAL undertaking.—Let Defts, The Newsagents &c. Co., their servants &c., be restrained by injunction from publishing, selling, exposing for sale, or distributing within the British dominions any copies or copy of No. 26 of the serial work described in (par. — of the bill) as "The Boy's Companion and British Traveller," or any part

thereof containing any notes, alterations or other matter contained in the work registered in the book of registry of the Stationers' Co. under the title "Artemus Ward, his Book, with Notes and Preface by the Editor of the Biglow Papers, London: J. C. Hotten &c.," not being part of the author's work intituled "Artemus Ward, his Book, with many Comic Illustrations," published in America, but the production of the Plt or of his skill or labour, or any other numbers or number in continuation thereof, or any other works or work containing any such matters or matter as aforesaid; until &c.; And Let the Deft W., his servants &c., be in like manner restrained from delivering up to the Defts The Newsagents &c. Co., or any persons or person whomsoever, except under the order of this Court, any copies or copy of the same No. 26 of the said serial work, so printed and published by the said Defts respectively as aforesaid, now remaining in the possession or power of the said Deft W. as the printer thereof, or otherwise, until &c.—*Hotten v. The Newsagents, &c. Co.*, V.-C. W., 16 Nov. 1865, A. 2070.

*7. Injunction against Publishing in this Country a Book printed in America.*

UPON motion &c., by counsel for the Plt, and upon hearing counsel for the Defts, and counsel for both parties consenting to treat the hearing of this motion as a motion for judgment, Let the Defts, their servants and agents, be perpetually restrained from importing into, printing, publishing, selling, delivering, or otherwise disposing of in this country, any copy or copies of, or causing or permitting to be imported into, published, sold, or otherwise disposed of in this country, any copy or copies of the books called "The A B C of Animals," and "The A B C of Nature," or either of them, or any copy or copies of any book or books containing any plate or plates, illustration or illustrations, letter-press or descriptions, passage or passages, copied, taken, or colourably altered from the Plt's books called "The Alphabet of Animals," and "The Globe Alphabet," or either of them; And Let the Defts forthwith return to America all copies of the said books in their possession or power, and within one month from the date of this order file an affidavit in this action stating that they have done so; Let an inquiry be made what profits have been made and realized by the Defts by the sale of the said books, "The A B C of Animals," and "The A B C of Nature," or either of them, with liberty to apply in Chambers after result of such inquiry.—Let Defts pay costs of action up to and including judgment.—*Warne v. Lawrence*, Kay, J., 18 March, 1886, B. 475.

*8. Injunction against Infringement in a Play of Copyright in a Novel—Objectionable Passages Cancelled.*

THIS action coming on for trial &c., in the presence of counsel for the Plts and Deft, Let the Deft, his servants and agents, be per-

petually restrained from printing or otherwise multiplying copies of his play called "Little Lord Fauntleroy," containing any passages copied, taken, or colourably altered from the Plts' book entitled "Little Lord Fauntleroy," so as to infringe the Plts' copyright in the novel or tale called "Little Lord Fauntleroy," of which the Plts are the registered proprietors; and Let Deft state on oath how many copies of the said play exist, and extract and deliver up to the Plts to be cancelled all passages in such copies of the said play taken or extracted from, or colourably altered from the said novel or tale, and produce all the copies of his said play to the Plts or their solrs so as to satisfy them that the objectionable passages have been extracted and delivered up.—*Warne v. Seebohm*, Stirling, J., 10 May, 1888, B. 598; 39 Ch. D. 73.

9. *Dramatic Copyright—Interlocutory Injunction continued during existence of Copyright.*

LET the injunction awarded by the order dated &c., to restrain the Deft W., his servants &c., and agents, until &c., from announcing for representation, by the circulation of playbills or otherwise, and from representing or causing to be represented the dramatic piece or entertainment advertised by him as in the (bill) mentioned, or any other dramatic piece or entertainment of which the title, scenes, or incidents are copied or imitated or colourably altered from the title, scenes or incidents of the Plt's drama in the (bill) mentioned, and therein called "Flying Scud" &c., be continued until the expiration of the Plt's copyright in the said drama.—*Boucicault v. Warde*, V.-C. W., 16 Jan. 1868, A. 58.

10. *Copyright of Designs.*

USUAL undertaking.—Let the Deft C. his servants &c., be restrained until after the &c., from selling the design in the (bill) mentioned, and from applying the same, or any colourable imitation thereof, to any substance or article of manufacture, and in particular from manufacturing ornamental sweetmeats made so as to resemble those of the Plt; and from selling or offering or exposing for sale any substance or article of manufacture to which the said design has been applied; and in particular the ornamental sweetmeats manufactured by the Deft &c., as in the (bill) mentioned, or any ornamental sweetmeats made so as to resemble those of the Plt.—*Sparagnapane v. Coombs*, V.-C. J., 19 March, 1869, B. 596.

For an injunction under 25 & 26 V. c. 68 (Copyright in Fine Arts Act, 1862) to restrain publication of an engraving from a photograph of the Bishop of Oxford, see *Mowbray v. Tilt*, V.-C. W., 6 June, 1867, B. 212.

For order continuing injunction granted under the Copyright of Designs Act, 5 & 6 V. c. 100, and for delivery up of articles specified, and taxation and payment of costs, and staying all proceedings, except in case of a breach of the injunction, see *McRae v. Holdsworth*, 2 D. & S. 499.

For inquiry whether the copper-plate published by the Deft, entitled &c., was of the same size and scale, and had the same marginal notes and direc-

tions or instructions, and was in all respects the same as the first plate published by the Plt, entitled &c., save an affected variation in the historical and geographical anecdotes in the margin &c., see *Jeffery v. Bowles*, L. C., 17 March, 1770; 1 Dick. 429.

For like order, see *Trusler v. Cummings*, L. C., 11 May, 1775, B. 284; 1 Dick. 429, note.

### 11. Restraining Sale of Photographs.

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Deft, treat motion as trial of action; Let Deft A. B., trading as &c., his agents and servants, and every of them, be perpetually restrained from selling or offering for sale, or exposing by way of advertisement or otherwise, a certain photograph of the Plt got up as a Christmas card, and from selling or exposing for sale or otherwise dealing with such photograph.—*Pollard v. Moll*, North, J., 20 Dec. 1888, B. 1561; 40 Ch. D. 345 (*nom. Pollard v. Photographic Company*).

#### NOTES.

##### INFRINGEMENT OF COPYRIGHT—RIGHT TO INJUNCTION.

In deciding questions of alleged infringement of copyright (where extracts have admittedly been made from the Plt's work), the Court will have regard to the quantity and value of the matter taken and republished without the exercise of independent thought and labour, and to the prejudice to the sale of the original work by the appropriation, even with acknowledgment and without any dishonest intention, and republication in a cheaper form of the results of the Plt's labour: *Scott v. Stanford*, 3 Eq. 718; *Jarrold v. Houlston*, 3 K. & J. 716 (laying down the tests of the *animus furandi*); *Folsom v. Marsh*, 2 Story, Eq. Jur. s. 943, n.; Kerr, 367.

The question will be whether there has been "a legitimate use of the Plt's publication in the fair exercise of a mental operation deserving the character of an original work": *Wilkins v. Aikin*, 17 Ves. 422.

Or, again, "Has such mental labour been bestowed upon what has been taken—has it been subjected to such revision and correction as to produce an original result"? *Spiers v. Brown*, 6 W. R. 352 (French Dictionary case).

See also *Hotten v. Arthur*, 1 H. & M. 603; *Jarrold v. Heywood*, 18 W. R. 279; *Whittingham v. Wooler*, 2 Sw. 428; *Mawman v. Tegg*, 2 Russ. 385; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Ager v. P. & O. Co.*, 26 Ch. D. 637, 642 (Standard Telegram Code case).

Information on matters of common knowledge open to all who seek to obtain it (*e.g.*, addresses for a directory or distances for a road-book) must be obtained at the compiler's own expense, as the result of his own independent labour; "and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained": *Kelly v. Morris*, 1 Eq. 697 ("London Directory" case), *sup.* Form 1; *Morris v. Ashbee*, 7 Eq. 34; *Cox v. Land and Water Co.*, 9 Eq. 324; *Lewis v. Fullarton*, 2 Beav. 6, *sup.* Form 2, p. 571.

The use which a rival author may make of a former work on the same subject as a guide to the same common sources of information is discussed and explained in *Pike v. Nicholas*; *Morris v. Wright*, 5 Ch. 251, 279 (to some extent modifying the unqualified strictness with which the use of the previous work by a subsequent author or compiler was limited in *Kelly v. Morris*, *sup.*).

As stated in *Hogg v. Scott*, 18 Eq. 458, "the true principle is that the Deft is not at liberty to use or avail himself of the labour which the Plt has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

Identity of object and "intent" in the original and copy is a material

element when portions of the one have been bodily transferred to the other: *Bradbury v. Hotten*, L. R. 8 Ex. 1.

For the application of these principles to the case of inserting in a subsequent work, for the purpose of increasing its value, extracts from works in which copyright exists, see *Smith v. Chatto*, 23 W. R. 290 ("Thackerayana"). And see *Tinsley v. Lacy*, 1 H. & M. 747; *Pike v. Nicholas*, 17 W. R. 842; *Campbell v. Scott*, 11 Sim. 31; *Warne & Co. v. Seebohm*, 39 Ch. D. 73.

The law of dramatic copyright is governed by the same principles; and to constitute infringement, material and substantial parts of the play must have been taken: *Chatterton v. Cave*, L. R. 10 C. P. 572; 2 C. P. Div. 43; 3 App. Ca. 483; *Warne v. Seebohm*, 39 Ch. D. 73.

The fraudulent adoption of a title which is original may be restrained by injunction: *Weldon v. Dicks*, 10 Ch. D. 247; *Metzler v. Wood*, 8 Ch. Div. 606; *secus*, if the title is a mere hackneyed phrase, long in common use: *Dicks v. Yates*, 18 Ch. Div. 76; and that in general there can be no copyright in the title or name of a work, see *Ib.* 89, 93; though an exclusive right may be capable of establishment on the principles applicable to trade marks or names: see *Schove v. Schmincke*, 33 Ch. D. 546.

The assignee for a term of a copyright will not be restrained from selling after the expiration of the term copies printed by him during it: *Howitt v. Hall*, 10 W. R. 381; and the assignor is similarly entitled, in the absence of special contract to the contrary, to sell copies printed by him before the assignment: *Taylor v. Pillow*, 7 Eq. 418; but where an agreement between author and publisher is personal to the latter, the benefit of it cannot be assigned: *Hole v. Bradbury*, 12 Ch. D. 886.

For the distinction, under 5 & 6 V. c. 45, s. 17, between "importing for sale" and "selling knowingly" foreign piracies of copyright, see *Cooper v. Whittingham*, 15 Ch. D. 501.

#### PROCEDURE.

According to modern practice, the Court takes upon itself the duty of going through the two works, and of determining by comparison what is the quantity of pirated matter: see *Pike v. Nicholas*, 17 W. R. 842; *Jarrold v. Houlston*, 3 K. & J. 708; *Spiers v. Brown*, 6 W. R. 352; *Murray v. Bogue*, 1 Dr. 368; *Chatterton v. Cave*, 2 C. P. D. 42; 3 App. Ca. 483.

In this comparison the principle that "if Deft will take Plt's corn and mix it with his own, the whole shall be taken to be Plt's," will, it seems, be applied: *Stevens v. Wildy*, 19 L. J. Ch. 190.

And a Deft must bear all the mischief and loss which the separation (of what belongs to him from what belongs to Plt) may occasion: *Mawman v. Tegg*, 2 Russ. 391.

The Deft in cases of alleged piracy must give full discovery as to the original sources from which he asserts that he has derived his information: *Kelly v. Wyman*, 17 W. R. 399; and his original MS. is important evidence on the question of *bona fides*: *Hotten v. Arthur*, 1 H. & M. 603; *Spiers v. Brown*, *sup.*

The practice has been to allege generally in the bill or affidavit that the Deft's work contains several passages which have been pirated from the Plt's work, without specifying the particular passages; and when the injunction is moved for, marked copies of the two books are usually produced for the use of the Court: *Sweet v. Maugham*, 11 Sim. 51.

Until the Deft's work has been published, and there is evidence of the actual contents, an injunction will not be granted upon evidence by the Plt of the mode employed by the Deft in preparing his work: *Morris v. Wright*, 5 Ch. 279.

Where the injunction would operate harshly, the Court will not suspend publication altogether until the hearing of the cause, but grant the injunction in a modified form: *Ainsworth v. Bentley*, 14 W. R. 630.

On the question whether, independently of sect. 23, there is jurisdiction to order delivery up of pirated copies for destruction to the Plt, though he may not have been the registered proprietor of the invaded work when such copies were published, see *Hole v. Bradbury*, 12 Ch. D. 886, 901; *Isaacs v. Fiddemann*, 49 L. J. Ch. 412; 42 L. T. N.S. 395; and that the rights of an assignee

for the purpose of making copies of a painting are limited by the terms of the contract, see *Lucas v. Cooke*, *sup.*; *Tuck v. Priester*, *sup.*

But after injunction granted, Deft will not be allowed, without Plt's consent, to continue the sale of copies of a book already published, even on terms of keeping an account: *Sweet v. Maugham*, 11 Sim. 51.

#### ACCOUNT.

The right to an account is incident to the perpetual injunction at the hearing: *Parrott v. Palmer*, 3 M. & K. 632; *Baily v. Taylor*, 1 R. & M. 73.

In *Pike v. Nicholas*, 5 Ch. 260, n., it is stated that in cases of literary piracy the Deft must account for every copy of his work sold, as if it had been a copy of Plt's, and pay Plt the profit which he would have received from the sale of so many additional copies. But see *Colburn v. Simms*, 2 Ha. 560; *Delfe v. Delamotte*, 3 K. & J. 581, from which it appears that the Plt whose copyright has been infringed is not entitled to more than an account of the net profits of the actual sales.

For the purposes of the account, Plt may require Deft to set out the number of pirated copies sold by him, and may continue the suit until such discovery is given: *Stevens v. Brett*, 12 W. R. 572.

#### REGISTRATION AND TITLE TO SUE.

That copyright exists by statute only, see *Reade v. Conquest*, 9 C. B. N.S. 768; *Jefferys v. Boosey*, 4 H. L. C. 833; *Caird v. Sime*, 12 App. Ca. 326, 343.

Registration is, by 5 & 6 V. c. 45, s. 24, made a condition precedent to any legal proceedings in respect of infringement of copyright, but not to the existence of the copyright: *Goubaud v. Wallace*, 25 W. R. 604. If effected on the same day as, but before the issue of, the writ, it is sufficient: *Warne v. Lawrence*, 34 W. R. 452; 54 L. T. N.S. 171.

The effect of this statute upon a work, the first edition of which was published before 1 July, 1842 (when registration was not a condition precedent to the title to sue), is that the new matter contained in subsequent editions cannot be protected by suit until registration: *Murray v. Bogue*, 1 Drew. 353.

Registration of the first number of a magazine is sufficient for protection of a serial published therein in successive numbers, without registering every subsequent number: *Henderson v. Maxwell*, 4 Ch. D. 163; but registration must follow, and not precede publication: *S. C.*, 5 Ch. D. 892.

Registration effected at the time of commencing the action, though subsequent to the date of the piracy, gives Plt the right to delivery up of the pirated copies: *Isaacs v. Fiddeman*, 49 L. J. Ch. 412.

In the case of copyright in paintings, drawings, and photographs, no action shall be sustainable, nor any penalty be recoverable in respect of anything done before registration: 25 & 26 V. c. 68, s. 4; but independently of the statute there may be a right to an injunction and damages: see *Tuck v. Priester*, 19 Q. B. Div. 629. Registration of a painting is only *prima facie* evidence of proprietorship, and may be rebutted by the terms of the assignment of the copyright by the owner to the person who has made the registration: *Lucas v. Cooke*, 13 Ch. D. 872.

On the distinction in this respect between registration of books and of works of art, see Copinger on Copyright, 73.

The provisions of 5 & 6 V. c. 45, ss. 3, 13, 24, as to registration must be strictly complied with to enable proceedings for infringement of copyright to be maintained. A wrong statement of the date of first publication is fatal to the suit: *Page v. Wisden*, 17 W. R. 483; *Low v. Routledge*, 1 Ch. 42; 3 H. L. 100; and not only the year and month, but also the actual day of first publication must be entered: *Collingridge v. Emmott*, 57 L. T. N.S. 864; and where there are several editions, in the nature of reprints, the time of publication of the first must be given: *Thomas v. Turner*, 33 Ch. Div. 292; and see *Hayward v. Lely*, 56 L. T. N.S. 418; *Mathieson v. Harrod*, 7 Eq. 270; *Wood v. Boosey*, L. R. 2 Q. B. 340; and the name and address of the first publisher: *Coote v. Judd*, 23 Ch. D. 727.

Mere registration of the title of an intended work does not give copyright in the title before publication, so as to entitle the person registering to restrain

the use of the title by another: *Maxwell v. Hogg*, 2 Ch. 307; and see *Dicks v. Yates*, 18 Ch. Div. 76, 88.

There is nothing in 5 & 6 V. c. 45 (s. 18, or elsewhere), to prevent joint ownership in the proprietors of several newspapers of copyright in an article: *Trade Auxiliary Co. v. Middlesborough Trade Assoc.*, 40 Ch. Div. 425.

An assignment of copyright must be in writing: *Leyland v. Stewart*, 4 Ch. D. 419.

As to what is a sufficient notice of objection to registration of copyright under sect. 16, see *Hole v. Bradbury*, 12 Ch. D. 886; *Hayward v. Lely*, 56 L. T. N.S. 418.

In the case of copyright in a design the copyright runs from registration; and before delivery on sale of any articles to which the design is applied, the proprietor must furnish to the comptroller the proper number of representations or specimens, and mark the goods in the prescribed form, so as to show that the design is registered: 46 & 47 V. c. 57, s. 50.

#### INTERNATIONAL AND DRAMATIC COPYRIGHT.

Under the International Copyright Acts, 7 & 8 V. c. 12, and 15 & 16 V. c. 12, a British subject first publishing in a country with which there is no international copyright treaty is not entitled to copyright in this country: *Boucicault v. Delafield*, 1 H. & M. 597. But an alien (citizen of a country with which there is no copyright treaty), resident here, at the time of printing and publication in this country, is entitled to copyright and protection from infringement: *Low v. Routledge*, 1 Ch. 42; 3 H. L. 100; and, *per* LL. Cairns and Westbury, publication, and not residence, in the United Kingdom gives the right to protection. And see *Jefferys v. Boosey*, 4 H. L. C. 815; *Ollendorff v. Black*, 4 D. & S. 209.

As to the effect of the International Copyright Act, 1886 (49 & 50 V. c. 33), s. 6, and that the proviso in that section protecting "rights or interests arising from or in connection" with works produced before the date of an order in council with respect to a foreign country, operates in favour of a person who has before such date purchased and performed a foreign piece of music, see *Moul v. Granings*, (1891) 2 Q. B. (C. A.) 443.

Copyright is divisible so as to be claimed for such portion of a work as is first published in this country: *Low v. Ward*, 6 Eq. 415.

In the case of a foreign dramatic work the translation required in order to give the author or his assignee the benefit of 15 & 16 V. c. 12, must be of the whole work, without alteration or omission, and not a mere imitation and adaptation for the English stage: *Wood v. Chart*, 10 Eq. 193 (*Frou-Frou* case). And see the Amendment Act, 38 V. c. 12.

Dramatic compositions are "published" by public representation: *Boucicault v. Chatterton*, 5 Ch. D. 267.

The part owner of a dramatic entertainment cannot grant a licence for its representation without the consent of the other owners: *Powell v. Head*, 12 Ch. D. 686.

#### SUMMARY OF CASES AS TO INFRINGEMENT.

Upon the subject of copyright the following cases may be consulted:—

*Abridgment*.—Fair abridgment has been held no piracy: *Dodsley v. Kinnersley*, Amb. 403; but there must be the fair exercise of a mental operation deserving the character of an original work: *Wilkins v. Aikin*, 17 Ves. 422; and see *Kerr*, 457; *Gyles v. Wilcox*, 2 Atk. 143; *Bell v. Walker*, 1 Bro. C. C. 451; *Nicol v. Kearsley*, L. C., 16 Aug. 1784, B. 461 (injunction against publishing an "Abridgment of Cook's Voyages").

*Advertisement*.—May be the subject of copyright: *Maple & Co. v. Junior Army, &c. Stores*, 21 Ch. Div. 369; not following *Cobbett v. Woodward*, 14 Eq. 407.

*Calendar*.—*Longman v. Winchester*, 16 Ves. 269; *Matthewson v. Stockdale*, 12 Ves. 270.

*Catalogue*.—A catalogue or bookseller's list will be protected so far as it is not a mere dry list of names, but contains original descriptive matter: *Hotten v. Arthur*, 1 H. & M. 603 (Catalogue of historical and antiquarian books with notes and anecdotes); *Grace v. Newman*, 19 Eq. 623 (Catalogue of monumental designs); *Maple v. Junior Army and Navy Stores*, 21 Ch. Div.

369 (Illustrated catalogue of furniture, without letterpress for which copyright could be claimed); overruling *Cobbett v. Woodward*, 14 Eq. 407 (Illustrated furnishing guide); *Hayward v. Lely*, 56 L. T. N.S. 418 (Description of articles as "patented" after patent had expired, held not to take away copyright in other part of catalogue).

*Child's puzzle*.—An envelope printed outside with directions, and containing a card perforated so as to cast a shadow, is not a literary work: *Cable v. Marks*, 31 W. R. 227; 52 L. J. Ch. 107; and see *Davis & Co. v. Consmith*, 54 L. J. Ch. 419 (Face of barometer with special letterpress held not a "book separately published").

*Designs*.—Copyright in designs is now regulated by the Patents, Designs and Trade Marks Act, 1883 (46 & 47 V. c. 57), ss. 47—61: see *inf.* Chap. LIII., "PATENTS."

The necessity of strict compliance with the conditions as to registration of designs under the former (repealed) Acts is illustrated by *Sarazin v. Hamel* (2), 32 Beav. 151; *Pierce v. Worth*, 18 L. T. N.S. 710; *Norton v. Nichols*, 4 K. & J. 475.

To obtain registration under sect. 47 of the Act of 1883, there must be substantial novelty or originality, having regard to the nature and character of the subject-matter: *Le May v. Welch, Margetson & Co.*, 28 Ch. Div. 24; followed in *Re Bach's Design*, 42 Ch. D. 662; and see *Re Read and Greswell's Design*, 42 Ch. D. 260; *McCrea v. Holdsworth*, 6 Ch. 418; *Lazarus v. Charles*, 16 Eq. 117; *Mulloney v. Stevens*, 10 L. T. N.S. 190, to the same effect under the former Acts.

And see as to the infringement of copyright in a pattern registered as a design under 5 & 6 V. c. 100, and 21 & 22 V. c. 70, *Holdsworth v. McRea*, L. R. 2 H. L. 380; *McCrea v. Holdsworth*, 6 Ch. 418; *Pierce v. Worth*, 18 L. T. N.S. 710; *Dupuy v. Dilkes*, 48 L. J. Ch. 682.

As to "fraudulent," as distinguished from "fair," imitation of a design under 5 & 6 V. c. 100, s. 7, see *Barran v. Lomas*, 28 W. R. 973.

A portrait of a well-known public character, copied from a photograph, and applied as a design upon earthenware, is not a new and original design: *Adams v. Clementson*, 12 Ch. D. 714.

The question of infringement must be determined by ocular comparison, and independently of whether the one design accomplishes the same useful purpose as the other: *Hecla Foundry v. Walker*, 14 App. Cas. 550.

*Dictionary*.—*Spiers v. Brown*, *sup.* And see *Kerr*, 367.

*Directory*.—*Kelly v. Morris*, 1 Eq. 697; *Morris v. Ashbee*, 7 Eq. 34; *Morris v. Wright*, 5 Ch. 279; *Kelly v. Hodge*, *sup.* Form 4, p. 572; and that there is no right to the exclusive use of the title "Post-Office Directory," see *Kelly v. Byles*, 13 Ch. Div. 682.

*Dramatised Novel*.—The fact that a novel when published has been dramatised by the author does not prevent any one else from also independently dramatising it: *Schlesinger v. Bedford*, 63 L. T. N.S. 763; *Toole v. Young*, L. R. 9 Q. B. 523; questioning dicta in *Reade v. Conquest*, 9 C. B. N.S. 755; 11 C. B. N.S. 479; and *Tinsley v. Lacy*, 1 H. & M. 747.

But although there is no infringement of the copyright of a novel in merely dramatising it, and representing the dramatised version, *Reade v. Lacy*, 1 J. & H. 524, the printing and publication of such dramatised version, even though not for the purposes of sale, is an infringement which will be restrained by injunction: *Tinsley v. Lacy*, 1 H. & M. 747; as also any multiplication of copies of the dramatised version for acting purposes: *Warne v. Seeborn*, 39 Ch. D. 73.

And where an author publishes his drama first and his novel afterwards, a drama taken by another person from the novel only may be an infringement of the author's drama: *Schlesinger v. Turner*, 63 L. T. N.S. 764.

*Drawing*.—A drawing devoid of artistic merit, e.g., a hand holding a pencil for guidance of illiterate voters, was held not entitled to protection against anything but an exact reproduction: *Kenrick v. Lawrence*, 25 Q. B. D. 99.

*Encyclopædia*.—*Mawman v. Tegg*, 2 Russ. 385. Republication of articles in a separate form by the proprietor of an encyclopædia or periodical may be restrained by the author who has reserved his copyright: 5 & 6 V. c. 45, s. 18. And see *Bishop of Hereford v. Griffin*, 16 Sim. 190.

*Engravings*.—To obtain the protection of 8 Geo. 2, c. 13, by which (sect. 1) the name of the proprietor must be engraved on each plate, and printed on



every print, it is sufficient to give the name of the firm under which the proprietors trade: *Rock v. Lazarus*, 15 Eq. 104. And see *Graves v. Ashford*, L. R. 2 C. P. 410.

The engraving, and not the original painting, must have been pirated: *Lucas v. Cooke*, 13 Ch. D. 872; and see *Dicks v. Brooks*, 15 Ch. Div. 22 (that a chromo-printed pattern for wool-work, though made by the aid of the engraving, is not a copy or piratical imitation of the engraving within 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57).

The seller of pirated copies of an engraving is liable, though ignorant of the piracy: *Gambart v. Sumner*, 5 H. & N. 5.

*Immoral Publications and Engravings.*—No copyright exists therein: *Stockdale v. Onwhyn*, 5 B. & C. 173; *Walcot v. Walker*, 7 Ves. 1; *Fores v. Johnes*, 4 Esp. 97.

*Law Reports.*—Head-notes of cases will be protected: *Sweet v. Benning*, 16 C. B. 459. And see *Saunders v. Smith*, 3 My. & Cr. 729.

*Lectures.*—Republication of a lecture delivered to students (though in short-hand character, *Nicols v. Pitman*, 26 Ch. D. 374), will be restrained, such delivery not amounting to publication to all the world: *Caird v. Sime*, 12 App. Ca. 326; *Nicols v. Pitman*, *sup.*; *Abernethy v. Hutchinson*, 1 H. & M. 28; Kerr, 50.

*Letters.*—The jurisdiction to restrain the publication of letters has been rested on the ground that such publication is a breach of contract or confidence, and *a fortiori*, will the jurisdiction be exercised when it is intended to make the letters a source of profit, for then there is also a violation of the exclusive copyright of the writer: *Copinger, Copyright*, 43; Kerr, 498; and see *inf.* Sect. IX., "LETTERS AND DOCUMENTS."

*Magazine or Periodical.*—The republication in a separate form by the proprietors of a periodical of articles written for the periodical will be restrained under 5 & 6 V. c. 45, s. 18, when the author's copyright has been reserved: *Mayhew v. Maxwell*, 1 J. & H. 312; and, when not so reserved, publication in a separate form by the author: *Henderson v. Maxwell*, 4 Ch. D. 163. But there is nothing in the section to prevent a joint ownership of the proprietors of several newspapers in the copyright of one article: *Trade Auxiliary Co. v. Middlesbrough Tradesmen's Co.*, 40 Ch. Div. 425.

And in *Smith v. Johnson*, 4 Giff. 632, the republication in supplemental parts of a magazine (not being reprints) of tales contributed thereto was restrained as an infringement of the author's copyright.

To entitle the proprietor of the book or periodical publication to sue, actual payment to the author of the pirated article or contribution must be shown: *Collingridge v. Emmott*, 57 L. T. N.S. 864; *Walter v. Howe*, 17 Ch. D. 708.

*Map.*—A map must be registered under 5 & 6 V. c. 45, before a suit can be maintained in respect of infringement of the copyright therein: *Stannard v. Lee*, 6 Ch. 346.

Not so a bird's-eye view or pictorial plan: *Stannard v. Harrison*, 19 W. R. 811.

*Musical Composition.*—Copyright and right of representation in musical compositions are regulated by 3 & 4 Will. 4, c. 15, ss. 1, 2; 5 & 6 V. c. 45, ss. 20, 21, 22; 45 & 46 V. c. 40, Copyright (Musical Compositions) Act, 1882, and 51 & 52 V. c. 17, Copyright (Musical Compositions) Act, 1888, which amends and partially repeals the prior Acts, *qua* penalties, damages, and costs; but see *Boosey v. Fairlie*, 7 Ch. D. 301, that the additional entry of a date applicable to the independent pianoforte arrangement, and deposit of that work, does not invalidate the registration, nor affect the sole right of performing the unpublished opera, for which protection was claimed by registration.

An assumption of the name and description of a popular song, in the melody of which there is no copyright, may be restrained by injunction: *Chappell v. Sheard*; *C. v. Davidson*, 2 K. & J. 117, 123; and see *S. C.*, 8 D. M. & G. 1, where the injunction was continued only on the terms of an undertaking to bring an action, and be answerable in damages.

Publication of a musical composition or dramatic piece as a book, before public performance or representation, does not deprive the author or his assignees of the exclusive right of performance or representation: *Chappell v. Boosey*, 21 Ch. D. 232.

For purposes of registration, a pianoforte arrangement of the full score is a separate and distinct work from the opera itself: *Wood v. Boosey*, L. R. 2 Q. B. 340; 3 Q. B. 223; *Boosey v. Fairlie*, 7 Ch. D. 301; 4 App. Ca. 711;

though such an arrangement, without authority, would, it seems, be a piracy: see *L. B. 3 Q. B. 228*; *D'Almaine v. Boosey*, 1 Y. & C. 288.

As to the effect of the International Copyright Act, 1886 (49 & 50 V. c. 33), s. 6, *v. Moul v. Grænings*, (1891) 2 Q. B. (C. A.) 443, *et sup.* p. 579.

*Newspapers*.—A newspaper must be registered as a book under 5 & 6 V. c. 45, s. 24: *Walter v. Howe*, 17 Ch. D. 708 (not following *Cox v. Land and Water Co.*, 9 Eq. 324); and although registration gives no exclusive right to the title, such right may be acquired by user and reputation: *Licensed Victuallers' Co. v. Bingham*, 38 Ch. D. 139; *Kelly v. Hutton*, 3 Ch. 703.

The proprietor can sue in respect of his copyright, though neither his name nor the title of the paper is registered: *Cate v. Devon and Exeter Newspaper Co.*, 40 Ch. D. 500.

Probable injury to Plt, as well as conduct of Deflt calculated to deceive the public, must, however, be shown: *Borthwick v. Evening Post*, 37 Ch. Div. 449.

And see the question of newspaper copyright discussed in *Exp. Foss*, 2 D. & J. 230; *Platt v. Walter*, 17 L. T. N.S. 157.

Under the head of property in the title of a newspaper or trade name, see *Clement v. Muddick*, 1 Giff. 101; and other cases cited *sup.* p. 545.

*Photograph*.—A photographer, on grounds of breach of implied contract and confidence, was restrained from selling or exhibiting copies of a negative taken for a customer: *Pollard v. Photographic Co.*, 40 Ch. D. 345. As to who is to be deemed the "author" of a photograph within 25 & 26 V. c. 68, s. 1, see *Nottage v. Jackson*, 11 Q. B. Div. 627; *Wooderson v. Raphael*, W. N. (87) 209.

A "castle" album, i.e., an album with pictorial border, containing views of castles, is not entitled to copyright, nor could the name be protected as a trade name: *Schöve v. Schmincke*, 33 Ch. D. 546.

*Sheet of Letterpress*.—An elaborately painted Christmas card opening book-wise held entitled to copyright under 5 & 6 V. c. 45, s. 2: *Hildesheimer v. Dunn*, W. N. (91) 66.

*Telegraphic Code*.—For private circulation, protected: *Ager v. P. & O. Navig. Co.*, 26 Ch. D. 637.

*Topographical Dictionary*.—*Lewis v. Fullarton*, 2 Beav. 6.

*Travelling Handbooks and Itineraries*.—*Murray v. Bogue*, 1 Dr. 353 ("Handbook for Switzerland"); *Cary v. Kearsley*, 4 Esp. 168 ("Patterson's Roadbook").

## SECTION IX.—PUBLICATION OF LETTERS AND DOCUMENTS.

### 1. Injunction against Printing and Publication of Private Correspondence.

LET the Defts, S., R., and H., their servants &c., be restrained by injunction from printing or publishing any letters written or sent by the Plt to any correspondents or correspondent or other persons or person, or any copies of or extracts from such letters of the Plt; until &c.—*Bishop of Exeter v. Shutte*, V.-C. W., 7 Aug. 1862, A. 1832.

### 2. Injunction against Publication of Letters or Disclosure of their Contents.

"AND the Deflt by his counsel consenting to this judgment, Adjudge that the Deflt O., his servants &c., be perpetually restrained by injunction from printing or publishing the letters written to him by the Plt, or showing them or any of them, or any copies or copy, extracts or extract of or from them or any of them, to any person or

persons, and from informing any person or persons of their or any of their contents."—Deft to pay Plt's costs of suit.—*Wilson v. O'Donovan*, M. R., 2 June, 1866, B. 1391 (following *Palin v. Gathercole*, 1 Coll. 565).

For injunction against publication of Pope's letters to Swift, see *Pope v. Curll*, 5 June, 1741, 2 Atk. 342; and see *Thompson v. Stanhope*, Amb. 737 (L. Chesterfield's Letters).

### 3. *Injunction against Publishing Letters.*

UPON motion this day &c.—This Court doth order that the Deft B., his servants and agents, be restrained until judgment in this action or until further order, from publishing, printing, circulating, or divulging or parting with, otherwise than to the Plt, or by deposit in Court, and from allowing to be printed, circulated or published, any correspondence, letters, or other documents received by the Deft from the Plt, or the effect thereof, or copies thereof, or extracts therefrom, and from informing any person or persons of their or any of their contents, save only that the Deft may communicate such letters to any solr *bond fide* employed by him for the purpose of litigation with the Plt.—Deft to pay costs of motion.—*Moon v. Boothman*, Kay, J., 3rd June, 1890, B. 725.

### 4. *Action to restrain Disclosure of Letters received by Deft as Solr for the Plt—Form of Undertaking.*

UPON motion &c., by counsel for the Plt, and upon hearing counsel for the Defts, and the Defts by their counsel undertaking not to communicate nor to disclose to P. or any other person any information acquired by the Defts in their character of solrs to the Plt, or the contents of any letter or other documents which have come to the hands of the Defts in such character, and not to give to the said P. or any other persons, nor to permit the said P. or any other persons to take copies of or extracts from any such letter or other documents as aforesaid (but this undertaking is not to prevent the Defts from communicating or discovering to the said P. any information acquired by the Defts in their character of solrs to the Plt and the said P. jointly or the contents of any letter or other document which may have come to the hands of the Defts as solrs for the Plt and the said P. jointly, or from permitting the said P. to take copies of or extracts from any such letter or other documents as last aforesaid).—No order on motion; costs to be costs in the action.—*Carter v. Beal*, North, J., 17th December, 1886, A. 1761.

### 5. *Letters addressed to Late Agents and intended for Firm.*

AND the Plts by their counsel undertaking not to open any letter addressed to the Deft B., except twice in a day during the hour next succeeding half-past nine in the morning and the hour next succeeding

five in the afternoon, at the Plt's place of business at P—, and to deliver to the Deft, who is to be at liberty to be present during the opening of such letters, any letter intended for him.—*Deft to pay costs.*—*Loog v. Bean*, C. A., 12 March, 1884, B. 467; 26 Ch. Div. 306.

#### 6. *Enjoining the Return of Documents.*

LET the Deft H., be restrained by injunction from detaining and keeping possession of the books, deeds, documents, and papers removed by him the said Deft, or by his order, from the chambers occupied by the Plts, for retaining which no written authority has been produced by the Deft, as mentioned in the Plts' affidavit of &c., or any or either of them, except the five boxes not claimed by the Plts, and from permitting the same, or any or either of them, except the five boxes, to remain away from the office of the Plts, or from parting with the books &c. removed by the Deft, or by his order, from the chambers occupied by the Plts, or any or either of them, except the said five boxes, to any person or persons other than the Plts, and from destroying, mutilating, or obliterating the said books &c., or any or either of them, except as aforesaid, or any parts or part thereof respectively, or any entries or entry therein, and from making any alteration, interlineation, or erasure in the same, or any of them; until &c.—*Whittaker v. Howe*, M. R., 25 Feb. 1841, B. 336.

For an order for return of books, documents and extracts which had come into Deft's possession in the course of a confidential employment, and restraining him from taking and retaining any copies and extracts, and from communicating the particulars or the contents thereof or any of the information therein contained, see *Evitt v. Price*, 1 Sim. 483.

#### 7. *Injunction against opening Letters of another Firm, or supplying the Orders therein contained.*

LET the Defts B. &c., their agents &c., be restrained by injunction from receiving, retaining, or opening any letters or letter addressed "C. Schiele," or "Schule" and Co. &c., or otherwise addressed to the Plt Christian Schiele, or to the Plt's said firm of C. Schiele and Co., as in the (bill) mentioned, and from taking advantage or making use of the communications or information, and from supplying the orders or any of them contained in any such letters, and from in any manner availing themselves of or using the contents of any such letters; until &c.—*Schiele v. Brakell*, V.-C. S., 29 May, 1863, B. 1169; *S. C.*, 11 W. R. 796.

For a similar order, after dissolution of partnership and sale by Deft of the business to Plt, with the goodwill and the right to use the trade name and trade marks of the firm, see *Witt v. Corcoran*, V.-C. B., *inf.* Sect. XII., Form 5.

For an undertaking by the Defts until the hearing not to open, except in the presence of the Plt or his agents, any letter addressed to him at No. 190, R. St., unless it should appear either on the outside or by some other indication than the address No. 190, R. St., that the same was intended for the Defts, see *Stapleton v. For. Vin. Assoc.*, V.-C. W., 13 June, 1864, B. 1526; 12 W. R. 976.

## NOTES.

The receiver's right of property in letters is at most joint with that of the writer: see *Pope v. Curll*, 2 Atk. 342; and is qualified by the right of the latter to restrain their publication without his consent, on the ground of breach of contract or of confidence; and also, where the publication is intended for purposes of profit, on the ground of infringement of the exclusive copyright of the writer therein, see *Copinger, Copyright*, 43; *Kerr*, 498; *Story, Eq. Jur.*, ss. 944—947.

For the application and qualification of this rule, see *Lytton v. Devey*, 54 L. J. Ch. 293; *Hopkinson v. L. Burghley*, 2 Ch. 447; *Howard v. Gunn*, 32 Beav. 462; *Gee v. Pritchard*, 2 Swan. 403; *Thompson v. Stanhope*, Amb. 739; *Oliver v. O.*, 10 W. R. 18; *Bishop of Exeter v. Shutte*, *sup.* Form 1 (and see 7 Sol. Journ. 485), in which case an injunction was obtained restraining the alleged threatened publication in "Life and Times of the Bishop of Exeter," of private correspondence of the Bishop, extending over forty years, which had been placed in the Deft's hands as material for his work. The bill, it seems, was on the 23rd April, 1863, dismissed, on the denial of the Deft that he ever intended to publish the letters unless the Bishop's consent had been obtained, but without costs.

In *Pollard v. The Photographic Co.*, 40 Ch. D. 345, *v. sup.* Form 11, p. 576, a photographer was restrained from selling or exhibiting or dealing with copies of a photograph of the Plt, which he had taken for her in the way of his business.

And see *P. Albert v. Strange*, 1 Mac. & G. 25; 2 D. & S. 652; *Phillips, Copyright*, 7, where publication of a catalogue of private etchings, not intended by the author for publication, was restrained.

The Court will restrain the publication of information obtained in a confidential capacity: *Evitt v. Price*, 1 Sim. 483; or derived from production of documents: *Williams v. P. Wales Co.*, 23 Beav. 338.

And where the Deft has surreptitiously obtained access to the Plt's accounts, books, and other documents, he will be restrained from printing or otherwise copying, and from distributing or parting with any copies, or otherwise in any way publishing such accounts, &c.: *Tipping v. Clarke*, 2 Ha. 383; *Marshall v. Watson*, 25 Beav. 501; and also from making any use of trade secrets, the knowledge of which has been surreptitiously acquired: *Morison v. Moat*, 9 Ha. 241.

A person will also be restrained from opening letters addressed to, and thus obtaining orders or custom intended for, another: *Edginton v. E.*, 11 L. T. N.S. 299; *Schiele v. Brakell*, 11 W. R. 796, *sup.* Form 7.

The Postmaster General will not be restrained from delivering business letters, directed to Plt at the address of his former employers, otherwise than at his present place of business (in the same street and under a very similar firm): *Stapleton v. Foreign Vin. Assoc.*, 12 W. R. 976.

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SECTION X.—LABEL.

1. *Injunction against Libelling Plt's Trade by Circular containing erroneous Quotation from a Judgment.*

UPON motion for judgment &c., by counsel for the Plt, and upon hearing counsel for the Defts, Let the Defts, A., B., and C., be perpetually restrained from issuing or distributing, or permitting to be issued or distributed, the circular which at the date of the issue of the writ in this action was being distributed by them at the International Exhibition of Navigation and Commerce, at Liverpool, purporting to contain a quotation from the judgment of Mr. Justice North, in *Hayward v. H.*, 1885, H. 566, or any other circular or advertisement containing an

unfair report of the said judgment to the prejudice of the Plt.—*Hayward v. H.*, North, J., 22 Nov. 1886, A. 1614. *S. C.*, 34 Ch. D. 198.

## 2. Injunction against Slander and Libel on the Plts' Trade by Spurious Experiments.

UPON motion &c., Let the Deft, his agents, servants, travellers, and representatives, be perpetually restrained from representing or stating in any way, either verbally or in writing, and in particular either by circular or spurious experiment or otherwise, that the Plt co.'s process does not contain meat or extract of meat, or any other ingredient stated by the Plt co. to be contained therein, or otherwise slandering or libelling the Plt co. in their trade, or otherwise representing, or suggesting, or doing anything calculated to represent or suggest, that the Plt co.'s preparation is spurious or not genuine.—Liberty to apply.—*Coleman & Co. v. Pearson*, Chitty, J., 25 Jan. 1889, A. 91.

Plts carefully eliminated albumen from their preparation. Deft furnished his travellers with tannic acid, which is a test for albumen, and instructed them to pour it into the Plts' preparation, and represent the absence of any resulting precipitation as a proof of the absence of meat.

### NOTES.

Though it was formerly settled that the Court had no jurisdiction to restrain publication of a libel, or of any letter, advertisement or other document which was injurious to the property, either in money or reputation, of another (see *Prudential Co. v. Knott*, 10 Ch. 142, overruling *Dixon v. Holdin*, 7 Eq. 493; *Springhead Co. v. Riley*, 6 Eq. 551), the effect of the Jud. Act, 1873, s. 25 (8), is to enlarge the jurisdiction so that injunctions to restrain libellous statements injurious to property or trade, as well as damages, may now be granted without the necessity of proving actual damage, and without the finding of a jury where the action has been tried by a Judge alone: *Thomas v. Williams*, 14 Ch. D. 864; *Thorley, &c. Co. v. Massam*, 14 Ch. Div. 763; *Hill v. Hart-Davies*, 21 Ch. D. 798 (and see *Thorley, &c. Co. v. Massam*, 6 Ch. D. 582; *Saxby v. Easterbrook*, 3 C. P. D. 339); and there is jurisdiction to grant an interlocutory injunction: *Bonnard v. Perryman*, W. N. (91) 75; 39 W. R. 506; but such an order will not be made except under very special circumstances: *Bonnard v. Perryman*, *sup.*; as where any jury would say the matter complained of was libellous, and if they found otherwise their verdict would be set aside as unreasonable; *S. C.*; *Liverpool Household Assoc. v. Smith*, 37 Ch. Div. 170; *Quartz Hill Co. v. Beall*, 20 Ch. Div. 501; especially where a claim of privilege is set up: *S. C.*; but see *Punch v. Boyd*, 16 L. R. Ir. 476; nor where the statements, however injurious, are not shown to have been made *malâ fide* or in breach of any contract: *Société Anonyme des Glaces v. Tilghman*, 25 Ch. Div. 1; nor where injury to person or property is not shown, even though the libels are calculated to cause extreme annoyance, are wholly unjustifiable, and of a gross character, and the Plts have previously obtained a verdict against Defts for substantial damages in respect of similar libels: *Salomons v. Knight*, 39 W. R. 506.

Oral as well as written statements, if slanderous and calculated to injure the business of another, will be restrained: *Hermann Loog v. Bean*, 26 Ch. D. 306.

And that the Court is reluctant to grant an injunction restraining the publication of future libels, as involving the trial of the question of libel or no libel in a very unsatisfactory way on motion to commit, see *Liverpool Household Assoc. v. Smith*, *sup.*, where also a doubt was intimated whether, in *Hill v. Hart-Davies*, *sup.*, the Court was right in granting an interlocutory injunction with the words "or any other circular or letter containing false or inaccurate representations as to the credit or financial condition of the said society."

An action of libel, even if involving injury to trade, is determined by the death of the Plt, unless it is in the nature of an action of slander of title, e.g., alleges publication impugning Plt's right to use his trade mark: *Hatchard v. Mege*, 18 Q. B. D. 771.

Where the injury proved was trifling, and the action not brought until three months after the Plt knew of the publication of the libel, the Court gave only £5 damages: *Hayward v. H.*, 34 Ch. D. 198; and a circular containing an erroneous statement of a judgment in an action, viz., that the Deft had been ordered to undertake not to represent his firm to be that of the Plts, whereas in fact such undertaking had been voluntarily given, was held to be a libel injurious to Deft's trade: *S. C.*

Upon the question whether words could be deemed libellous as imputing insolvency, see *Capital and Counties Bank v. Henty*, 7 App. Cas. 741; and upon the question of privilege, see *Allbutt v. General Council of Medical Education*, 23 Q. B. Div. 400 (publication of minutes of the Deft Council); *Davis v. Shrepstone*, 11 App. Cas. 187 (reports of statements made to proprietors of newspapers); *Proctor v. Webster*, 16 Q. B. D. 112 (letter to lords of Privy Council); *Hill v. Hart-Davies*, 21 Ch. D. 798 (circular to members of friendly society); *Waller v. Loch*, 7 Q. B. Div. 619 (report of Secretary of Charity Organization Society); *Macdougall v. Knight*, 14 App. Cas. 194; 17 Q. B. Div. 636 (reports of proceedings in Courts of Justice); *Munster v. Lamb*, 11 Q. B. Div. 588 (protection of advocate absolute); *Hayward v. H.*, 34 Ch. D. 198 (privilege not lost unless communication shown to be untrue to the knowledge of the person making it); *Jenouwe v. Delmege*, (1891) A. (P. C.) 73 (the occasion rebuts the inference of *mala fides* of Deft, so that the *onus probandi* is cast on the Plt).

And that a corporation cannot sue for libel affecting personal reputation only, and not property, see *Corporation of Manchester v. Williams*, (1891) 1 Q. B. 94.

## SECTION XI.—COMMENTS ON PENDING PROCEEDINGS.

### 1. *Injunction restraining the Delivery of a Sermon with Special Reference to Pending Proceedings.*

**USUAL undertaking.**—Let the Deft B. be restrained by injunction from preaching or delivering any sermon or address with special or other reference to the trial of this cause, and from publishing or distributing, or being in any way instrumental in publishing or distributing, the printed handbill or placard being the exhibit &c., or any like handbill or placard or notice, and from otherwise prejudicing and interfering with the trial of this cause, or the persons to be examined as witnesses at the hearing thereof.—*Mackett v. Herne Bay Commrs.*, V.-C. B., 24 June, 1876, B. 1026; *S. C.*, 24 W. R. 845.

For an order that the printers and publishers of the "S. Independent" do, within three weeks, publish in three successive papers apologies for their offence (in publishing the bill and depositions taken in a suit still pending, and commenting thereon in a manner calculated to prejudice the case of the Deft) in as legible a type and conspicuous a manner as the extracts and articles complained of; and do also pay the costs of the motion; otherwise that they stand committed for contempt, see *General Exchange Bank v. Horner*, M. B., 12 Nov. 1868, A. 2668.

For similar orders for submission and payment of costs by the printers and publishers of newspapers, see *Tichborne v. Mostyn*, V.-C. W., 18 July, 1867, B. 2073, 2076; *Robson v. Dodds*, V.-C. M., 27 May, 1869, B. 1317; *S. C.*, 17 W. R. 782.

## 2. *Ex parte* Order restraining Publication of Matter tending to prejudice Trial of Action.

UPON motion &c. by counsel for the Plts, Let A. B., the printer and publisher of the C. D. newspaper, his servants and agents, be restrained until &c., from printing or publishing, or reprinting or republishing, or causing or permitting to be written, printed, or published, or rewritten, or reprinted, or republished, an article or paragraph entitled "The Harsop Estate Claimant—After a Missing Will," or any copy of or extract from such paragraph or article, or any statement therein, or to the like effect; And from writing, or printing, or publishing, or causing or permitting to be written, or printed, or published, with or without comment, any pleading or evidence in this action, or any defamatory statement tending to prejudice the minds of the public or to prevent a fair trial of this action.—*Leslie v. Cave*, Pearson, J., 14 May, 1885, B. 548.

And for case in which an interlocutory injunction was granted to restrain a threatened publication by the Deft of circulars abusive of the Plt, and tending to prejudice the fair trial of the action, see *Kitcat v. Sharp*, 52 L. J. Ch. 134.

### NOTES.

The publication by persons interested of *ex parte* statements of pending proceedings (*Coleman v. W. Hartlepool Ry. Co.*, 8 W. R. 734; *Brook v. Evans*, *Ib.* 688), or of comments, in anticipation of a trial, calculated to prejudice the public mind and obstruct the course of justice (*Tichborne v. Mostyn*, 7 Eq. 55, n.; *Daw v. Eley*, *Ib.* 49; *Mackett v. Herne Bay Commrs.*, Form 1, *sup.*); or, with or without comment, of the pleadings, evidence, petition, or any *ex parte* statement in any pending cause or matter, will be restrained and punished as a contempt of Court: *Re Cheltenham and Swansea Can. Co.*, 8 Eq. 580; *Felkin v. Herbert*, 12 W. R. 241; *Kitcat v. Sharp*, 31 W. R. 227; 52 L. J. Ch. 134; and an apology must be made and published as the condition of not committing (in the case of a newspaper) the publishers and printers: *General Exchange Bank v. Horner*, W. N. (68) 259; *Robson v. Dodds*, 17 W. R. 782; and as to contempt of Court generally, *v. sup.* Chap. XXVII., "EXECUTION," p. 404.

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## SECTION XII.—PARTNERS.

### 1. *Injunction against acting as Partner.*

LET the Deft B., his agents and servants, be restrained by injunction until &c. from entering into any contract or contracts, and from accepting, drawing, indorsing, or negotiating any bills or bill of exchange, notes or note, or written securities or security, in the name of the partnership firm of D. and B.; and from contracting any debts or debt, and buying and selling any goods, and from making or entering into any verbal or written promise, agreement, or undertaking, and



from doing or causing to be done any acts or act, in the name or on the credit of the said partnership firm, or whereby the said partnership firm can, or may, in any manner become or be made liable to, or for the payment of, any sums or sum of money, or for the performance of any contract, promise, or undertaking.—*Dyson v. Benson*, V.-C., 21 Oct. 1815, A. 1531.

For interlocutory order restraining Deft from introducing or employing one of his sons as a clerk (in breach of the partnership contract) without the consent of his partner, see *Watney v. Trist*, V.-C. H., 6 April, 1876, B. 885; 45 L. J. Ch. 412.

2. *Interim Order in an Action for Dissolution of Partnership restraining Deft from drawing Cheques &c., in the Name of the Firm until after the Trial.*

AND the Plt by his counsel undertaking not to draw, make, accept, indorse, or negotiate any cheque, bill, note, warrant, or security in the name or firm of the copartnership in the writ mentioned, except so far as the Deft may do so under the terms of this order, Let the Deft B. (*the partner*) be restrained, until &c., from drawing, making, accepting, indorsing, or negotiating any cheque, bill, note, warrant, or security whatever in the name or firm of the copartnership, otherwise than for or on account of the said copartnership, and from receiving, using, employing, or retaining any money, securities, or property of the said copartnership for his own separate use, and from placing, keeping, or permitting the moneys of the said copartnership to stand at any bank to or on the separate and private account of the Deft, or on any account other than the joint account of the said copartnership.—But this order is not to prevent either party from drawing out of the net profits of the said partnership to the extent of one half of such net profits or to the extent of £— a quarter each if the half of such profits shall exceed that sum.—*Lemann v. Berger*, V.-C. B., 24 Feb. 1876, B. 530; 34 L. T. N.S. 235.

3. *Injunction on Dissolution of Partnership.*

LET the Deft and his (servants and) agents be restrained by injunction from intermeddling with the partnership assets, and from signing or using the name or style of firm of H. and D., or from trading, or dealing, in or under that name or style; until &c.—Directions for receiver.—*Hoffman v. Duncan*, V.-C. W., 2 Nov. 1853, A. 7.

For order staying partner, during the partnership term, from carrying on business with other persons in the name of the old firm, and publishing notices of dissolution, see *England v. Curling*, 8 Beav. 130.

For order restraining a partner from applying any of the moneys and effects of the partnership, otherwise than in the ordinary course of business, and from obstructing or interfering with Plt in the exercise or enjoyment of his rights under the partnership articles, see *Hall v. H.*, 12 Beav. 414; 20 Beav. 139.

For declaration that the partnership between Plt and Deft extended to a certain patented process, and that the same was partnership property, and

for injunction to restrain Deft from any interference with the sale thereof by Plt, see *Mellin v. Lerner*, V.-C. J., 26 Feb. 1869, B. 723.

For injunction to stay Defts from removing Plt's name from the list of members of the society known as "Lloyd's," and from excluding the Plt from the use and enjoyment of the society's rooms, and from otherwise interfering with the exercise of Plt's rights as a member, see *Forwood v. Goschen*, M. R., 3 Nov. 1870, A. 2638.

For injunction to restrain Deft from carrying on business in the partnership name at the partnership premises, Q. Street, of which he had renewed the lease, and from employing the assets of the partnership in the Q. Street business, see *Clements v. Norris*, M. R., 20 Feb. 1878, A. 414; 8 Ch. D. 129.

#### 4. *Injunction on Dissolution restraining carrying on Business or soliciting Custom in the Name of the old Firm.*

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Deft, Let the Deft A. B., his partners, servants, workmen, and agents, be restrained until judgment in this action from applying to any person who was a customer of the Deft prior to &c., privately or by letter, personally or by a traveller, asking such customer to deal with the Deft, or not to deal with the Plt, in varnish or polish of any description, and from serving varnish or polish of any description to or otherwise dealing in the same with any such customer.—*Davis v. Smaggasgale*, North, J., 25 July, 1890, A. 1053; S. C., W. N. (90) 158, 169.

#### 5. *Injunction against the Use of Trade Name on Dissolution of Partnership.*

LET the Deft B. C., his servants &c., be restrained by injunction until &c., from resuming or carrying on the business of &c., either alone or in partnership with his son B. C. the younger in the (bill) mentioned, or any other person or persons, under the firm or style of B. C. & Co., or B. C., Son & Co., or under any other style or firm calculated to induce the customers of the firm of B. C., W. & Co. in the (bill) mentioned, or the public generally, to believe that the Deft B. C. is carrying on the business of the last-mentioned firm, and from thereby, or otherwise in any manner holding out that the said Deft is carrying on the business of —, in continuation of or in succession to the business carried on by the said firm of B. C., W. & Co., and also from receiving or retaining, or in any manner interfering with, any letters or messages addressed to or intended for the said firm of B. C., W. & Co., by whatever description or style or manner such letters or messages may be respectively addressed.—*Witt v. Corcoran*, V.-C. B., 13 June, 1873, B. 1637; S. C., made perpetual 24 July, 1874, B. 220.

For injunction to restrain Deft from resuming or carrying on business in a particular neighbourhood, either alone or in partnership, under a certain style or firm of which he had sold the goodwill, or holding out that he carried on such business in continuation of or in succession to the late firm, see *Churton v. Douglas*, Joh. 198.

For injunction to restrain the Deft W. from using the Plt's patents, and from carrying on business under the name of W. & Co., and from represent-

ing by advertisement and circulars that he had succeeded to the business of engineer, &c., lately carried on by W. G. & S., at &c., and purchased by Plts G. E. & Co., with directions for delivery up of all trade cards or circulars, and any drawings or patterns, of the late firm W. & Co., and inquiry as to damage, see *Graveley v. Winchester*, V.-C. W., March, 1867, A. 700.

6. *Injunction against removing Partnership (Theatrical) Property*  
—Receiver.

USUAL undertaking as to damages.—Let the Deft S., his servants &c., be restrained by injunction from taking possession of, removing, selling, disposing of, or intermeddling with any part of the scenery, machinery, dresses, properties, effects, and things, belonging to the Plt and Deft as partners, in the joint adventure in the Plt's (bill) mentioned; until &c.—And Let a proper person be appointed, upon his first giving security, to take possession of the said scenery &c. (as above), so belonging to the Plt and Deft; And Let the Plt H. and the Deft S. deliver over to such receiver the said scenery &c.—*Hopkins v. Smith*, V.-C. J., 18 Feb. 1869, A. 317.

7. *Injunction against interfering with Plt's enjoyment of his Club.*

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Defts, Let the Defts and their servants, and the servants of the Beef Steak Club, be perpetually restrained from interfering with the enjoyment by the Plt, as a member of the said Beef Steak Club, of the usage and benefit of the said club and the buildings and property thereof.—*Labouchere v. Earl of Wharnccliffe*, M. R., 28 Nov. 1879, B. 2281; S. C., 13 Ch. D. 346.

8. *Interim Injunction against dealing with Partnership Funds and drawing Money out of Private Banking Account.*

UPON motion &c. (Usual undertaking as to damages), Let the Defts be restrained until &c. from applying any assets of the partnership to any purposes other than those of the partnership business.—And Let the Deft B. be restrained until &c., or until further order, from drawing out of his private account at the N. Bank any sum of money that will leave to the credit of that account an amount less than (a) the sum of 100*l.* transferred to his private account from the partnership account; and also (b) the further sum of 119*l.*, partnership moneys paid in by him to such account as by the Plt's affidavit appears.—*Garrett v. Moore*, Chitty, J., 14 April, 1891.

NOTES.

RIGHT TO INJUNCTION.

As a general rule, matters of internal regulation between partners (including cos. corporate or unincorporated) will not be interfered with by the Court, unless the members or member of the firm to whom the management of the business has been entrusted by the others are acting illegally, and in breach of the trust reposed in them, or in violation of the partnership contract: Lindl. 935; and see *inf.* Chap. XLIX., "PARTNERSHIP."

A partner will be restrained from depreciating the property: *Marshall v. Watson*, 25 Beav. 501; and, until sale, stipulated for in the agreement for dissolution, from doing any act whereby the value of the goodwill may be prejudiced: *Turner v. Major*, 3 Giff. 442; and generally from acts inconsistent with the partnership agreement, or with the duties of a partner, even though a dissolution is not prayed: *Watney v. Trist*, 45 L. J. Ch. 412; *Kerr*, 164; *Joyce*, 522.

Dissolution of partnership, and consequent sole possession of the premises by one of two partners, was not a breach of a covenant in the lease to both against parting with possession: *Corporation of Bristol v. Westcott*, 12 Ch. Div. 461.

An injunction will not be granted to restrain arbitration proceedings by co-partners which would be futile, and in no way binding on the applicant: *Farrar v. Cooper*, 44 Ch. D. 323.

A partner withdrawing from a periodical so that the concern must be wound up, will not be restrained from advertising the discontinuance, as regards himself, of the publication: *Bradbury v. Dickens*, 27 Beav. 53.

Temporary unsoundness of mind (as distinguished from lunacy found by inquisition or permanent incapacity, see 53 & 54 V. c. 39, s. 35) of a partner will not justify the others in excluding him from the business: *Anon.*, 2 K. & J. 441. And see, as to the rights of an insane partner not so found, *Jones v. Lloyd*, 18 Eq. 265.

The bankruptcy of a partner is a dissolution as to all the partners in the absence of any agreement to the contrary, 53 & 54 V. c. 39, s. 33, and gives the solvent partner the right to sell the partnership property to pay the partnership debts: *Fox v. Henbury*, Cowp. 445; and see *Lindl.* 671. But this right is personal, and cannot be assigned, and accordingly an injunction was granted at suit of a bankrupt partner's assignee to restrain a sale by the solvent partner's execution creditor by assignment: *Fraser v. Kershaw*, 2 K. & J. 496.

As to the right of a surviving partner to restrain execution upon partnership goods for the debt of his partner who died before the writ was delivered to the sheriff, see *Newell v. Townsend*, 6 Sim. 419.

#### NAME AND GOODWILL.

On a dissolution, an assignment of the goodwill and business carries, as between the vendor and purchaser, the exclusive right to use of the business name: *Levy v. Walker*, 10 Ch. D. 436; *Chappell v. Griffith*, 53 L. T. N.S. 459. But a mere agreement by a partner to retire from a firm does not, in the absence of express agreement as to goodwill, involve a right to continue to use the retiring partner's name: *Gray v. Smith*, 43 Ch. Div. 208; nor may a purchaser use the name so as to expose the vendor to liability by holding him out as a person with whom trade contracts are made: *Thynne v. Shove*, 45 Ch. D. 577; *Chatteris v. Isaacson*, 57 L. T. N.S. 177.

After a conflict of opinion, it has now been settled by the Court of Appeal that the vendor of a goodwill, in the absence of express stipulation to the contrary, may not only carry on a similar business where and as he pleases, but may solicit personally or by letter, as well as by public advertisement, the customers of his former business, provided that he does not represent himself as carrying on the old business, or as being the successor of the person or persons by whom it was carried on: *Pearson v. P.*, 27 Ch. Div. 145 (overruling *Labouchere v. Dawson*, 13 Eq. 322; *Ginesi v. Cooper*, 14 Ch. Div. 596, and rendering obsolete *Leggott v. Barrett*, 15 Ch. D. 306; *Dawson v. Beeson*, 22 Ch. Div. 504, and other cases, and the distinction between voluntary and involuntary alienation taken in *Walker v. Mottram*, 19 Ch. D. 355); and see *Bristol, &c. Bread Co. v. Maggs*, 44 Ch. Div. 616.

Upon this principle, a partner who, upon a dissolution, has sold the goodwill to his former partners, will, it seems, still as heretofore be restrained from carrying on the business, or assuming the trade name, on the footing of being the representative or successor of the old firm: see *Burrows v. Foster*, *Witt v. Corcoran*, *sup.*, Forms 3, 4; *Churton v. Douglas*, *Joh.* 174; *Labouchere v. Dawson*, 13 Eq. 322; and for cases in which a like principle has been applied to a retiring partner, see *Hookham v. Pottage*, 8 Ch. 91; *Glenny v. Smith*, 2 Dr. & Sm. 476.

But see *Clark v. Leach*, 1 D. J. & S. 409, 32 Beav. 14, that a clause in the partnership articles which would give the dissolving partner the right to such an injunction will not be applicable where the partnership has been continued at will after the expiration of the term.

As to the right to the partnership name or style, as included in the purchase of the goodwill, see *Banks v. Gibson*, 34 Beav. 566; *Hall v. Barrows*, 4 D. J. & S. 150; *Johnson v. Helleley*, 34 Beav. 63.

The surviving partner was restrained, during the period given to the representative of the deceased partner for electing to continue the business, from carrying on the business under any other firm or style than that formerly used: *Evans v. Hughes*, 18 Jur. 691.

The question of the right of surviving partners to carry on the business in the old name, and to restrain the exors from carrying on business under the old name, until the right was established (at law), is discussed in Lindl. 445, citing and commenting on *Webster v. W.*, 3 Swan. 490; *Lewis v. Langdon*, 7 Sim. 421; and see *Kerr*, 404, 514.

## CLUBS.

Clubs, not being associations for the purpose of making profit, are not partnerships: Lindl. 50; and the Court will not interfere with the exercise by the committee of their discretionary power of expelling members: *Dawkins v. Antrobus*, 17 Ch. Div. 615; *Wood v. Wood*, L. R. 9 Ex. 190; *Lambert v. Addison*, 46 L. T. N.S. 20; *Harrison v. Earl of Abergavenny*, W. N. (87) 21; *Andrews v. Salmon*, W. N. (88) 102; *Lyttleton v. Blackburn*, 33 L. T. N.S. 641; *Gardner v. Fremantle*, 19 W. R. 256; unless such power has been exercised in a manner "contrary to natural justice" (*Baird v. Wells*, 44 Ch. D. 661, 670), irregularly, corruptly, maliciously, or not *bonâ fide*: see *Labouchere v. E. Wharnccliffe*, 13 Ch. D. 346; *Hopkinson v. Marq. Exeter*, 5 Eq. 63; *Fisher v. Keane*, 11 Ch. D. 353.

The foundation of the jurisdiction is the right of property vested in the member of which he is deprived by the expulsion: *Rigby v. Connol*, 14 Ch. D. 482; and that a member of a "proprietary club" has no such right, see *Baird v. Wells*, 44 Ch. D. 661.

### SECTION XIII.—COMPANIES, CORPORATIONS, AND OTHER PUBLIC BODIES.

#### 1. *Injunction against Railway Company proceeding on Notice to Treat.*

VARY order—And Let the Defts, the N. L. Ry. Co., their solrs, agents &c., be restrained by injunction until &c., from proceeding under the warrant in the (bill) mentioned issued to the sheriff of —, and from issuing or proceeding upon any other warrant to the sheriff of the said county, directing him to summon a jury for the purpose of settling, and from taking any other proceedings to assess, the amount of compensation to be paid to the Plt for the purchase of his freehold lands and hereditaments comprised in the notice to treat, dated &c. in the (bill) mentioned; and from taking any other proceedings for the purpose of obtaining possession of the same lands and hereditaments or any part thereof; and to restrain the Defts, their servants &c., in like

manner from entering upon or taking possession of the Plt's said freehold lands and hereditaments or any part thereof on the footing of the said notice.—Defts to pay Plt's costs of the motion.—*Lamb v. North London Ry.*, L. J., 3 May, 1869, B. 1186; 4 Ch. 522.

For injunction to stay railway co. from proceeding under their compulsory powers to take part of lands, after counter-notice to take the whole, subsequent notice of abandonment and seven years' delay, see *Hedges v. Met. Ry.*, 28 Beav. 109.

For injunction to stay proceedings upon a notice to treat given by the co. under their Act, the compulsory powers under which had since expired, and from taking any step to assess the compensation, or to take possession of the premises, until a proper notice should have been given by the co. under their existing Act, see *Richmond v. N. L. Ry.*, 3 Ch. 679; 5 Eq. 352.

For injunction restraining a railway co. from entering on or continuing in possession of land until the proper deposit should have been made, as provided by the L. C. C. Act, s. 85, and the Ry. Cos. Act, 1867, s. 36, see *Field v. Carnarvon, &c. Ry.*, 5 Eq. 190.

For declaration that a railway co. were entitled under their contract with the landowner to take his land for the purpose of diverting a footpath, although their compulsory powers had expired, and order for payment of the purchase-money with Plt's costs of suit, see *Rangeley v. Midland Ry.*, 3 Ch. 306.

## 2. *Railway Company enjoined from continuing in Possession of or entering on Land.*

LET the Defts, the L. V. Ry. Co., their contractor, servants, &c., be restrained by injunction from continuing in possession of the piece of land thirdly described in the indenture of lease in the Plt's bill mentioned, and upon which the Defts have entered, or any part thereof; and from entering upon, taking or using the said piece of land, or any part thereof, without the consent of the Plts first had and obtained; until &c.—*Brogden v. Llynvi Val. Ry. Co.*, M. R., 22 Sept. 1859, A. 2708.

For an order that Deft co. (who had been put under an undertaking not to interfere with Plt's property without proceeding under the L. C. C. Act) give access to the Plt and his surveyors, upon giving notice, to view the works of the Defts in the construction of their railway being carried on close to the house and premises of Plt, see *Saul v. Met. Ry. Co.*, V.-C. W., 7 Mar. 1867, B. 456; S. C., 16 L. T. N.S. 169.

By the decree in this case the co. were perpetually restrained from any interference with Plt's house and premises until the provisions of the L. C. C. Act should have been complied with: S. C., Nov. 1867, B. 2629.

For declaration of Plt's right to an injunction to restrain the railway co. from running trains over his land or otherwise using the same for their purposes without his consent; but on Plt submitting in lieu of such injunction to have paid to him the present value of the land recovered by him from the co. in ejectment, a decree for ascertaining the present value of the land and mesne profits in respect of the user by the co. of the land for six years before the suit, and for payment by the co. of the amount so ascertained, within six months from the date of the certificate; and upon payment by the co. to Plt of the amount certified to be due to him, Plt to convey the land to the co., and vacate the judgment in ejectment, see *Stretton v. G. W. Ry.*, 20 July, 1870, B. 2115; S. C., 5 Ch. 751.

For injunction to restrain railway co. from using part of their railway on the site of a diverted road until they had made a sufficient road for the use of the public, see *A. G. v. Barry Docks and Railway Company*, 35 Ch. D. 573.

For injunction to restrain a local board from entering on the Plt's land for the purpose of carrying a water main through it, see *Lewis v. Weston-super-Mare Local Board*, 40 Ch. D. 55.

### 3. *Railway Company declared bound to take the whole of two Houses, Gardens, and Premises—Injunction against taking less.*

DECLARE that the Defts, the W. E. &c. Ry. Co., are bound to purchase the whole of B. lodge and gardens, and the whole of the premises in the occupation of M., in the pleadings mentioned; And Let the Defts and their agents be perpetually restrained by injunction from summoning a jury or taking any proceedings to acquire a title to any smaller portions of the property.—Defts to pay the costs of suit, to be taxed. Plt to be at liberty to apply to compel performance of the order, or otherwise as advised.—*Cole v. West End of London, &c. Ry.*, M. R., 5 July, 1859, A. 2312; 27 Beav. 242; *Alexander v. W. E. & L. Ry.*, M. R., 26 Feb. 1862, A. 1013; and see *King v. Wycombe Ry.*, 28 Beav. 104; *L. Grosvenor v. Hampstead, &c. Ry.*, 1 D. & J. 446; *Salter v. Met. Dist. Ry.*, 9 Eq. 432; *St. Thomas's Hospital v. Charing Cross Ry.*, 1 J. & H. 400; *Furniss v. Midland Ry.*, 6 Eq. 473.

For the like order, unless or until the co. should either pay into Court, under sect. 85 of the L. C. C. Act, 1845, the value of the whole to be assessed, or have the whole value ascertained, see *Giles v. L. C. & D. Ry.*, 9 W. R. 588.

For declaration that Defts were bound to take the whole, and Plt not bound to sell a part, being able and willing to sell and make a title to the whole, with inquiry as to Plt's title, see *Marson v. L. C. & D. Ry.*, V.-C. G., 1 May, 1868, B. 1284, 6 Eq. 101.

The subsequent order in this case, after Plt's title had been found to be good, was for the co. to take all necessary and proper steps, under the L. C. C. Act, for the purpose of ascertaining the amount to be paid by them to Plt as the value of the whole of the property; payment to Plt of the value within one month after it had been ascertained; execution of conveyance and surrender by Plt; declaration of Plt's lien in the meantime; and in case default be made by Defts in paying Plt the value of the property when so ascertained within the time appointed for the purpose, Plt to be at liberty to apply to the Court with respect to the possession of the property, or to the enforcing his lien: *Marson v. L. C. & D. Ry.*, V.-C. J., 26 Feb. 1869, B. 479, 7 Eq. 546; and see *inf.* Chap. LIII., "LANDS CLAUSES ACTS."

For refusal of the injunction, where the land required was a paddock with a cow-house, loose box, and cottage, divided from the house and garden by a turnpike road, see *Steele v. Midland Ry.*, 1 Ch. 275; and see *Falkner v. Somerset, &c. Ry.*, 16 Eq. 458; in the case of a semi-detached house under one roof, occupied by different tenants under separate leases, with separate entrances, and no internal communication except between the common roof and the ceilings of the top floors, see *Hurvie v. S. D. Ry.*, 23 W. R. 202.

For injunction to restrain the Commrs of Sewers, acting under 57 Geo. III. c. xxix., from taking the whole of a house, they not having formally adjudged that possession of the whole was necessary for the purpose of executing their powers, see *Thomas v. Daw*, 2 Ch. 1.

For order declaring that the adjudication of the Commrs under the same Act was wrong and *ultra vires*, and perpetual injunction against their proceeding under the notice to treat, see *Gard v. Commrs. of Sewers*, 28 Ch. Div. 486.

For injunction to restrain metropolitan vestry, acting under the same Act, from taking the whole of the buildings and site of an orphanage, the owners wishing to sell the part of it required for the street widening, see *Teuliere v. Vestry of St. Mary Abbott, Kensington*, 30 Ch. D. 642.

For injunction to restrain the Mayor, &c. of London from exceeding their statutory powers by taking any further proceedings under the precept and notice of trial served upon the Plt, and from taking possession of his

premises until the purchase and compensation money payable to him should have been separately assessed, paid, and deposited according to the provisions of the particular Acts, see *Abrahams v. Corp. of London*, V.-C. G., July, 1868, A. 2072, 6 Eq. 625; and from proceeding on their notice to take the Plt's land for any purpose other than for that of their Act, until the portion *bond fide* required by them for such purpose should be ascertained, see *Galloway v. Corp. of London*, 2 D. J. & S. 213; but the difficulty was afterwards removed by a subsequent Act of Parliament: *Ib.* 639; and see *S. C.*, L. R. 1 H. L. 34.

For perpetual injunction to restrain a vestry from pulling down, after insufficient notice, under the Met. Loc. Man. Am. Act, 1862 (25 & 26 V. c. 102), s. 75, a structure beyond the general line of buildings in a street, see *Brutton v. St. George's, &c. Vestry*, 13 Eq. 339.

For injunction to restrain a railway co. from erecting or building any bridge over a road, so as to leave a less width than 45 feet, in accordance with the deposited plans and sections, see *A. G. v. Tewkesbury and Malvern Ry.*, 1 D. J. & S. 423; 4 Giff. 333.

For injunction to restrain a railway co. from making or maintaining a bridge with less headway than 15 feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded, see *A. G. v. Furness Ry. Co.*, 47 L. J. Ch. 776.

For injunction staying a railway co. from digging up, removing, or using, for the purposes of their undertaking, a natural deposit of beach forming a protection against inundations of the Severn, and within the survey and management of the Plts as commrs of sewers for the district, see *Crossman v. Bristol & S. W. Ry.*, V.-C. W., 23 July, 1863, A. 1351, 11 W. R. 981.

For an injunction to restrain the use of a new portion of railway, forming a communication over the main line between two branch lines of railway, until notice of the co.'s intention had been given to the Board of Trade, as required by 5 & 6 V. c. 55, s. 4, see *A. G. v. G. W. Ry.*, 7 Ch. 767.

For an injunction against opening a railway for passenger traffic, after an order of the Board of Trade directing the opening to be postponed on the ground of certified incompleteness of works, until after the expiration of the period for which the Board of Trade had directed or might direct the opening to be postponed, see *A. G. v. G. W. Ry. and Midl. Ry. Co.*, M. R., 4 Aug. 1876; 24 W. R. 1015.

For perpetual injunction to restrain a railway co. from selling or disposing of a piece of superfluous land not required for the purposes of the railway, except to the person, &c. entitled to the lands (if any) from which it was originally severed, until they should have offered it for sale to Plts as the owners of adjoining lands, see *Coventry v. L. B. & S. C. Ry.*, 5 Eq. 104.

#### 4. *Inquiry as to Damage in respect of Works by a Railway Company injuriously affecting a Landowner.*

LET the following &c.: 1. An inquiry what compensation and damages, if any, Plt is entitled to by reason of the burr wall as it stands having been built as a party wall partly on land of the Plt and partly on the land of the Defts, in the place and stead of his original independent boundary wall. 2. An inquiry what sum or sums, if any, Plt is entitled to for damage, if any, actually committed on the Plt's premises by the Defts or their contractors, or their contractors' workmen. 3. An inquiry whether the Plt's house is injuriously affected by the Defts' works, and the burr wall constructed by them partly on the land of the Defts and partly on the land of the Plt, and if so what sums, if any, ought to be allowed in respect thereof.—Adjourn &c.—*Lockwood v. L. & N. W. Ry.*, V.-C. G., 20 July, 1868, B. 2622; *S. C.*, 19 L. T. N.S. 68.

For the like inquiry what sum Plt was entitled to for compensation in respect of his having been injuriously affected by a tunnel having been



driven by the co. under part of a passage lying between two of his houses taken by the co., see *Souch v. E. L. Ry.*, 22 W. R. 566.

5. *Mandatory Injunction against working a Railway in Breach of Agreement with Landowner.*

VARY decree—And Declare that there has been a breach of the covenant contained in the indenture dated &c. in the pleadings mentioned, inasmuch as the Defts, the N. E. Ry. Co., have not taken up and set down passengers at C— station in the (bill) mentioned by as many trains, excluding express, mail, and special trains, as they have done at other stations between Y— and D—; And Declare, that in this respect the said C— station ought to be on the same footing as the most favoured station between Y— and D—; And Let the Defts, their servants &c., be restrained by injunction from stopping a less number of trains in the twenty-four hours of each day and night at C— station aforesaid, for the purpose of setting down and taking up passengers than they may from time to time stop at the most favoured station between Y— and D—, excluding, however, express, special, or mail trains.—*Hood v. N. E. Ry.*, C. A., 2 March, 1870, A. 720; 5 Ch. 525.

For a similar mandatory order upon interlocutory application to stay railway co. from permitting any trains for the accommodation of passengers, and for the conveyance of goods, &c. to pass along the railway, without stopping at a particular station, pursuant to an agreement with the landowner, entered into with promoters of a projected co. afterwards amalgamated with another; but injunction not to take effect till a day fixed by the order, see *E. Lindsey v. G. N. Ry.*, 10 Ha. 703. By a subsequent order this injunction was discharged, and new injunction ordered in terms arranged: V.-C. W., 19 Dec. 1854, B. 955.

And see *Churchill v. Salisbury, &c. Ry. Co.*, 23 W. R. 894 (varying V.-C. B., *Id.* 534), where the liability of a co., lessees of the line from the co. which had made the agreement with the landowner, to stop their trains at the particular station when made, but not to erect the station, was recognized.

For an interlocutory order to stay the G. W. R. Co. from carrying passengers other than their own guards, servants, and officers, and the Post Office guards, &c., between stations on their railway to which Swindon station was intermediate, by any of their trains appointed to run at stated times which might be lawfully required to stop at that station for any shorter time than "a reasonable period of about ten minutes," see *Phillips v. G. W. Ry. Co.*, V.-C. W., 8 Feb. 1872, B. 310.

This order, which was founded upon *Rigby v. G. W. Ry. Co.*, 2 Ph. 44; 10 Jur. 488, 531, was reversed on appeal, on the ground that the injunction extended the covenant between the refreshment contractor and the co. to cases not thereby contemplated, *e.g.*, to the day mail train carrying letters by direction of the Postmaster General, and under his control as to the time of stopping: see 7 Ch. 409.

6. *Railway Company restrained from removing a Wall, or making any Openings therein, in Breach of Agreement with the Landowner.*

LET the Defts, the L. & N. W. Ry. Co., be restrained until &c. from taking down or removing the wall built by the said co. in B— Street &c., or any part thereof, except so far, if at all, as it may be necessary

so to do for any merely temporary purpose in connection with the widening of the Defts' line of railway in the agreement dated &c., mentioned or referred to, and save as aforesaid from making or opening or permitting any window, door or other aperture to be made or opened in the said wall or any part thereof.—*D. Bedford v. L. & N. W. Ry. Co.*, V.-C. J., 24 Feb. 1870, A. 177.

For a perpetual injunction to restrain the obstruction of a communication between the Deft co.'s railway and Plt's wharf, see *Bell v. Midland Ry.*, 3 D. & J. 673.

#### 7. *Injunction against obstructing Trains run by another Company under Running Powers.*

"REVERSE decree dismissing bill with costs.—And Let the Defts, the G. W. Ry. Co. (their servants and agents), be perpetually restrained by injunction from obstructing the trains of the Plt co. passing over the junction, sidings, connections, and works described in the (bill) as the substituted junction to or from the main line of the said Defts, or from in any way depriving the Plts of their full use (subject to the usual and proper regulations for insuring the safe working thereof), of the said substituted junction."—Costs up to the (hearing) to be paid by the G. W. Ry.—*Midland Ry. v. Great Western Ry.*, L. JJ., 28 April, 1873, B. 1222; S. C., 8 Ch. 841.

For injunction to stay a railway co. from obstructing a turnpike road, or any road substituted for it, or rendering it less safe than when first interfered with by them, see *A. G. v. G. N. Ry.*, 4 D. & S. 86; *A. G. v. Barry Docks and Ry. Co.*, 35 Ch. D. 573.

For order staying Defts from using a joint station for the booking or transit of passengers or goods destined for or coming from a certain railway, see *J. B. & S. C. Ry. v. L. & S. W. Ry.*, 4 D. & J. 391.

For order restraining a railway co. from removing and selling a contractor's plant and materials pending an arbitration, see *Garrett v. Sal. & D. Ry. Co.*, 2 Eq. 358.

And for the converse case refusing interference with the exercise by the Defts of their right of using the contractor's plant and materials for the completion of the works under a new contract, see *Jennings v. Brighton, &c. Board*, 4 D. J. & S. 735, n.

#### 8. *Issue of Shares to pay Dividends restrained.*

LET the Defts, the G. W. Ry. Co., their directors and servants, be restrained by injunction until &c., from issuing any preference or other shares or stocks, or any debenture stocks, for the purpose of paying, by means of such preference or other shares or stocks, any dividends or interest to the shareholders of the co. in respect of their shares or stock in the co., and in particular the dividends in the Plt's (bill) mentioned as having been announced in the months of March and August last.—*Hoole v. The Great Western Railway Co.*, V.-C. W., 21 Nov. 1867, A. 2581; 3 Ch. 262.

#### 9. *Payment of Dividends out of Capital restrained.*

LET the Defts, the M. Ry. Co. and their directors, the Defts &c., be restrained by injunction from declaring or paying any dividends,

except so far as the profits and other income of the co. may be applicable to such dividend, regard being had to the provisions of the special Acts authorizing the several undertakings of the said co., and those of the Companies Clauses Consolidation Act, 1845; until &c.—*Blozam v. The Metropolitan Railway Co.*, V.-C. W., 31 Jan. 1868, A. 173; 3 Ch. 337.

For like order to stay the same co. from declaring or paying any dividend out of or in respect of a particular fund, see *Salisbury v. The Metropolitan Ry. Co.*, V.-C. J., 18 Feb. 1869, B. 355; S. C., 38 L. J. Ch. 249. And see *Davison v. Gillies*, 16 Ch. D. 347.

10. *Injunction to restrain striking out Plt's Name from Register of Members, and treating his Shares as forfeited.*

LET Defts, the London, &c. Co., Limited, and the Defts C., M., and J., the directors thereof, be restrained by injunction from striking out or erasing the name of the Plt from the register of the members of the Deft co., and from selling, re-allotting, or otherwise disposing of the Plt's shares therein numbered &c., inclusive, in the said co., which by a resolution of the directors of the Deft co., of the — day of — are purported to be forfeited, or any of them, or otherwise acting upon the aforesaid resolution until judgment in this action, or until further order.—*Goulton v. London, &c. Co.*, V.-C. M., 7th June, 1877, A. 1180.

For order restraining directors of a co. from excluding Plt (one of the directors) from any meeting of the board of directors of the co., and from holding any meetings of the board without notice to him, and from in any way interfering with Plt in the discharge of his duties as a director, see *Kyshe v. Alturas Gold Co.*, 36 W. R. 496.

11. *Injunction to restrain Improvement Commissioners from applying Rates in promoting a Bill in Parliament.*

LET the Defts, the W. H. I. Commrs., and the individual members of such commission, and their clerks, treasurer, solr, and agents, be restrained by injunction from applying any moneys heretofore produced or hereafter to be produced by the rates and funds under their control as such commrs, or any of them, in or towards the payment of any costs or expenses heretofore incurred, or hereafter to be incurred, by them in or in relation to the preparation, introduction into Parliament, or promotion of the bill intituled &c., or otherwise in relation to such bill, or in or towards the payment of any of the costs or expenses of any opponent or late opponent of the said bill, either as an inducement to withdraw such opposition or otherwise, unless and until authorized by Parliament to do so, or until &c.—*A. G. v. West Hartlepool Improvement Commrs.*, V.-C. J., 22 April, 1870, A. 916; 10 Eq. 152.

For the like order to restrain the Deft as one of and representing the Commrs of —, and the Commrs, &c., see *A. G. v. Andrews*, V.-C. of E., 24 Jan. 1850, A. 408; affd. 2 Mac. & G. 225.

For like order against a board of health, their members, officers, and

agents, see *A. G. v. Peacock*, M. R., 27 Ap. 1854, A. 808; interim order, *Ib.* 745.

For like injunction, by consent perpetual, against vestry, and against drawing cheques, with costs, see *A. G. v. St. Leonards*, V.-C. W., 3 Mar. 1858, Reg. Min. 236.

For injunction to stay borough commrs from expending rates in promoting bill in Parliament, or drawing any cheques or orders for that purpose, see *A. G. v. Eastlake*, 11 Ha. 229.

And to stay railway co. applying its funds in application to Parliament for powers to extend its business beyond the objects for which it was constituted, on bill by a shareholder, see *Simpson v. Denison*, 10 Ha. 51.

And from applying funds in promoting a bill for a new line and issuing shares, except under the existing Act, see *Vance v. E. Lanc. Ry.*, 3 K. & J. 50.

For injunction to restrain the Metropolitan Board of Works from promoting or supporting a draft scheme under the Metropolitan Commons Act, 1866, containing provisions inconsistent with those contained in an agreement between themselves and the Plt, see *Telford v. Met. Bd. of Works*, V.-C. B., 9 March, 1872, B. 549; S. C., 13 Eq. 574.

For injunction to stay the Crystal Palace Co. accepting a surrender of shares in exchange for tickets of admission for Sunday, and from admitting persons for money on Sunday, as contrary to their charter, see *Rendall v. Crystal Palace Co.*, 4 K. & J. 337.

For injunction to stay directors of joint stock co. from forfeiting, or declaring to be forfeited, Plt's shares, on the ground of non-payment of calls or non-execution of settlement deed, or selling or disposing of them as forfeited, and from permitting co-Defts to execute, and such co-Defts from executing, the settlement deed alleged to have been prepared on behalf of Plts and other subscribers, till further order, see *Norman v. Mitchell*, 5 D. M. & G. 674; *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687.

For injunction restraining directors of a co. from using the co.'s funds in paying for stamps or return postage on proxy forms, or in paying for the printing or sending out any proxy forms with the names of the proposed proxies therein, or otherwise calculated to influence the votes of the shareholders, see *Studdert v. Grosvenor*, 33 Ch. D. 528.

## 12. *Improvement Commissioners restrained from applying Corporate Funds in building Offices in a Public Park.*

LET the Defts &c., be restrained by injunction from appropriating any portions or portion of the S— Park &c., in the (bill) mentioned as sites, or as a site, for the erection of any town buildings, or of any erection or building which shall not be needed for or incidental to the maintenance or use of the said parks, or public walks, or pleasure grounds; but this injunction is not to extend to using parts of the ground as sites for a public or free conservatory, museum, and library, open for the use, convenience, and recreation of the persons frequenting such public walks and pleasure grounds.—Defts to pay Plt's costs.—*A. G. v. Sunderland Corp.*, C. A., 26 March, 1876, A. 632; 2 Ch. D. 634.

## 13. *Corporation restrained from avoiding Plt's Office of, and from interfering with his Rights and Privileges as Alderman.*

LET the Defts, the Mayor &c. of S—, be restrained from avoiding and declaring void the office of alderman of the borough of S—, now held by the Plt, and from acting in reference to such declaration according to the notice of intention in that behalf given by the Defts,

and from in any way interfering with the exercise by the Plt of his rights and privileges as alderman.—Defts to pay Plt's costs.—*Aslatt v. Southampton Corp.*, M. R., 8 Nov. 1880, A. 2166; 16 Ch. D. 143.

14. *Directors of Public Company restrained from holding the Annual General Meeting at an unusual Date.*

USUAL undertaking—Let the Defts, A. B. & Co., and their secretary and agents, be restrained from holding or allowing to be held the annual general meeting of the Deft co. on the — day of —, and from summoning, or allowing to be summoned or held, any meeting of the Deft co. until after the — day of —, or until &c.—*Cannon v. Trask*, V.-C. B., 29 July, 1875, A. 1440; 20 Eq. 669.

For injunction to restrain a water company from discontinuing supply of water, if Plt undertakes to proceed before justices, under sect. 68 of the Waterworks Clauses Act, 1847 (10 V. c. 17), see *Hayward v. East London Waterworks Co.*, 28 Ch. D. 138.

15. *Declaration that an intended Agreement for a Transfer of the Assets and Business was ultra vires and invalid, and Injunction to restrain the Company and Directors from carrying the Agreement into effect.*

DECLARE that the said agreement dated &c., is invalid, and the resolutions for carrying the same into effect in the (bill) mentioned are *ultra vires* and illegal—Let the Defts T. S. &c. (*the directors*) repay to the Deft A. the sum of £— paid to them as in the (bill) mentioned under the said agreement, but without interest.—And Let the Defts, B. Co. (limited), T. S. &c., be restrained by injunction from carrying the said agreement dated &c., into effect, from assigning the patent, property, and assets of the co. (in the bill mentioned), or any of them, to the Deft A., or to any other person on his behalf.—Let the Defts T. S. &c., pay to the Plt his costs of this suit, to be taxed &c.—*Bird v. Bird's Patent Deodorising, &c. Co.*, V.-C. B., 28 Jan. 1874, A. 222; affirmed 7 Mar. 1874, A. 621; 9 Ch. 358.

For declaration that supply of water for bath was compulsory on waterworks company, &c., and injunction restraining taking of water contrary to declaration, see *Sheffield Waterworks Co. v. Bingham*, 25 Ch. D. 443, 456.

For case in which an injunction was granted to restrain the Corporation of Dublin from altering the name of Sackville Street to O'Connell Street, against the wishes of a large majority of the householders, see *Anderson v. Corporation of Dublin*, 15 L. R. Ir. Ch. 410.

NOTES.

Companies and public bodies will be kept strictly within the limits of their powers, and will be restrained from exceeding them, and from exercising them otherwise than for the purposes of their Act, or than in manner and to the extent thereby authorized: *Webb v. Manch. Ry. Co.*, 4 M. & Cr. 116; *Richmond v. N. L. Ry. Co.*, 3 Ch. 679; *Lamb v. N. L. Ry. Co.*, 4 Ch. 522; *L. Auckland v. Westm. L. Bd.*, 7 Ch. 597; *A. G. v. Cockermouth L. Bd.*, 18 Eq. 172; *Simpson v. Denison*, 10 Ha. 51; *Abrahams v. Corp. of London*, 6 Eq. 625. And see *Kerr v. Preston Corporation*, 6 Ch. D. 463; *Hedley v.*

*Bates*, 13 Ch. D. 498. But anything which is fairly incidental to that which the statute authorizes will be deemed to be authorized: *A. G. v. G. E. Ry. Co.*, 5 App. Cas. 473; *L. & N. W. Ry. Co. v. Price*, 11 Q. B. D. 485.

In order to constitute acquiescence in the unlawful exercise of statutory powers, even where public works of magnitude and importance have been completed, and their construction has extended over several years, there must be actual knowledge, or means of knowledge, by the parties injured of the fact that the works were not in accordance with the statute: *Herron v. Bath-mines Commissioners*, 27 L. R. Ir. 180.

In the case of a public body transgressing their statutory powers, the A. G., on behalf of the public, even where private injury has been neither proved nor alleged, may obtain an injunction: see *A. G. v. Cockermouth L. Bd.*, *sup.*; *Ware v. Regent's Canal Co.*, 3 D. & J. 212; *A. G. v. Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752; but this relief will not be granted at the instance of an individual, unless upon a case of threatened or actual injury to himself: *Stockport, &c. Co. v. Manchester Corpn.*, 9 Jur. N.S. 266; and see *Aslatt v. Corpn. of Southampton*, 16 Ch. D. 143, 149, *sup.*, Form 13.

The Court will not (especially on behalf of an outside creditor: *Mills v. Buenos Ayres Co.*, 5 Ch. 621) interfere in matters relating strictly to the internal management of a co.: *Macdougall v. Gardiner*, 1 Ch. D. 13, reversing 20 Eq. 383; *Foss v. Harbottle*, 2 Ha. 461; *Mozley v. Alston*, 1 Ph. 790; *Inderwick v. Snell*, 2 Mac. & G. 216; *Bailey v. Birkenhead Co.*, 12 Beav. 433; *Isle of Wight Ry. Co. v. Tahourdin*, 25 Ch. Div. 320, 333; except, perhaps, in cases where from anarchy and interregnum the business of the co. cannot be carried on without the interference of the Court: *Featherstone v. Cook*, 21 W. R. 835; *Trade Auxiliary Co. v. Vickers*, *ib.* 836. But acts by the directors or the majority which are *ultra vires*, oppressive, or fraudulent as regards the minority will be restrained: *Clinch v. Financial Corporation*, 5 Eq. 450; *Gregory v. Patchett*, 33 Beav. 595; *Cannon v. Trask*, 20 Eq. 669; *Fraser v. Whalley*, 2 H. & M. 10.

Generally, in proceedings on behalf of a corporate body to recover property from its directors or officers, or any other person, or to restrain acts alleged to be *ultra vires*, the corporate body, and not an individual member (even on behalf of the other members) is the proper Plt: *Gray v. Lewis*, 8 Ch. 1035; *Russell v. Wakefield W. W. Co.*, 20 Eq. 474; and see *Macdougall v. Gardiner*, *sup.*

But relief against acts *ultra vires* may be obtained by a single shareholder, suing on behalf of himself and the other shareholders, or the particular class having the same interest, when the majority will not allow the name of the co. to be used: *Atwood v. Merryweather*, 5 Eq. 464, n.; *Menier v. Hooper's Tel. Co.*, 9 Ch. 350; *Mason v. Harris*, 11 Ch. D. 97; *Hoole v. G. W. Ry. Co.*, 3 Ch. 262 (and see this question discussed in *Russell v. Wakefield, &c. Co.*, *sup.*; *Exeter, &c. Ry. Co. v. Buller*, 5 Rail. Ca. 211; *East Pant Du Co. v. Merryweather*, 2 H. & M. 254); unless the action is by a mere nominee having no legitimate interest, and acting at the instance of a rival co.: *Forrest v. Manch. Ry. Co.*, 3 D. F. & J. 126; *Filder v. L. B. & S. C. Ry. Co.*, 1 H. & M. 489; *Robson v. Dodds*, 8 Eq. 301 (where the bill was ordered to be taken off the file).

A shareholder whose vote has been rejected may bring an action on behalf of himself and all other shareholders who voted with him to restrain the directors from rejecting the votes of himself and other shareholders in the same interest: *Pender v. Lushington*, 6 Ch. D. 70; but as against the vote of the majority, the minority, or an individual, will not be allowed to use the name of the co. as Plt: see *Silber Light Co. v. Silber*, 27 W. R. 427; and in such case the name of the co. will be struck out as Plt, with liberty to add it as Deft.

But where the Plts substantially represented a majority, although they had technically no right to use the co.'s name, they were allowed the costs out of the assets: *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. Div. 1.

A creditor whose debt is *bonâ fide* disputed may be restrained from presenting a petition to wind up a co. not shown to be insolvent: *Cadiz Waterworks Co. v. Barnett*, 19 Eq. 182; *Niger Merchants' Co. v. Capper*, 25 W. R. 365; *Cercle Restaurant Castiglione Co. v. Lavery*, 18 Ch. D. 555.

The small amount of his interest, or the purchase of shares with a view to a suit, will not preclude the Plt from obtaining relief: *Bloxam v. Met. Ry. Co.*, 3 Ch. 337; *Hare v. L. & N. W. Ry. Co.*, 2 J. & H. 80.

The illegality of the act sought to be restrained by a shareholder as *ultra vires* must be shown by distinct averments: *Mills v. Buenos Ayres Co.*, 5 Ch. 621.

In addition to the forms above given, the following cases may be consulted upon the exercise of jurisdiction by injunction against cos. (and their directors) and public bodies.

#### *Applications to Parliament:—*

The application of funds or rates in promoting a bill in Parliament has been restrained as an act not within the powers of the public body or co.: see *A. G. v. West Hartlepool Commrs.*, 10 Eq. 152, *sup.*, Form 11; *A. G. v. Eastlake*, 11 Ha. 205; *Vance v. E. Lanc. Ry.*, 3 K. & J. 50; *Simpson v. Denison*, 10 Ha. 51; *Maunsell v. Mid. G. W. (Ireland) Ry. Co.*, 1 H. & M. 130; *A. G. v. Norwich Corpn.*, 16 Sim. 225; *Munt v. Shrewsbury, &c. Ry.*, 13 Beav. 1; *A. G. v. Lambeth Vestry, W. N.* (88) 19; *Caledonian Ry. Co. v. Solway Junction Ry. Co.*, 46 L. T. N.S. 526.

But not the application of corporate funds in opposing a bill in Parliament prejudicial to the interests and property of the corporation: *A. G. v. Wigan Corp.*, Kay, 268; 5 D. M. & G. 52; *A. G. v. Brecon Corp.*, 10 Ch. D. 204; *Bright v. North*, 2 Ph. 216.

Although the existence of jurisdiction *in personam* to restrain directors from improperly promoting or soliciting a bill in Parliament has not been denied, instances of its exercise are rare, if not unprecedented: *Re L. C. & D. Ry. Arrangement Act*, 5 Ch. 671; *Steele v. North Met. Ry. Co.*, 2 Ch. 237; *Lanc. &c. Ry. v. L. & N. W. Ry.*, 2 K. & J. 293; *A. G. v. Manch., &c. Ry. Co.*, 1 Rail. Ca. 436; *Heathcote v. N. Staff. Ry.*, 2 Mac. & G. 100.

But a public body will be restrained from promoting or supporting before the Inclosure Commrs a scheme (requiring Parliamentary sanction) where such scheme would defeat the provisions of an antecedent agreement between the public body and the Plt: *Telford v. Met. Bd. of Works*, 13 Eq. 574.

For the application of the distinction between restraining an appropriation of corporate funds in promoting a bill in Parliament, and restraining the co. or its directors from introducing or soliciting such bill, see *Mathias v. Wilts & Bucks Canal Co.*, 34 L. T. N.S. 346 (where, on an undertaking by the co. not to apply any of their funds in promoting the bill, the motion to restrain the co. from presenting the bill in Parliament, pursuant to a resolution passed at a Wharnccliffe meeting, was refused): *G. W. Ry. v. Rushout*, 5 D. & S. 290; *Stevens v. S. Dev. Ry. Co.*, 13 Beav. 48; *Winch v. Birkenhead Ry.*, 5 D. & S. 580.

And to the same effect as to an application to a foreign legislature, see *Bill v. Sierra Nevada Co.*, 1 D. F. & J. 183.

#### *Compulsory Powers:—*

Compulsory powers for the purchase of land must be strictly followed, and cannot be exercised for collateral purposes: *Stockton & Darlington Ry. v. Brown*, 9 H. L. C. 246; *Dodd v. Salisbury, &c. Ry.*, 1 Giff. 158; *Webb v. Manchester, &c. Ry.*, 4 M. & C. 116; *James v. Lovel*, 56 L. T. N.S. 739.

The certificate of the co.'s engineer, if given with reasonable show of accuracy, will be accepted as to the quantity of land required for the undertaking: *Kemp v. S. E. Ry.*, 7 Ch. 364; *Stockton and Darlington Ry. v. Brown*, 9 H. L. C. 254; see also *Flower v. L. B. & S. C. Ry.*, 2 Dr. & Sm. 330.

An extension of compulsory powers will not be inferred, and cos. or public bodies have been restrained:—

—from entering on or continuing in possession of land until the proper deposit has been made: *Field v. Carnarvon, &c. Ry. Co.*, 5 Eq. 190;

—from carrying a water main through the Plt's land where the proceedings of the Deft local board were not founded on the report of a properly constituted "surveyor," and the Public Health Act, 1875, s. 16: *Lewis v. Weston-super-Mare Local Bd.*, 40 Ch. D. 55;

—from entering upon land held under a determinable agreement, the co. having bought with notice of facts entitling the tenant in equity to an

extension of time: *Birmingham, &c. Land Co. v. L. & N. W. Ry. Co.*, 40 Ch. Div. 268;

—or until a bond in conformity with the L. C. C. Act has been given: *Poynder v. G. N. Ry.*, 2 Ph. 330; *Dakin v. L. & N. W. Ry.*, 3 D. & S. 414;

—from summoning a jury to assess separately the value of one out of four houses for which notice to treat had been given under 57 Geo. III. c. xxix.: *Ecc. Commrs. v. London Commrs. of Sewers*, 14 Ch. D. 305;

—from taking the whole of an orphanage under the same Act when the owners wished to sell only the part required for the street improvement: *Teuliere v. Kensington Vestry*, 30 Ch. D. 642; and see under same Act, *Gard v. Commrs. of Sewers*, 28 Ch. Div. 486; *Lynch v. Commrs. of Sewers*, 32 Ch. Div. 72;

—from diverting a river or road for the purpose merely of saving expense, when the road or river presents no actual obstacle to construction of the line: *Pugh v. Golden Valley Ry. Co.*, 15 Ch. Div. 330; 12 *Ib.* 274 (following *Reg. v. Wycombe Ry. Co.*, L. R. 2 Q. B. 310);

—from taking proceedings under a notice to treat given under an Act the compulsory powers of which had since expired, though power was given to take the particular land under a subsequent Act obtained after the expiration of the compulsory powers of the first: *Richmond v. N. L. Ry.*, 3 Ch. 679; 5 Eq. 352; and see *Lamb v. N. L. Ry.*, 4 Ch. 522, *sup.* Form 1; *Bentley v. Rotherham L. Bd.*, 4 Ch. D. 588;

—from exercising their powers without proper precautions to prevent injury to adjoining property: *Biscoe v. G. E. Ry.*, 16 Eq. 636.

And as to the exercise by cos. of their powers in a negligent, vexatious, and careless way, and consequent liability, see *Ricket v. Met. Ry.*, L. R. 2 H. L. 175; *Brine v. G. W. Ry.*, 10 W. R. 341.

A co. who have given notice to treat within the period limited for compulsory purchase will not be restrained from entering on the land at any time before the expiration of their powers of completing the line: *Tiverton and N. Devon Ry. Co. v. Loosemore*, 9 App. Cas. 480; *Kemp v. S. E. Ry. Co.*, 7 Ch. 364; nor from taking, in excess of their powers, lands included in the parliamentary plans, where no special damage to the Plt is shown: *Finck v. L. & S. W. Ry. Co.*, 44 Ch. Div. 330; nor from taking land for the purposes of accommodation works which the co. is liable and has power to make: *Wilkinson v. Hull, &c. Ry. Co.*, 20 Ch. Div. 323; nor from using sect. 85 of the Lands Clauses Act in aid of their power of acquiring a perpetual right to run trains over the line of another co., until the capital had been subscribed in accordance with sect. 16 of the Act, that section being held inapplicable in such a case: *G. W. Ry. Co. v. Swindon, &c. Ry. Co.*, 9 App. Cas. 787 (*q. v.* as to the question whether such a statutory right is "land" within sects. 3 and 16).

For the application of similar principles to public works authorized by the Metropolis Loc. Man. Act (18 & 19 V. c. 120), ss. 135, 225, and other Acts, see *Clothier v. Webster*, 10 W. R. 624; *Coe v. Wise*, L. R. 1 Q. B. 711; *Hammond v. St. Pancras Vestry*, L. R. 9 C. P. 316; *Bateman v. Poplar District Bd.*, 37 Ch. D. 272; *Mersey Docks, &c. v. Gibbs*, L. R. 1 H. L. 93; *Forbes v. Lee Conservancy*, 4 Ex. D. 116; *Abrahams v. Mayor of London*, 6 Eq. 625; *Kerr v. Preston Corp.*, 6 Ch. D. 463; and see Pub. Health Act, 1875, s. 308; Sect. V., "NUISANCE," *sup.*

In the exercise by a corporation of powers given to them by Parliament for public improvements in the borough, a liberal interpretation will be given to the clauses of the Act: see *A. G. v. Cambridge Corp.*, L. R. 6 H. L. 303; *Galloway v. Mayor of London*, L. R. 1 H. L. 34; and see *Spencer v. Met. B. of Works*, 22 Ch. Div. 142; *Rolls v. School Board for London*, 27 Ch. D. 639, 643.

The remedy of landowners whose property is injuriously affected by the erection of buildings under the authority of the Metropolis Local Management and Streets Improvement Acts, and similar Acts, is by claiming compensation under the L. C. C. Act, s. 68, and not by injunction: *Wigram v. Fryer*, 36 Ch. D. 87; *Clark v. London School Bd.*, 9 Ch. 120; *D. Bedford v. Dawson*, 20 Eq. 353.

Sect. 15 of the Railways Clauses Act, 1845 (8 & 9 V. c. 26), as to limits of deviation, has been held not to apply to a widening of an existing line of railway: *Finck v. L. & S. W. Ry. Co.*, 44 Ch. Div. 330.



Power by a special Act (incorporating the Railways Clauses Act) to cross a street by an arch or tunnel does not exclude the right of the railway co. to use the surface of the soil for a station: *A. G. v. G. E. Ry. Co.*, L. R. 6 H. L. 367; 7 Ch. 475; see also *Warden of Dover v. L. C. & D. Ry.*, 3 D. F. & J. 564; and such a right to tunnel is a "hereditament" within sects. 3, 85 of the L. C. Act: *Hill v. Midland Ry. Co.*, 21 Ch. D. 143.

A railway co. having power to "underpin" were held entitled to construct a concreted retaining wall for their railway: *Stevens v. Met. Dist. Ry. Co.*, 29 Ch. Div. 60.

A riparian owner is not entitled to restrain a waterworks co. from taking water from the stream above his land until they shall have proceeded to treat for the purchase of his interest in the stream, his right being to compensation only for damage by the diversion of water: *Bush v. Trowbridge W. W. Co.*, 10 Ch. 459; and see *Stone v. Yeovil Corp.*, 1 C. P. D. 691; 2 C. P. Div. 99.

*Ferrand v. Bradford Corporation*, 21 Beav. 415 (in which a co. was restrained from diverting a stream until the value of Plt's interest therein had been ascertained and secured), is not inconsistent with, and has not been overruled by, *Bush v. Trowbridge Co.*, *sup.*; see 2 C. P. Div. pp. 107, 115, 116.

Although on land purchased for a park or public pleasure-grounds by a corporation, under the Public Health Act, 1848, the erection of buildings for municipal offices will be restrained, the injunction will not be extended to a free public library, museum, or conservatory: *A. G. v. Sunderland Corp.*, 2 Ch. Div. 634, *sup.*, Form 12, p. 600.

*Dividends* :—

Directors have been restrained :

—from paying dividends out of capital: *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. 337, *sup.* Form 9; *Re Alexandra Palace Co.*, 21 Ch. D. 160; and see *Lee v. Neuchatel Asphalte Co.*, 41 Ch. Div. 1; or by the unauthorized issue of interest-bearing bonds: *Wood v. Odessa Waterworks Co.*, 42 Ch. D. 636; *Guinness v. Land Corp. of Ireland*, 22 Ch. D. 349; or out of borrowed moneys: *Macdougall v. Jersey Imp. Hotel Co.*, 2 H. & M. 528; or except out of profits: *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *Davison v. Gillies*, 16 Ch. D. 347; *Dent v. London Tram. Co.*, 16 Ch. D. 34.

(See also Companies Act, 1862, Table A. (73), 8 & 9 V. c. 16, s. 121.)

—from issuing shares or stock in lieu of dividends (as a means of recouping the revenue sums improperly withdrawn for capital purposes), and from declaring any dividend on those so already issued: *Hoole v. G. W. Ry. Co.*, 3 Ch. 262, *sup.*, Form 8, p. 598.

—from payment of dividends on ordinary shares without regard to the rights of preference stockholders to be paid in priority: *Henry v. G. N. Ry. Co.*, 1 D. & J. 606; *Sturge v. E. Union Ry.*, 7 D. M. & G. 158; *Mattheus v. G. N. Ry.*, 28 L. J. Ch. 375; and see *Webb v. Earle*, 20 Eq. 556;

—from paying dividends to one class of shareholders without also paying the corresponding dividends to the other shareholders: *Morgan v. G. E. Ry. Co.*, 1 H. & M. 560; and see *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65.

But payment of a dividend actually declared will not be restrained: *Carlisle v. S. E. Ry.*, 1 Mac. & G. 689; *Fawcett v. Laurie*, 1 Dr. & Sm. 192.

As to the illegality of a purchase of its own shares by a co., see *Trevor v. Whitworth*, 12 App. Cas. 409; and of issuing shares at a discount, see *Re Addlestone Linoleum Co.*, 37 Ch. Div. 191, 206; *In re Almada and Tiritto Co.*, 38 Ch. Div. 415; and that an agreement to underwrite shares is not an agreement to issue at a discount, see *Re Licensed Victuallers' Assoc.*, *Exp. Audain*, 42 Ch. Div. 1; and see Buckley, 560; and that payment of brokerage or commission to a stockbroker for placing a company's shares is improper, see *Re Faure Electric Co.*, 40 Ch. D. 141.

Delay by Plt is fatal to an interlocutory motion to restrain an alleged illegal application of funds for dividend purposes: *Salisbury v. Metropolitan Ry. Co.*, 18 W. R. 484; especially where there has been long acquiescence with the principle on which the accounts with reference to the dividend have been taken: *Yool v. G. W. Ry.*, 20 L. T. N.S. 74; and as to the effect of acquiescence by shareholders, see *London Financial Assoc. v. Kelk*, 26 Ch. D. 107.

If such illegal application has been already made, the order will be for the directors personally to refund the money improperly paid, with interest at 4 p. c., without prejudice to their right to recover back from the share-

holders to whom they have paid it the amount of dividend which they have so improperly paid to them: *Salisbury v. Metropolitan Ry.*, 18 W. R. 974; *Evans v. Coventry*, 8 D. M. & G. 835.

And see *National Funds Assur. Co.*, 10 Ch. D. 118; *Flitcroft's case*, 21 Ch. D. 519; *Alexandra Palace Co.*, 1b. 160; *Re Denham & Co.*, 25 Ch. D. 752; *Re Oxford Ben. Building Society*, 35 Ch. D. 502; *Leeds Estate Building Co. v. Shepherd*, 36 Ch. D. 787, for the exercise of summary jurisdiction under the Companies Act, 1862, ss. 101, 165 (which is replaced by the Companies (Winding-up) Act, 1890, s. 10), to direct repayment, with interest at 5 p. c., by the directors, who were declared jointly and severally liable, of dividends improperly declared and paid.

*Illegal and unauthorized Contracts and Arrangements:—*

Under this head railway cos. have been restrained—

—from promoting and guaranteeing a steam packet co.: *Colman v. E. C. Ry. Co.*, 10 Beav. 1; and from carrying on marine traffic: *Shrewsbury, &c. Co. v. L. & N. W. Ry.*, 16 Beav. 441 (see also *Forrest v. Manchester, &c. Co.*, 4 D. F. & J. 126; 30 Beav. 40);

—from carrying on the business of coal merchants: *A. G. v. G. N. Ry. Co.*, 1 Dr. & Sm. 154.

So also a co. formed for fire and life insurance business is not entitled to grant marine policies: *Re Phoenix Life Co.*, 2 J. & H. 441.

But payments made *ex gratia* for losses not covered by the policy will not be restrained: *Taunton v. Royal Ins. Co.*, 2 H. & M. 135.

And as conducive to the objects of the undertaking, it is not *ultra vires* for an hotel co. to let off part of their building for temporary use as a Government office: *Simpson v. Westm. Pal. Hotel Co.*, 8 H. L. C. 712; 2 D. F. & J. 141; or for a railway co. to supply rolling stock to another co. under a statutory agreement as to working, maintenance, and management of such line: *A. G. v. G. E. Ry. Co.*, 5 App. Cas. 473; or for directors of a building society to make advances on speculative securities, and incur expenditure, and do acts necessary for their realization: *Sheffield & S. Yorkshire B. B. Soc. v. Aizlewood*, 44 Ch. D. 412; and that the doctrine of *ultra vires* ought to be reasonably applied, see *L. & N. W. Ry. Co. v. Price*, 11 Q. B. D. 485.

And the owner of land adjoining a railway has no equity to restrain the co. from putting up a screen so as to prevent his acquisition of prescriptive rights: *Bonner v. G. W. Ry. Co.*, 24 Ch. Div. 1.

Railway and other cos. have also been restrained—

—from using a line for traffic other than their own: *L. B. & S. C. Ry. Co. v. L. & S. W. Ry. Co.*, 4 D. & J. 362;

—from applying the funds of the co. in making a line different from that prescribed by their Act: *Bagshaw v. E. Union Ry. Co.*, 7 Ha. 114; 2 Mac. & G. 389;

—in making part only of the line: *Cohen v. Wilkinson*, 12 Beav. 125; 1 Mac. & G. 481;

—in making one only out of several lines authorized by their Act: *Hodgson v. E. Powis*, 12 Beav. 392, 529; 1 D. M. & G. 6;

—in carrying out an agreement for the purpose of extending their business by acquiring the trade of another co.: *Simpson v. Denison*, 10 Ha. 51;

—from entering into a contract fixing and regulating future traffic of a proposed line so as to give to another co. an interest in such traffic and profits: *Midland Ry. Co. v. L. & N. W. Ry. Co.*, 2 Eq. 255; and see *Charlton v. Newcastle Ry. Co.*, 5 Jur. N.S. 1096;

(*Secus*, however, as to a *bona fide* traffic agreement between two coterminous railway systems: *Hare v. L. & N. W. Ry. Co.*, 2 J. & H. 80; and see *inf.* "Traffic Agreement.")

—from acting on an agreement so far as it bound one co. to contribute towards the promotion of a bill by another co., or to make traffic regulations applicable to future extensions: *Maunsell v. Mid. G. W. (Ireland) Ry. Co.*, 1 H. & M. 130;

—from applying the funds of a co. in the prosecution of a suit in which the co. are not Plts: *Kernaghan v. Williams*, 6 Eq. 228;

—in payment of the costs of a prosecution for libel against a former secretary of a committee of the co.: *Pickering v. Stephenson*, 14 Eq. 322; *Re Faure Electric Co.*, 40 Ch. D. 141; and see *Studdert v. Grosvenor*, 33 Ch. D. 528 (where the injunction was refused because the payment was

made and known to a general meeting before action brought); *secus*, where the prosecution was carried on entirely in the co.'s interest: *S. C.*;

—in making loans to the directors or officers of the co.: *Bluck v. Mallalue*, 27 Beav. 398;

—in a subscription to the Imperial Institute (in honour of the Queen's jubilee): *Tomkinson v. S. E. Ry. Co.*, 35 Ch. D. 675.

And generally cos. cannot enter into contracts or apply any part of their funds for purposes other than those contemplated or authorized by their Act: *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653 (reversing L. R. 9 Ex. 224, 249); *Salomons v. Laing*, 12 Beav. 379; *Hattersley v. E. Shelburne*, 10 W. R. 881; *Pickering v. Stephenson*, 14 Eq. 322; *Re Faure Electric Co.*, 40 Ch. D. 141; *Chapleo v. Brunswick Building Soc.*, 6 Q. B. Div. 696; *Baroness Wenlock v. River Dee Co.*, 10 App. Cas. 354; or reasonably incidental thereto: *A. G. v. G. E. Ry. Co.*, 5 App. Cas. 473; *L. & N. W. Ry. Co. v. Price*, 11 Q. B. D. 485; *Truman v. L. B. & S. C. Ry. Co.*, 11 App. Cas. 45; *Sevenoaks, &c. Ry. Co. v. L. C. & D. Ry. Co.*, 11 Ch. D. 625; *Hutton v. West Cork Ry. Co.*, 23 Ch. Div. 654; *Re West of England Bank, Exp. Booker*, 14 Ch. D. 31; and see *Cullerne v. London and Suburban Building Soc.*, 28 Q. B. Div. 485; however advantageous such proposed application may be considered by the co.: *Munt v. Shrewsbury, &c. Ry. Co.*, 13 Beav. 1; *E. C. Ry. Co. v. Hawkes*, 5 H. L. C. 331; 1 D. M. & G. 737; *Hope v. International Fin. Soc.*, 4 Ch. D. 227.

And see *Shrewsbury, &c. Co. v. L. & N. W. Ry. Co.*, 6 H. L. 113; *Scottish N. E. Ry. Co. v. Stewart*, 3 Macq. 382.

But the application by the directors of a portion of the funds in gratuities or pensions to the servants of the co. for services rendered is not *ultra vires*, and will not be restrained: *Hampson v. Price's Pat. Candle Co.*, 45 L. J. Ch. 437; 24 W. R. 754; *Henderson v. Bank of Australasia*, 40 Ch. D. 170.

And that the Court will not interfere in questions relating to the remuneration of directors for past as well as future services, see *Lambert v. Northern Buenos Ayres Ry. Co.*, 18 W. R. 180; or for services during a winding-up; *secus*, as to past services before transfer of co.'s undertaking, as not being reasonably incidental to the carrying on of business for co.'s benefit: *Hutton v. West Cork Ry. Co.*, 23 Ch. Div. 654; or to restrain the dismissal of an agent whose management and agency were especially provided for by the articles of association: *Mair v. Himalaya Tea Co.*, 1 Eq. 411.

An injunction will not be granted to enforce a contract embodied in the co.'s articles, but not adopted by the co., that the Plt, a director, shall not be removed: *Broune v. La Trinidad*, 37 Ch. Div. 1.

A co. has also been restrained—

—from transferring its business and assets to another co. without making provision for the claim of the Plt (as a policy-holder): *Kearns v. Leaf*, 1 H. & M. 681;

—from distributing assets in liquidation amongst shareholders without setting aside money to provide for rent and liabilities under the co.'s lease: *Gooch v. London Banking Assoc.*, 32 Ch. Div. 41;

—from applying assets to pay costs of a winding-up petition presented by co., but opposed by many shareholders, and of an appeal from dismissal of such petition: *Smith v. Duke of Manchester*, 24 Ch. D. 611;

—from carrying into effect an agreement for the sale and transfer to a person about to form a co. of the business and assets of the co.: *Bird v. Bird's Patent, &c. Co.*, 9 Ch. 358, *sup.* Form 15, p. 601;

—from discontinuing supply of water, notwithstanding the special remedy given by the Waterworks Clauses Act, s. 68: *Hayward v. E. London Waterworks Co.*, 28 Ch. D. 138.

But a contract by a co. to sell its rolling stock to another co., and re-hire it at a rent calculated to pay off the purchase-money, with interest, in a term of years, at the expiration of which the rolling stock was to belong to the hirers absolutely, was upheld as *bonâ fide*, though a loan *ultra vires* was thereby circuitously effected: *Yorkshire Waggon Co. v. Maclure*, 21 Ch. Div. 309.

Where a co. has ceased to carry on its proper business, and is carrying on one *ultra vires*, a shareholder is not confined to the remedy by injunction, but may obtain a winding-up order: *Re Crown Bank*, 44 Ch. D. 634.

As to the distinction between the sale and transfer of business and assets under the Cos. Act, 1862, s. 161, to an existing co., and to a speculator pro-

posing to form a co., see *Bird v. Bird's Patent, &c. Co., sup.*; *Southall v. Brit. Mutual, &c. Soc.*, 6 Ch. 614; 11 Eq. 65.

Directors have also been restrained from issuing shares for the express purpose of thereby controlling a general meeting: *Fraser v. Whalley*, 2 H. & M. 10; from wrongfully excluding Plt from acting as director: *Pulbrook v. Richmond Mining Co.*, 9 Ch. D. 610; *Munster v. Cammell Co.*, 21 Ch. D. 183; *Kyshe v. Alturas Gold Co.*, 36 W. R. 496; and see *Harben v. Phillips*, 23 Ch. Div. 14, 40; from summoning the general meeting at such a date as to deprive shareholders of their power of voting: *Cannon v. Trask*, 20 Eq. 669, *sup.* Form 14, p. 601; or upon an insufficient notice: *Alexander v. Simpson*, 43 Ch. Div. 139; *secus*, upon a notice ambiguously worded so that it might possibly include matters *ultra vires*: *I. of Wight Ry. Co. v. Tahourdin*, 25 Ch. Div. 320. But a very strong case will be required to induce the Court to restrain shareholders from holding a meeting: *I. of Wight Ry. Co. v. Tahourdin*, 25 Ch. Div. 320.

As to restraining directors from calling a meeting without giving notice to a co-director, *quere*: *Browne v. La Trinidad*, 37 Ch. Div. 1; and in *Imperial Hydropathic Hotel v. Hampson*, 23 Ch. D. 1, the Court refused to grant an injunction to restrain a person from acting as director on the ground that the co. had removed him.

Where the chairman at a meeting refused to put to the meeting an amendment properly moved by the Plt, a shareholder, the resolution was set aside: *Henderson v. Bank of Australasia*, 45 Ch. Div. 330.

Directors have been restrained from using the corporate name and powers for the purpose of dividing amongst the majority, to the exclusion of the minority, consideration money received from an arrangement with another co.: *Menier v. Hooper's Tel. Works*, 9 Ch. 350; *Mason v. Harris*, 11 Ch. D. 97.

A corporation has also been restrained from applying the borough funds in buying a gold chain for the mayor: *A. G. v. Bailey Corp.*, 26 L. T. N.S. 392; or to purposes not authorized by the Municipal Corporations or some other Act: see *A. G. v. Mayor of Newcastle*, 23 Q. B. Div. 492; *A. G. v. Mayor of Norwich*, 2 My. & Cr. 406; *A. G. v. Aspinall*, *ib.* 613; and from avoiding Plt's office of, and interfering with his rights and privileges as, alderman: *Aslatt v. Mayor, &c. of Southampton*, 16 Ch. D. 143; see Form 13, *sup.*, p. 600.

As to the jurisdiction to grant an injunction restraining execution for local rates, see *Ashworth v. Hebden Bridge Local Board*, 47 L. J. Ch. 195.

As to the incapacity of a corporation to enter into a contract fettering the powers of their successors, see *Ayr Harbour Trustees v. Oswald*, 8 App. Cas. 623; *Tunbridge Wells Improvement Commrs. v. Southborough Local Board*, 60 L. T. N.S. 172.

Upon the question of the capacities incident to corporations and cos., see Pollock, *Contr.*, &c.

And for cases in which injunctions have been granted or refused against cos. and their directors in respect of various acts, see Lindl. on Companies, 597.

#### *Preference Shares:—*

For injunction restraining the issue of preference shares, by the issue of unallotted parts of the original share capital with a preferential dividend, see *Hutton v. Scarborough Cliff Hotel Co.*, 2 Dr. & Sm. 517; 4 D. J. & S. 672; see also *Harrison v. Mexican Ry. Co.*, 19 Eq. 358.

#### *Superfluous Lands:—*

Upon the Lands C. C. Act, 1845, directing (sect. 127) that within the prescribed period, or, if no period be prescribed, within ten years after the time limited for completion of the works, superfluous lands not required for the purposes of the undertaking shall be sold, and in default shall vest in the owners of the lands adjoining thereto; and (sect. 128) giving, "unless such lands be situate within a town, or be lands built upon or used for building purposes," to the person then entitled to the lands from which the superfluous land was originally severed, or to the adjoining owners the right of pre-emption, the following cases have been decided:—

*Beauchamp v. G. W. Ry. Co.*, 3 Ch. 745 (that land required for making accommodation works which the co. would be compelled to make is not superfluous land); *Wilkinson v. Hull, &c. Docks Co.*, 20 Ch. D. 323.

*Mulliner v. Midland Ry. Co.*, 11 Ch. D. 611 (that land under a railway arch is not superfluous); and see *Ware v. L. B. & S. C. Ry. Co.*, 31 W. R. 228.

*Re Met. Dist. Ry. Co. and Cosh*, 13 Ch. Div. 607 (that land over a tunnel is not superfluous).

*Bird v. Eggleton*, 29 Ch. D. 1012 (that a prohibition under Inclosure Act, against building, revived when land was sold as superfluous).

*Hooper v. Bourne*, 5 App. Cas. 1 (that the burden of proving title to land as superfluous rests on the claimant; that the mere fact that the land is not built upon is not conclusive; that the fact of the land being in the neighbourhood of a populous town raises a presumption that it will be wanted for increased railway traffic).

*Hobbs v. Midland Ry. Co.*, 20 Ch. D. 418 (that sale of land by one co. to another is *ultra vires*, but is not conclusive proof of the land being superfluous).

*Betts v. G. E. Ry. Co.*, L. R. 8 Ex. 294; 3 Ex. D. 182 (that land acquired and *bonâ fide* retained by a co. with intention to use it for the purposes of their Act does not become superfluous land if not actually so used at the expiration of ten years).

*May v. G. W. Ry. Co.*, L. R. 8 Q. B. 26; 7 Q. B. 364; S. C., L. R. 7 H. L. 283 (that the right of adjoining owners to unsold land after ten years, under sect. 127, which, from having been applied by the co. to purposes other than those of their undertaking, has become superfluous land, is not defeated by an Act obtained by the co. after the expiration of the ten years enabling them to retain such land); and see *Moody v. Corbett*, L. R. 1 Q. B. 510.

*Norton v. L. & N. W. Ry. Co.*, 13 Ch. Div. 268 (that a strip of land between a hedge and disused fence, and occupied by the adjoining owner as part of his land, had become superfluous, and vested in the owner, and that his possession was sufficient to extinguish the co.'s title under the Statute of Limitations).

*Smith v. S.*, L. R. 3 Ex. 282 (that the provisions as to superfluous lands do not apply when the railway has been abandoned).

*Blackmore v. L. & S. W. Ry. Co.*, L. R. 4 H. L. 610 (as to the meaning of the word "adjoining"); see also *Coventry v. L. B. & S. C. Ry. Co.*, 5 Eq. 104.

*Carington v. Wycombe Ry. Co.*, 2 Eq. 825; 3 Ch. 377 (that lands outside, and not surrounded by the buildings of, the actual town, though within the borough boundary, are not within the words of exception, "within a town").

*Coventry v. L. B. & S. C. Ry. Co.*, *sup.* (that "lands used for building purposes" mean lands sold as building land or let on building leases, and actually laid out for building); see also *L. & S. W. Ry. Co. v. Blackmore*, L. R. 4 H. L. 610.

*Tomlin v. Budd*, 18 Eq. 368 (that the Metropolitan District Ry. Co. has been relieved by the Metropolitan District Railway Act, 1868, from the restrictions as to the sale of superfluous lands imposed by sects. 127, 128).

*Re Higgins' and Hitchman's Contract*, 21 Ch. D. 95 (that superfluous lands may be sold subject to a restrictive covenant not to erect a public-house, if such covenant be advantageous to the company).

*L. & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562 (that when land is sold as superfluous no interest in it can be retained by the co.).

*Re Thackwray and Young's Contract*, 40 Ch. Div. 34 (*quære* whether co. can convey postponing payment of purchase-money and retaining interim lien).

#### *Traffic Agreement:—*

A *bonâ fide* traffic agreement for diminishing competition between two coterminous railway systems is not invalid: *Hare v. L. & N. W. Ry. Co.*, 2 J. & H. 80.

And the Court will restrain acts in violation thereof, even in the absence of negative stipulation: *Wolverhampton, &c. Ry. Co. v. L. & N. W. Ry. Co.*, 16 Eq. 433; *Midland Ry. Co. v. G. W. Ry. Co.*, 8 Ch. 843, *sup.* Form 7.

And see *Llanelly Ry. Co. v. L. & N. W. Ry. Co.*, 8 Ch. 942; L. R. 7 H. L. 550, to the same effect, and negating the claim of one of the contracting parties to treat it as a terminable agreement, and to restrain the other from availing themselves of it (by running over and using the railways, &c.).

The earlier cases in which such agreements have been held invalid to the extent of restraining the delegation of the powers and duties, or the aliena-

tion of the plant and property of the one co. to the other (*Winch v. Birkenhead Ry.*, 5 D. & S. 562; *Charlton v. Newcastle, &c. Ry. Co.*, 5 Jur. N.S. 1096) seem to have proceeded upon the principle that it is the delegation of powers which vitiates the agreement: see *Beman v. Rufford*, 1 Sim. N.S. 550; *Shrewsbury, &c. Ry. Co. v. L. & N. W. Ry. Co.*, 6 H. L. C. 113; 4 D. M. & G. 115; 16 Beav. 441; *Browne & Theobald*, 287, 288.

Under a power to "maintain" a railway and work it, reasonable improvements, consistent with the purposes of the undertaking, are included: *Sevenoaks Ry. Co. v. L. C. & D. Ry. Co.*, 11 Ch. D. 625.

*Unpaid Vendor*:—

An unpaid vendor is not entitled in the first instance to have his lien enforced by an injunction restraining the co. from continuing in possession or running trains over the land: *Munns v. Isle of Wight Ry. Co.*, 5 Ch. 414; *Lycett v. Stafford & Uttoxeter Ry. Co.*, 13 Eq. 261; *Latimer v. Aylesbury Ry. Co.*, 9 Ch. D. 385; *Marshall v. Scarb. & Whitby Ry. Co.*, W. N. (91) 73; but after unsuccessful attempts to sell, the injunction will be granted: *Williams v. Aylesbury & Buckingham Ry. Co.*, L. C. for M. R. July, 1873, B. 2380; and so, too, if it is clear that the land is unsaleable, and that an attempt to sell would only cause useless expense: *Allgood v. Merrybent, &c. Ry. Co.*, 33 Ch. D. 571.

And as to vendor's lien generally, *v. inf.* Chap. L., "SPECIFIC PERFORMANCE."

*Winding-up*:—

It will require a strong case to induce the Court to hold that the paramount statutory power of winding up the co. was ousted by special articles: *Ellis v. Dadson*, 7 Times Rep. 318.

#### SECTION XIV.—ECCLESIASTICAL BENEFICES AND NONCONFORMIST CONGREGATIONS.

##### 1. *Decree for Perpetual Injunction as to Presentation.*

[In suit by proprietors of lands within a chapelry, claiming to present, an issue was directed; B. claimed the right and nominated H., and on his resignation P., whom the Bishop had licensed.]

DECLARE, that the customary right of electing or nominating a curate or chaplain to the chapel of —, within the parish of &c., ought to be established, according to the said verdict; And decree the same accordingly; And Declare that the Bishop of C. ought to license such clerk as hath been or shall be nominated, according to the right found by the said verdict, unless some legal objection shall appear to the Bishop against the qualification of such person to be licensed.—(Perpetual injunction against the Defts B. and H. to stay their proceedings in the actions of prohibition and replevin.)—"And to restrain the Deft P. from disturbing any person who hath been or shall be nominated curate or chaplain of the said chapel, pursuant to the right hereby declared and established, in the possession or enjoyment of the said chapel, or officiating there."—Deft B. to pay Plts' costs in the actions; Plts to pay the Bishop's costs of suit; such costs to be taxed.—As between Plts and the other Defts no costs in this Court.—*Hodgson v. Benison*, L. C., 31 Jan. 1747, A. 310.

For the allowance of solr and client costs to the Bishop, see *Edenborough v. Archbp. of Canterbury*, 2 Russ. p. 112.

For injunction until answer or further order to restrain the Bishop of C. and his substitutes and agents from sending out any instrument or mandate, or doing any act for the institution, &c., of the Deft, see *Potter v. Chapman*, 1749, B. 321; *Amb.* 98.

## 2. *Injunction against taking Possession of Living.*

LET the Deft M. be restrained by injunction from performing divine service in the church of St. M., in the town of S., in the (information) mentioned, and from reading therein the articles and other matters required to be read by a curate licensed to a church on taking possession thereof, and from doing or causing to be done, any act, matter, or thing, to put himself into possession of the curacy in the (information) mentioned, under or by virtue of the election, nomination, and licence in the (information) mentioned, or any of them; until &c.—*A. G. v. E. Powis*, V.-C. W., 23 Dec. 1853, A. 245; *Kay*, 186.

For order dissolving injunction, and ordering the trustees to present, and the Bishop to institute, see *Edenborough v. Archbp. of Canterbury*, 2 Russ. 93, 112.

For injunction to stay the Bishop from admitting the Deft's clerk, see *Hyde v. H.*, M. R., 11 July, 1710, A. 395; and from instituting and inducting a co-Deft to a vicarage, see *A. G. v. Cuming*, 2 Y. & C. C. 145.

For injunction to restrain the vestry of St. J., Clerkenwell, and the trustees of the living from presenting or nominating M. to the Bishop for institution or induction to the living or perpetual curacy, on the footing of an election declared by the decree to be null and void, see *Carter v. Copley*, 8 D. M. & G. 680 (reversing V.-C. K., 5 W. R. 172).

## 3. *Injunction to restrain Minority of Trustees of Methodist Chapel, who had resigned, from excluding Preachers appointed by the Majority.*

LET the Defts S. &c., be restrained by injunction from taking possession of the pulpit in the chapel at &c., vested in the trustees of the indenture dated &c., and from excluding the preachers, or any of them, duly appointed by the major part of the trustees acting in the trusts of the said indenture to preach and officiate in the said chapel, from preaching or officiating in the said chapel, and from in any manner disturbing or interfering with the performance of divine worship in the said chapel, and from in any manner meddling or interfering with the trust premises.—*Stott v. Storey*, V.-C. W., 18 July, 1860, B. 1561.

For declaration that Defts, trustees of the French Protestant Church of London, were not justified in removing the pastor, and injunction against interfering with his due exercise of his office, see *Daugars v. Rivaz*, 28 Beav. 262.

For decree on motion, in a suit by the majority of the trustees of a non-conforming chapel, for perpetual injunction to restrain a minister on probation and the minority of the trustees from disturbing the pastor, deacons, and members in the performance of divine service in, or in the use of, the chapel, and the minister from officiating as pastor, and from preaching, or intermeddling with the service; with costs against the Defts, see *Perry v. Shipway*, 1 Giff. 1, 11; 4 D. & J. 353.

For injunction to restrain two vicars (who had affected to dismiss the Plt

from the office of schoolmaster) from removing him from his office until after holding a meeting of the three vicars, who had power to remove him for specified causes, and the Plt had had an opportunity of being heard at such meeting in his own defence, see *Fisher v. Jackson*, North, J., 7 March, 1891, A. 316; (1891) 2 Ch. 84.

#### 4. Injunction against Receipt of Pew Rents by displaced Minister of Chapel.

DECLARE that the Deft, the Rev. G., is not entitled to officiate or preach in the chapel in the pleadings mentioned against the wish of the majority of the trustees of the said chapel, and of the society or congregation in the pleadings mentioned; And Let the Defts, the Rev. G., and P., be restrained by injunction from receiving or collecting, or continuing or attempting to receive or collect, any of the rents payable for pews or sittings in the said chapel.—*Cooper v. Gordon*, V.-C. S., 28 May, 1869, A. 1400; 8 Eq. 249.

For interlocutory order to restrain the Deft from acting as the agent or manager of a voluntary society for disseminating the peculiar doctrines of Swedenborg, and from selling any of the books of, and receiving any money belonging to, the society; and from selling, &c., from the house of the society any spiritualistic books, periodicals, or other works whatsoever, unless under the order or with the permission of the Plts; but without prejudice to any question as to the right (if any) of the Deft to recover damages from Plts or any of them, the Plts undertaking to abide by any order which the Court shall make as to damages, and to allow the Deft the use for two months of the house and premises, and to allow him access to the shop at all reasonable times for the purpose of enabling him to remove his own stock and property, see *Spurgin v. White*, V.-C. S., 22 Dec. 1860, B. 2536; S. C., 7 Jur. N.S. 15; 2 Giff. 473.

For an injunction to restrain the trustees of a chapel from mortgaging it for a small sum without apparent necessity, see *Rigall v. Foster*, 18 Jur. 39.

For a decree establishing the right of a Baptist minister to possession of a house, built under a trust to provide a ministerial residence, as against a majority of the trustees who had let the house to a stranger, see *Ward v. Hipwell*, 3 Giff. 547; 8 Jur. N.S. 666.

For injunction restraining Deft from acting or purporting to act as parish clerk in virtue or under colour of his alleged appointment, and interfering with the Plt in the execution of his office so long as the Plt should continue parish clerk, and from receiving the fees, and for delivery over of all books and keys (if any) which belonged to the parish clerk by virtue of his office, and which were in the possession or under the control of the Deft, see *Lawrence v. Edwards*, (1891) 2 Ch. 72.

#### NOTES.

Pending a suit to determine the validity of a presentation, the Bishop will be restrained from taking any advantage of a lapse: *Nicholson v. Knapp*, 9 Sim. 326; *Daly v. Archbp. of Dublin*, Fl. & K. (Ir.) 263.

But the legal right of the patron to present, and the order giving effect to that right against the Bishop, do not exclude the Bishop's right to examine into the fitness of the presentee, and to reject him on sufficient grounds: *A. G. v. Cuming*, 2 Y. & C. C. 139, 155; and see *Bp. of Exeter v. Marshall*, L. R. 3 H. L. 17.

That the office of parish clerk is a temporal office, see *Lawrence v. Edwards*, (1891) 2 Ch. 72.

Notwithstanding the previous decisions, that where the advowson of a parish is vested in trustees for the benefit of the parishioners, an election



by ballot is invalid as not permitting a scrutiny (see *Edenborough v. Archbp. of Canterbury*, 2 Russ. 93; *Faulkner v. Elger*, 4 B. & C. 449), the parishioners in whom the right of determining how the election shall be carried out may, if they think fit, adopt the modern system of ballot: *Shaw v. Thompson*, 3 Ch. D. 233; 34 L. T. N.S. 721.

The minister of a nonconformist congregation being merely a tenant at will of the trustees, has no equity to retain possession of the chapel, or to officiate therein against the express will of the majority: *Perry v. Shipway*, *sup.*; *Cooper v. Gordon*, 8 Eq. 249; *Doe v. M'Karg*, 10 B. & C. 721.

And the right of the governing body to prevent the use of the property for a purpose hostile to the interests of the society, or the terms of the trust deed, will be supported: *Spurgin v. White*, 2 Giff. 473; *Ward v. Hipwell*, 3 Giff. 547; *A. G. v. Munro*, 2 D. & S. 122; *A. G. v. Pearson*, 3 Mer. 400; and see *A. G. v. Clapham*, 4 D. M. & G. 626.

The power of dismissal vested in the majority must be exercised in a regular way, and upon definite grounds, and an injunction against a minister will not be granted at the instance of trustees who have dismissed him oppressively and improperly: *Dean v. Bennett*, 6 Ch. 489; 9 Eq. 625; *Daugars v. Rivaz*, 28 Beav. 233.

As to the appointment of trustees of places of meeting for religious worship, and the statutory powers of the Charity Commissioners in reference thereto, *v. inf.* Chap. XLII., "CHARITIES."

And where a power of removal of a schoolmaster for certain specified causes was vested in three vicars, and he was dismissed without an opportunity being given to him of being heard in his own defence at a properly-constituted meeting of the vicars, an injunction was granted: *Fisher v. Jackson*, (1891) 2 Ch. 84, and *v. sup.* p. 612.

The Charitable Trusts Act, 1853 (16 & 17 V. c. 137), s. 17, provides that no suit or proceeding for obtaining any relief or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced or taken without an authority previously obtained from the Charity Commissioners. The words "suit or proceeding" do not include an action for the enforcement of any right not relating to the admon of the trusts of the charity; *ex. gr.*, an action by a master of a school to restrain the managers from dismissing him, and ejecting him from the school house, though the question was raised whether the managers were properly appointed: *Rendall v. Blair*, 45 Ch. Div. 139; *Fisher v. Jackson*, (1891) 2 Ch. 84. And as to the effect of the section, see Lewin, 932.

As to appointing new trustees, and the remedy when a congregation departs from the doctrines on which a chapel was founded, see *Newcome v. Flowers*, 20 Beav. 461; but that a congregation of Particular Baptists are entitled, without departing from any essential doctrine, to adopt the practice of "free" or of "strict" communion, see *A. G. v. Gould*, 28 Beav. 485; *A. G. v. Etheridge*, 11 W. R. 199.

But the original intention of the trust cannot be defeated by altering the form of worship previously used in the chapel, and introducing preachers of different doctrines and persuasion: *Milligan v. Mitchell*, 3 M. & Cr. 72; *S. C.* (on motion to restrain the election of a minister not duly qualified according to the tenets of the Kirk of Scotland), 1 My. & K. 446; *Foley v. Wontner*, 2 J. & W. 245; *A. G. v. Pearson*, 3 Mer. 353; *A. G. v. Murdoch*, 1 D. M. & G. 86; 7 Ha. 445; *A. G. v. Anderson*, W. N. (88) 64; 57 L. J. Ch. 543; and see *Shore v. Wilson*, 9 Cl. & F. 355 (*Lady Hewley's Charity*); and Lewin, 533.

## SECTION XV.—SHIPS.

1. *Interim Order to restrain any Dealings with a Ship inconsistent with the Charterparty.*

UPON motion &c., Discharge the order dated &c. (refusing an injunction); And Let the Defts, their brokers, agents, servants, and workmen, be restrained by injunction until &c., from dealing with the ship—in the (bill) mentioned, in any manner inconsistent with, or which may prevent or interfere with, the execution of the charterparty in the (bill) mentioned.—*Collins v. Lamport*, L. C., 8 Dec. 1864, A. 2422; 4 D. J. & S. 500.

2. *The Like Order.*

LET the Defts &c., be restrained by injunction until &c., from interfering with the loading of the vessel *Ella A. Clark*, afterwards called *The Golden Age*, in the (bill) mentioned, in accordance with the charterparty therein also mentioned, or in anywise interfering with or doing any act in reference to the said vessel so as to prevent the Plts having the full benefit of the said charterparty.—*Messageries Imperiales v. Baines*, V.-C. W., 2 Feb. 1863, B. 137; 11 W. R. 322.

3. *Injunction pending Inquiry by Person specially appointed.*

LET a proper person be appointed, with the approbation of the Judge pursuant to O. LV. 19, to inquire and certify whether the cargo of the ship called — in the (bill) mentioned, or any and what part thereof, is in a fit state to be reshipped; (On usual undertaking as to damages) Let the Defts &c. be in the meantime, and until further order, restrained from employing the said ship or vessel called — in a manner inconsistent with the charterparty of the — day of — in the (bill) mentioned.—See *Heriot v. Nicholas*, L. J., 27 May, 1864, A. 989.

As to orders made under this rule, see *sup.* p. 491.

For injunction to stay selling, mortgaging, transferring, sailing, or chartering a ship, see *Ewing v. Liverpool Bk.*, V.-C. W., 23 Nov. 1856, A. 86.

For order on motion for injunction to stay receiving, parting, or dealing with the purchase-money of a ship's cargo, or the insurance moneys for it, directing one of the Defts to pay the proceeds of the cargo into Court within one week, exclusive of vacation, after receiving it, and the amount thereof to be laid out and accumulated, subject to further order, see *White v. Cohen*, V.-C. S., 30 Mar. 1858, B. 1053.

For injunction to restrain the ship's husband from interfering with her sailing by detention of the machinery, and for the appointment of a receiver of the machinery, Plts being in possession of the hull, see *Brenan v. Preston*, 2 D. M. & G. 813.

For interim injunction to stay a purchaser of shares of a ship, having notice that the vendor was merely a trustee, from dealing with the shares, or indorsing the transfer on the certificate of registry, see *Armstrong v. A.*, 21 Beav. 78.

4. *Interim Order restraining Removal of a Foreign Ship from a British Port.*

USUAL undertaking—Let the Defts, their agents, officers, seamen, and workmen, be restrained, until after the — day of —, from remov-

ing the vessel called the H— in the (bill) mentioned from the port of S—, and from selling or disposing of, mortgaging, charging, chartering, or hiring the same to any person other than the Plt.—*Hart v. Herwig*, V.-C. M., 5 March, 1873, A. 816 (affirmed, 8 Ch. 860).

This order has been followed in Ireland: see *Clavering v. Aguire*, 5 L. R. Ir. 97.

## NOTES.

Although specific performance of a charter-party will not be directed, the employment of a ship in any manner inconsistent, or any interference, with the charter-party will be restrained: *De Mattos v. Gibson*, 4 D. & J. 276; *Sevin v. Des Landes*, 9 W. R. 218; *Le Blanch v. Granger*, 35 Beav. 187; *Messageries Imp. v. Baines*, 11 W. R. 322; *Collins v. Lamport*, 4 D. J. & S. 500, *sup.* Forms, 1, 2, p. 614.

And as against the mortgagee, so long as his security is not impaired, engagements for the employment of the ship, entered into by the mortgagor who remains in possession, are valid and cannot be defeated: *Johnson v. R. M. S. Packet Co.*, L. R. 3 C. P. 38; *Collins v. Lamport*, *sup.*; *The Maxima*, 29 L. T. N.S. 112; *The Fanchow*, 5 P. D. 173.

On the question of priorities between the mortgagee of a ship and the assignee of the freight, and forms relating to shipping mortgages, *v. inf.* Chap. XLVII., "MORTGAGES."

Where the charter-party was entered into in Scotland, and the parties resided there, but the ship was at a port within the jurisdiction, the Court, on grounds of convenience, refused to grant an injunction or direct service of writ out of jurisdiction: *Exp. M'Phail*, 12 Ch. D. 632.

On a proper case being made, the sailing of a ship may be restrained: *Haly v. Goodson*, 2 Mer. 77; *Castelli v. Cook*, 7 Ha. 89.

But whether the Court will restrain a party from taking a ship to any other than a certain port so as indirectly to compel him to go to that port, *qu.*: *Lidgett v. Williams*, 4 Ha. 465.

Removal of a foreign ship from a British port so as to defeat the Plt's rights, under an agreement to purchase the ship, made abroad with a foreigner, may be restrained: *Hart v. Herwig*, 8 Ch. 869, *sup.* Form 4.

The jurisdiction given to the Court of Chancery by the Merchant Shipping Act, 1854, ss. 62—65, to order a sale of a registered British ship on the application of any unqualified owner by transmission: and also on the summary application of any interested person, by petition or otherwise, to prohibit, for a time to be named, any dealing with a registered British ship or shares therein, upon terms, &c., has been extended to the Admiralty Division (High Court of Admiralty) by the Admiralty Court Act, 1861 (24 V. c. 10), s. 12; and the provisions of the Jud. Act, 1873, s. 25 (8), and of O. L. (for granting interlocutory orders for sale or preservation of property), are of course exercisable by the Probate, Divorce and Admiralty Division of the High Court: see also Jud. Act, 1873, ss. 16, 34, 42; Jud. Act, 1875, s. 11; O. I.

And under the new procedure, an order under sect. 65 has been granted in the Probate, Divorce and Admiralty Division to restrain the admor from dealing with shares in a ship (part of the deceased's assets) pending proceedings to establish a subsequently found will: *Nicholas v. Dracachis*, 1 P. D. 72; and to restrain the Deft *pendente lite* "from further mortgaging or creating any charge in or otherwise dealing with any share or shares in the vessel": *The Horlock*, 2 P. D. 243, 250.

## SECTION XVI.—NEGOTIATING SECURITIES.

1. *Injunction against negotiating Promissory Note.*

LET the Defts be restrained by injunction from parting with, out of the custody of them, or any of them, or indorsing, assigning, or negotiating the promissory note, dated &c., in the Plt's (bill and affidavit) mentioned; until &c.—*Smith v. Hakewell*, L. C., 20 Oct. 1746, B. 468. (The usual undertaking as to damages would now be required.)

For order for injunction against joint stock bank accepting bills for less than six months, see *Bank of England v. Booth*, 2 Ke. 496.

2. *Interim Order staying Negotiation of Bills of Exchange continued—Deposit in Court.*

USUAL undertaking as to damages—Let the Defts B. and P. continue to be restrained until after &c., from negotiating or dealing or parting with the bills, drafts, and acceptances, signed by the Plt, as in the writ issued in this action mentioned, except to the Plt, and except as hereinafter directed; And Let the Defts B. and P., on or before &c., deposit, upon oath, in a box, in the presence of the solrs for the Plt, all the bills, drafts and acceptances signed by the Plt, as in the writ mentioned, other than the two bills mentioned in the said affidavit of H.; and such box is to be endorsed: In Chancery. Earl of L. v. B., 1876, L. 110; "Negotiable instruments." And Let the Defts B. and P., within the time aforesaid, deposit such box so endorsed in Court to the credit of this cause, Earl of L. v. B., 1876, L. 110, as directed in the schedule hereto; And Let this motion stand over until &c.—[Add Lodgment Schedule, Form No. 7.].—See *Earl of Lewes v. Barnett*, V.-C. M., 25 May, 1876, B. 1261. Affirmed, C. A., 4 Aug. 1876.

For order, on Plt's undertaking as to damages, restraining Defts from negotiating certain Exchequer bills in their possession, and that they deposit the same with the Record and Writ Clerk, see *Chaplin v. Harmens*, V.-C. M., 25 May, 1871, A. 1334; but the proper course is to deposit them at the bank as in Form 2; and *v. sup.* Chap. XVI., p. 184.

## NOTES.

An injunction will be granted to restrain the negotiation of bills of exchange and other negotiable instruments, which have been fraudulently, illegally, or improperly obtained, and the instrument (if liable to be completely avoided: *Brooking v. Maudsley*, 38 Ch. D. 636) may also be ordered to be delivered up to be cancelled: see *Esdaile v. La Nauze*, 1 Y. & C. 394; *Travill v. Baring*, 4 D. J. & S. 318; 4 Giff. 485; *Cooper v. Joel*, 1 D. F. & J. 240; 27 Beav. 313. And see cases collected, Kerr, 597.

And that an action for a declaration that the Plts are not liable on an instrument, and an injunction to restrain proceedings upon it, can only be maintained when the Court would have jurisdiction to direct cancellation, see *Brooking v. Maudsley, sup.*

Under the former procedure cases of this kind usually came before the Court upon applications for an injunction to stay proceedings at law upon the instrument. The jurisdiction of staying such proceedings by injunction has been abolished by the Jud. Act, 1873, s. 24 (5), and any equitable defence, on which an injunction against the prosecution of the action at law might

have been obtained, may be relied on by way of defence in whatever Division of the High Court of Justice the action may have been brought.

Even under the old practice, where the defence was equally available at law (*Harrison v. Nettleship*, 2 My. & K. 423; *Simpson v. L. Howden*, 3 M. & C. 108; see also *Stewart v. G. W. Ry. Co.*, 2 D. J. & S. 319; 2 Dr. & Sm. 438), especially by equitable plea under C. L. P. Act, 1854 (see *Stiff v. Eastbourne L. Bd.*, 17 W. R. 428 (reversing V.-C. S., *Ib.* 68); *Waterlow v. Bacon*, 2 Eq. 519), the Court of Chancery would not restrain the action at law, except on terms of giving judgment at law, to be dealt with as the Court of Chancery should direct: see *Simons v. Cridland*, 5 L. T. N.S. 523.

And see *Thiedemann v. Goldschmidt*, 1 D. F. & J. 4, where (reversing V.-C. S., 1 Giff. 142) an injunction to restrain indorsees for value, and without notice of the forgery, of forged bills of exchange, from negotiating or proceeding at law upon them, was dissolved upon their undertaking to deliver up the bills if judgment at law should be against them.

Injunctions have also been granted against proceedings—on a bill of exchange given for a gambling debt: *L. Portarlington v. Soulby*, 3 M. & K. 104;—on a bond to secure a debt, the consideration for which was alleged to have been in respect of gambling transactions, and was admitted to be doubtful: *L. Milltown v. Stewart*, 3 M. & C. 18; 8 Sim. 371.

But an injunction to restrain an action on an I. O. U. given for money lent in Germany for playing at games, not at that time forbidden by the law of that country, was refused: *Quarrier v. Colston*, 1 Ph. 147; and see *Wilkinson v. L'Eaugier*, 2 Y. & C. 367; Joyce, 1202.

Proceedings on a promissory note given by Plt without independent advice, shortly after coming of age, and subsequently renewed by her, to secure her step-father's debt, have also been restrained: *Kempson v. Ashbee*, 10 Ch. 15; see also *Esepy v. Lake*, 10 Ha. 260; *Maitland v. Backhouse*, 16 Sim. 58.

A question as to the rightful possession in England of certificates of shares in a foreign co. must be determined by English law, though the consequences of such possession may depend on the foreign law: *Williams v. Colonial Bank*, 38 Ch. Div. 388.

The fact that evidence in support of the Plt's case may be lost is not a sufficient ground for an injunction, as the proper remedy is by an action to perpetuate testimony: *Brooking v. Maudsley*, *sup.*

## SECTION XVII.—TRANSFERS.

### 1. Injunction to restrain Transfer of Stock under 39 & 40 G. 3, c. 36.

LET the Deft A. be restrained by injunction from transferring any stock [or the New Cons.] standing in the name of B., the testator &c., or in the name of the said A., as the exor of the said B., or any part thereof, and from receiving the dividends and interest due or to accrue due thereon; And Let also the Gov. & Co. of the Bank of England be restrained from permitting the said Deft A. to transfer such stock [or the said New Cons.], or receive such dividends and interest; until &c.

For like order as to any stock, with injunction against the Bank, see *White v. W.*, V.-C., 4 Feb. 1828, B. 898. But the usual undertaking should now be added.

### 2. Interim Order restraining Transfer of Stock under 5 V. c. 5, s. 4.

UPON motion &c.—And X. (the next friend of) the applicant by his counsel undertaking to abide by any order this Court may make as to

damages, in case the Court shall hereafter be of opinion that any damages have been sustained by reason of this order, which the applicant ought to pay; Let the Gov. & Co. of the Bank of England be restrained until further order from permitting the transfer of the £— New Cons. standing in their books in the name of &c., or any part thereof, and from paying any dividend or dividends due or to become due thereon.—*Re Birch*, V.-C. M., 4 July, 1873, A. 1617; *Re Foley*, V.-C. M., 3 Dec. 1867, A. 2648; *Cook v. Needham*, M. R., 5 Mar. 1874, A. 407.

### 3. Order restraining Transfer of Railway Stock or Shares.

LET the L. & N. W. Ry. Co., the G. W. Ry. Co., the N. E. Ry. Co., and the S. E. Ry. Co., be respectively restrained from permitting B. &c., the surviving trustees and exors of N., or any of them, to transfer the following bonds and debentures and sums of stock or any part thereof without notice to the applicants &c., until further order, namely (*describe the securities*).—*Re Locke and others*, V.-C. S., 11 Jan. 1870, B. 115.

In this case, in which there was no question in dispute between any of the parties, and no intention of filing any bill, the order was made upon motion *ex parte* on behalf of the mortgagees of reversionary interests in the stock and shares of certain cos., without any affidavit of special facts: see 18 W. R. 275.

For an order *ex parte* under 5 V. c. 5, s. 4, on the usual undertaking, restraining payment of a Government annuity to a husband who refused to carry out marriage articles for a settlement thereof on the wife, see *Exp. Watts*, M. R., 31 Jan. 1871; 19 W. R. 400.

For an *ex parte* order in the Prob. Div. restraining a bank, at which property pending an action in the Ch. Div. to set aside a will had been deposited, from parting with the property pending the probate suit, see *Meluish v. Milton*, 24 W. R. 679.

For order restraining Defts parting with shares or using them for voting until trial of an action, see *Mann v. Patent Tram. Cable Corporation*, W. N. (86) 66.

For injunction restraining respondent in divorce suit, after decree nisi and before decree absolute, from selling or disposing of property comprised in a post-nuptial settlement on her, see *Noakes v. N.*, 4 P. D. 60.

### NOTES.

The jurisdiction in Courts of Equity (1) to restrain banks or cos. from transferring or permitting a transfer of stock without making the banks, &c., parties to the suit; and (2) to grant the restraining order on summary application (without action) is statutory—

1. By 39 & 40 Geo. 3, c. 36, Courts of Equity are empowered to order the Bank of England and East India and South Sea Cos. to suffer a transfer of stock, or to pay any accrued or accruing dividends thereon, belonging to or standing in the name of any party to a suit, or to issue an injunction to restrain them from suffering any transfer of such stock, or from paying any dividends thereon, although the bank and cos. are not parties to the suit in which the decree or order shall be made.

But this provision does not extend to cases where the bank, &c., claims any interest in, or lien upon, the fund, or where discovery is sought from them (sect. 2); and does not prohibit their being made parties: *Temple v. Bank of England*, 6 Ves. 770; though where the bank had been unnecessarily made a party the bill was, as to them, dismissed with costs: *Edridge v. E.*, 3 Mad. 386; *Perkins v. Bradley*, 1 Ha. 232.

The injunction was obtained on notice to the Deft or on affidavit: *Hammond v. Maundrell*, 6 Ves. 773, n. If after giving notice to the bank of (filing the bill) Plt does not move for an injunction, Deft may obtain an order that the Bank permit the transfer, unless Plt should obtain an injunction within a limited time: *Ross v. Shearer*, 5 Mad. 458; 6 Mad. 1.

2. By 5 V. c. 5, s. 4, the Court of Chancery was enabled, on motion or petition, in a summary way, without bill filed, to restrain the Bank of England or any other public co., whether incorporated or not, from permitting the transfer of stock or shares, or from paying any dividends due or to become due thereon, and the order was to specify the amount of the stock, or the particular shares to be affected thereby, and the names in which the same may be standing.

By sect. 5, the writ of *distringas* was to issue from the Court of Chancery: but the practice is now regulated by O. XLVI., which abolishes (r. 2) the writ of *distringas*, and in lieu thereof enables (rr. 4—7) any person claiming to be interested in any stock (which includes shares, securities, and dividends thereon) standing in the books of a co. (which includes the Governor, &c. of the Bank of England, and any other public co., whether incorporated or not), to file and serve an affidavit (as in R. S. C. Appx. B. Form 27) and notice (as in Appx. B. Form 22), service of which (r. 8) shall have the same force and effect against the co. as a writ of *distringas* would have had.

Under the Rules of 1875, the effect of service of the affidavit and notice (unless renewed) was limited to the period of service, but the corresponding rule of 1883 (r. 8) does not contain this restriction.

If (r. 10) whilst such notice is in force a request is made to the co. by the persons in whose name the stock is standing for a transfer of the stock, or payment of the dividends thereon, the co. cannot, without the order of the Court or a Judge, refuse to permit a transfer to be made, or withhold payment of the dividends for more than eight days after the date of request.

In such case an interim injunction over the next motion day, restraining transfers of the stock or payment of the dividend, may be obtained, and notice of the order must be served on the legal owners of the stock: *Blakeley's Trusts*, 23 Ch. D. 549.

The remedy of an equitable assignee or *c. q. tr.* of shares whose equitable interest the Court is not bound to recognise, is to apply, under 5 V. c. 5, s. 4, and O. XLVI., for an order restraining the co. from allowing a transfer to be made: see *Soc. Gen. de Paris v. Tramways Union Co.*, 14 Q. B. Div. 424, 453; *S. C.*, 12 App. Ca. 20.

A legatee, by putting a *distringas* on shares, does not accept them so that he cannot afterwards disclaim: *Hobbs v. Wayet*, 36 Ch. D. 256.

The order to stay a transfer made on summary application under sect. 4 remained in force until discharged after a bill had been filed for the same purpose: *Re Marq. Hertford*, 1 Ph. 203; and the party obtaining it must have proceeded to file a bill within due time afterwards. Upon bill filed, the proceedings under the statute were not thereby determined, and if the Deft could not satisfactorily displace the grounds upon which the order was originally granted, it has been continued until the hearing: see *Marq. Hertford v. Suisse*, 8 Jur. 71; 1 Ph. 129.

The order has been made without any affidavit of special facts in support of the application: *Re Locke*, 18 W. R. 275. But see *Re East of England Bank*, 6 N. R. 81, that some special reason (*e. g.*, danger of the shares, &c., being made away with) must be shown for the order; see also *Exp. Field*, 1 Y. C. C. 1.

A party who had obtained a *distringas* under sect. 5 was not thereby prevented from afterwards obtaining a restraining order under sect. 4: *Exp. Marq. Hertford*, 1 Ph. 129, 132 (explaining *Exp. Amyot*, *ib.* 130, n.): and see Lewin, 978.

The writ was liable to be discharged with costs when applied to a sum of stock not the same as that mentioned in the affidavit on which the writ was obtained: *Re Cross*, 1 Dr. & S. 580.

The effect of the notice to the bank or co. is merely temporary, and must be followed up by proceedings to restrain a transfer: see *Soc. Gen. de Paris v. Tramways Union Co.*, 14 Q. B. D. 453, 454.

## SECTION XVIII.—COLLECTING AND DEALING WITH ASSETS.

*Injunction to restrain Receiving or Collecting Assets.*

LET the Deft C. be restrained by injunction from receiving or collecting any part of the outstanding personal estate and effects of the testator B., and from receiving or collecting any part of the debts due and owing in respect of the business or concern of &c., carried on by the testator up to the time of his death, and afterwards by the said Deft; and also from receiving or collecting any part of the rents of the freehold and copyhold estate of the testator, and from letting or managing the said estates or interfering therewith, or with any other part of the testator's estate or effects; until &c.—Direction to appoint receiver.—*Brooke v. Cooke*, V.-C., 24 May, 1815, A. 839.

For like order for receiver and for injunction to restrain the Deft from all further interference with the testator's estate, see *Hore v. Smith*, V.-C. K.B., 16 April, 1845, A. 938.

For the like order appointing a manager, and restraining any interference with the estate or business of an intestate, there being no existing admon to the estate, see *Steer v. S.*, 2 Dr. & S. 311.

For injunction *ex parte* in the Probate Division to restrain the Deft until further order from disposing of or removing any of the intestate's personal estate, of which she was in possession as his alleged lawful widow, see *Brand v. Mitson*, 24 W. R. 524.

## NOTES.

An injunction will be granted and a receiver appointed to restrain an exor or admor from getting in the assets in cases where from his misconduct, drunken habits, extreme poverty, insolvency or bankruptcy, the property, if allowed to remain under his control, will be endangered; though if the testator has knowingly chosen to appoint a bankrupt or insolvent debtor as his exor, the appointment will not be interfered with: *Kerr*, Injunctions, 608, 509; *Lewin*, 855, 856; and cases there cited.

The Court will not thus interfere by injunction in favour of a creditor unless it is shown that the assets are being wasted, and in a creditors' action for admor, a receiver will not be appointed merely because the exor will probably exercise his legal right of retaining his own debt, or of preferring a particular creditor: *Re Wells*, *Molony v. Brooks*, 45 Ch. D. 569; *Harris v. H.*, 35 W. R. 710.

In the case of a married woman executrix, where the husband, from being out of the jurisdiction, or of unsound mind, cannot be made liable for her *devastavit*, she may be restrained from receiving or intermeddling with the estate: *Taylor v. Allen*, 2 Atk. 213; *Yetts v. Palmer*, 11 W. R. 765; but now under 45 & 46 V. c. 75, ss. 18, 24, the husband is not liable for his wife's *devastavit* unless he has acted or intermeddled.

A married woman cannot be restrained from dealing with her separate estate before judgment in an action by a creditor seeking to enforce against it a general engagement by her: *Robinson v. Pickering*, 16 Ch. Div. 660.

Pending proceedings to recall probate, a bill lay to restrain the exors from getting in the outstanding personal estate, and for a receiver: *Dimes v. Steinberg*, 2 Sm. & G. 75; and see *Watkins v. Brent*, 1 M. & Cr. 97; *Baron de Feuchères v. Dawes*, 5 Beav. 110; *Newton v. Ricketts*, 10 Beav. 527.

Where one exor before probate was proceeding to dispose of the estate, the Prob. Div. gave the co-exor leave to issue a writ against him for an injunction and receiver: *In the Goods of Moore*, 13 P. D. 36; referring to *Re Parker*, *Dearing v. Brooks*, 54 L. J. Ch. 694, as showing that application was rightly made to the Prob. Div.

In a foreclosure action by an equitable mortgagee (entitled under contract



to a conveyance when called for), the mortgagor was restrained from parting with the legal estate *pendente lite*: *London and County Bank v. Lewis*, 21 Ch. Div. 490; *Speller v. S.*, 3 Sw. 556.

## SECTION XIX.—SALES.

### 1. *Injunction against Sale in Redemption Action.*

UPON motion &c.—Usual undertaking.—Let the Deft H., his solrs, auctioneers, and agents, continue to be restrained until after the — day of —, or until further order, from selling or offering for sale the piece of land situate &c.; And Let the said Deft H., be at liberty to sell the said premises if the amount due to him for principal, interest, and costs, be not paid to him on or before the said — day of —.—*Re Richardson, King v. Richardson*, V.-C. M., 9 Mar. 1876, B. 765.

### 2. *Staying Sale by first Mortgagee, on payment into Court by second Mortgagee—Account.*

LET the Deft R., his solrs and agents, be restrained by injunction from selling or advertising for sale the life estate and interest of the Deft T. in the statement of claim mentioned, or from doing any act by which the same estate or interest may become vested in any other person on the faith of the security of the said R. of the 17th Dec. 1864, in the statement of claim mentioned, being a subsisting security, until &c.; And Let the Plt H. on or before &c., lodge in Court &c., to an account to be intituled “The claim of the Deft R. under the indenture of mortgage in the statement of claim mentioned dated &c.,” the sum of £1,200; And the Plt by his counsel admitting the due execution of the said indenture of mortgage;—Account of what is due to the Deft in respect of his mortgage without prejudice to the questions whether the £1,200 or any and what less sum was due at the date of the said indenture; and Deft to give credit for the rents and profits as mortgagee in possession.—Plt to pay Deft his costs of motion, to be taxed.—Liberty to apply.—[Add Lodgment Schedule, Form No. 3].—See *Hoare v. Harvey*, V.-C. W., 4 Dec. 1866, A. 2525.

For injunction in a redemption suit, until the hearing or further order (the right of Plt to redeem being in dispute), to restrain the mortgagee from transferring or assigning the mortgage securities, and from conveying away or otherwise dealing with the legal estate in the hereditaments comprised in the mortgage securities or parting with the title-deeds, see *Rhodes v. Buckland*, 16 Beav. 212, 219.

For injunction, on bill by judgment creditor, to restrain mortgagees who were about to sell under their power from paying the surplus to the mortgagor, see *Thornton v. Finch*, 4 Giff. 515.

For interim injunction to restrain a sale by mortgagee under a trust or power of sale, see *Harding v. Tingey*, M. R., 5 April, 1864, A. 550; S. C., 12 W. R. 684; 10 Jur. N.S. 872.

For injunction pending winding-up proceedings to restrain the sheriff from selling or remaining in possession of the co.'s effects until the hearing of the (winding-up) petition or further order, see *Re The Stapleford Co. (Limited)*, V.-C. B., 15 Dec. 1875, B. 1899; *S. C.*, W. N. (75) 256.

### 3. Sale by Trustees under depreciatory Conditions restrained.

UPON motion &c.—Let the Deft H. (*purchaser*), and his agents, be restrained by injunction from accepting any deed or deeds, grant, conveyance, or other assurance of the B. estate in the pleadings mentioned, or any part thereof, and from taking or holding any of the deeds or muniments of or relating to the said estate or any part thereof, and to restrain the Defts G. and W. (*the trustees*) from executing or delivering to the said H., or to any other person or persons on his behalf, any deed or deeds, grant, conveyance, or other assurance of the said B. estate, or any part thereof, and from delivering to the said H. or to any other person or persons on his behalf any deed or deeds, muniment or muniments of title, of or relating to the said estate or any part thereof; until &c.—*Dance v. Goldingham*, L. J., 13 June, 1873, A. 2219; 8 Ch. 902.

### 4. Sale of Securities restrained on payment of Money into Court.

UPON the appeal of the Plt from the order dated &c., and upon hearing counsel for the Plt and for the Deft, and the Plt by her counsel undertaking to lodge in Court on or before the — day of &c., as directed in the schedule hereto, £—; Let the Plt be at liberty to lodge the said £— in Court; And Let the Deft A. B. be restrained from selling or in any other manner parting or dealing until further order with any charges or securities held by him upon the life interest of the Plt, or any policy or policies on the life of the Plt or her husband, comprised in his charges and securities, or with any bill, note, judgment debt, or other securities on which the Deft alleges the Plt to be liable to him.—[Add Lodgment Schedule, Form No. 3.]—*Macleod v. Jones*, C. A., 17 July, 1883, B. 3793.

#### NOTES.

As a general rule a mortgagee will not be restrained from selling under his power of sale, provided he keeps within the terms of the power: *Colson v. Williams*, 58 L. J. Ch. 539; 61 L. T. N.S. 71; but this rule is subject to exceptions, and injunctions have been granted when the sale would be in breach of special contract, or fraudulent as against the mortgagor: *Kerr*, *Injunctions*, 524, 525; *Fish*, *Mort.* 489.

In general, an injunction restraining a sale will only be granted on payment into Court by mortgagor of the amount sworn by mortgagee to be due: *Hill v. Kirkwood*, 28 W. R. 358; unless it is manifest from the terms of the deed that such an amount cannot be due on the security: *Hickson v. Darlow*, 23 Ch. Div. 690; or the relation of solr and client subsisted between mortgagee and mortgagor at the time when the mortgage was made: *Macleod v. Jones*, 24 Ch. Div. 289.

Cases in which injunctions have been granted are :

—where the mortgagee had not given notice to determine the trusts of a deed by which his power of sale was suspended: *Gill v. Newton*, 12 Jur. N.S. 220; *secus*, when it had been provided that the mortgagor's

- remedy, in the event of a sale without the stipulated notice, should be by action for damages: *Prichard v. Wilson*, 10 Jur. N.S. 330;
- when the sale was alleged to be in breach of trust; until Deft had put in his answer, or further order: *Merest v. Murray*, 14 L. T. N.S. 321;
- where a co. made an absolute sale to a mortgagee, and the validity of the sale was disputed by debenture holders: *Hubbuck v. Helms*, 56 L. J. Ch. 536;
- in an action by equitable mortgagee for sale and foreclosure, to restrain the mortgagee from parting with the legal estate *pendente lite*: *London and County Bank v. Lewis*, 21 Ch. Div. 490.

And see *Jenkins v. Jones*, 2 Giff. 99, that on an actual tender at the time of sale of principal and interest the mortgagee ought not to proceed with the sale; and as to a bill of sale, *Exp. Cotton*, 11 Q. B. D. 301; *secus*, where there has been a mere offer unaccompanied by actual tender: see Kerr, 193 (citing *Matthie v. Edwards*, 16 L. J. Ch. N.S. 406).

And that a sale by a mortgagee cannot be impeached merely because he is a shareholder in the purchasing co., see *Farrar v. Farrars, Lim.*, 40 Ch. Div. 395.

An injunction against the grantee of a bill of sale who is in uncontrolled possession will not be granted in favour of the trustee in the liquidation of the grantor on the mere suggestion that it is possible that the security may be impeached: *Exp. Bayly, Re Went*, 15 Ch. Div. 223.

And see *inf.* Chap. XLVII., "MORTGAGES."

A Deft will be restrained from assigning the subject-matter of the action pending litigation: *Powell v. Wright*, 7 Beav. 444, 452; including an appeal: *Dunn v. Flood*, 28 Ch. Div. 586; 25 Ch. D. 629; *Wilson v. Church*, 11 Ch. D. 576; *London and County Bank v. Lewis, sup.*

Both the purchaser and the trustees (the vendors) will be restrained from completing a sale which from the improper and unnecessary character of the conditions of sale constitutes, as against the c. q. tr., a breach of trust: *Dance v. Goldingham*, 8 Ch. 902, *sup.* Form 3; and see *Rede v. Oakes*, 4 D. J. & S. 505; *Dunn v. Flood, sup.*; *Lewin, Trusts*, 435, 855; *Dart, V. & P.* 174, 1047; or if the conveyance has not been executed, and it is shown that by reason of the conditions the price is inadequate: 51 & 52 V. c. 59, s. 3.

Where a father's goods were seized in execution for his son's debt, and interpleader proceedings were pending, an action by the father against the sheriff for an injunction on the ground of trespass was held premature: *Hilliard v. Hanson*, 21 Ch. Div. 69; and that an action by a c. q. t. merely to restrain a sale by the sheriff will not lie since Jud. Act, 1873, s. 24 (5), see *Wright v. Redgrave*, 11 Ch. Div. 32.

## SECTION XX.—STAYING PROCEEDINGS IN FOREIGN COURTS.

### 1. Order to stay Proceedings in Holland.

LET the Deft E. H. be restrained by injunction from continuing or prosecuting the proceedings commenced by her in the Kingdom of the Netherlands, in respect of the moveable and immoveable estate of the testator, A. H.; and from commencing or prosecuting any proceedings in respect of the moveable or personal estate of the testator, either in the said Kingdom of the Netherlands or elsewhere, and from intermeddling with the said moveable or personal estate of the testator, or any part thereof, whether in the said Kingdom of the Netherlands or elsewhere, and from obstructing, by legal proceedings or otherwise, or in any manner intermeddling with the said moveable or personal estate, or with any agent or agents of the exors of the

testator in the said Kingdom of the Netherlands or elsewhere, or any person or persons having the custody or management of any part of the said moveable or personal estate, in respect to the management and disposition of the said moveable or personal estate, or any part thereof, or otherwise in relation thereto, until further order.—Plt's next friend to pay to the Deft E. H. her costs of this order and of a former order, such costs to be taxed.—*Hope v. Carnegie*, V.-C. S., 12 Jan. 1866, A. 73.

## 2. Order to stay Proceedings in Court of Session in Scotland.

UPON motion &c.—Let the Defts, the N. B. &c. Co., their solrs, advocates, writers, officers, or agents, be restrained by injunction until &c., from further prosecuting any proceedings in the Court of Session in Scotland against the Defts H. and B., and the Plt as co-exors of the will of D., which will involve taking the accounts of the administration of the said testator's estate. But this order is to be without prejudice to the said Defts, the N. B. &c. Co., taking or prosecuting any proceedings for the purpose of establishing their right or title to a charge upon the amount, which, upon taking the accounts prayed by the Plt's (bill) in this cause, shall be found to be due to the Deft H. S. B. in respect of his moiety of the residuary estate of the said D., and without prejudice to any question of priority between the said Defts and the Plt.—*Baillie v. B.*, V.-C. M., 3 Dec. 1867, A. 2766.

For order restraining proceedings in Demerara as to property there, on undertaking by Plt to be bound by any order which this Court might make with respect to those proceedings, see *Bunbury v. B.*, 1 Beav. 336.

For order staying suits in Berbice and Essequibo, see *Bromwell v. Parr*, M. R., 15 Jan. 1810, A. 165.

For order staying proceedings on a bill of foreclosure in the Jamaica Court of Chancery, filed after a decree in the Court of Chancery, directing inquiries as to what was due on the mortgage debt, see *Beckford v. Kemble*, 1 S. & S. 7.

For similar orders to restrain proceedings in the Courts of Ireland and Scotland, see *Harrison v. Gurney*, 2 J. & W. 563; *Bushby v. Munday*, 5 Madd. 297; and in Ireland against executors, pending admon proceedings in this country, *Eustace v. Lloyd*, 35 L. T. N.S. 900.

For order restraining proceedings in the Court of Session by a Plt in respect of the same demand for which he had obtained a decree in this country, except for the purpose of procuring security for what might be found due to Plt, see *Wedderburn v. W.*, 4 M. & Cr. 585; 2 Beav. 208.

For order staying a creditor from proceedings in an action in Scotland, commenced by him in ignorance of an admon decree in this country, under which his claim was in course of investigation, see *Graham v. Maxwell*, 1 Mac. & G. 71.

For orders in bankruptcy restraining actions against a bankrupt or liquidating debtor in foreign Courts, see *Exp. Ormiston*, 24 L. T. N.S. 197; *Exp. Tait*, 13 Eq. 311.

For order giving leave to Scotch landlord to proceed with sequestration to enforce his hypothec against the property of a company in liquidation, unless sufficient security was given for the rent of the current year, including a period previous to the winding-up, on terms of the landlord paying the costs of the motion (the Court being of opinion that the hypothec gave a security on the goods on the premises), see *Re Wanzer*, (1891) 1 Ch. 305.

NOTES.

The principles upon which Courts of Equity, by the exercise of jurisdiction *in personam* (and not by any interference with the action of the foreign tribunal: *London, &c., Bank v. Strutton*, 18 W. R. 107; *L. Cranstown v. Johnston*, 3 Ves. 182; 5 Ves. 277; and see *Exp. Tait*, 13 Eq. 311), have restrained persons within the jurisdiction from improperly or vexatiously instituting or prosecuting proceedings in foreign Courts to determine questions which ought to be adjudicated upon in this country, are discussed and illustrated in *Carron Co. v. Maclaren*, 5 H. L. C. 416; *L. Portarlington v. Soulby*, 3 M. & K. 104; *Venning v. Lloyd*, 1 D. F. & J. 193; *McHenry v. Lewis*, 22 Ch. Div. 397; *Kerr*, 577, &c.; *Dan*. 1475.

For cases in which after a decree in this country injunctions have been granted against the prosecution of proceedings in foreign Courts, see *Hope v. Carnegie*, 1 Ch. 320; *Beckford v. Kemble*, 1 Sim. & S. 7; *Harrison v. Gurney*, 2 J. & W. 563; *Wedderburn v. W.*, 4 M. & Cr. 585; 2 Beav. 208; *Graham v. Maxwell*, 1 Mac. & G. 71; *Booth v. Leicester*, 1 Ke. 579; 3 M. & Cr. 459 (against prosecuting a suit in Ireland after a decree in this country refusing relief in respect of the same subject-matter).

In order that proceedings in a foreign suit may be restrained there must be some equity to justify the application; mere hardship or inconvenience is not enough: *Fletcher v. Rodgers*, 27 W. R. 96; and see *Moor v. Anglo-Ital. Bk.*, 10 Ch. D. 681.

Although an admon judgment has been obtained in this country, foreign creditors will not be restrained from proceeding in a foreign Court against the admon: *Re Boyse, Crofton v. C.*, 15 Ch. D. 591; *Carron Co. v. Maclaren*, 5 H. L. C. 416.

Even though a decree had not been obtained, where the relief would be more complete, or the question more conveniently tried in this country, or the subject-matter of the suit must be governed by the rules of English law, prosecution of the foreign action has been restrained on terms: see *Bushby v. Munday*, 5 Madd. 297; *Baillie v. B.*, 5 Eq. 175; *Bunbury v. B.*, 1 Beav. 336; *Cood v. C.*, 33 Beav. 314; but *quære* whether this could be done as against a Deft, who before decree has no control in the action: *Hyman v. Helm*, 24 Ch. Div. 531, 540, *per* Cotton, L. J.

If the injunction would be ineffectual (see *Re Chapman*, 15 Eq. 75), or if from the questions of foreign law involved, or from other reasons, the matter can be more conveniently tried in the foreign Court, the proceedings there will not be restrained: see *Elliott v. L. Minto*, 6 Madd. 16 (where the cause was directed to stand over until the result of the Scotch proceedings should have been determined); *Jones v. Geddes*, 1 Ph. 724; *Venning v. Loyd*, 1 D. F. & J. 193; *Liverpool, &c. Co. v. Hunter*, 4 Eq. 68; and pending the foreign litigation the English action may be stayed: *Transatlantic Co. v. Pietroni*, Joh. 604; or direction of accounts in a creditor's admon action postponed with leave to the representative to take proceedings in a foreign Court to ascertain the amount due: *Batthyany v. Walford*, 36 Ch. Div. 269; or the Plt in the English proceedings put to elect in which Court he will proceed: *Pieters v. Thompson*, G. Coop. 294; but in order that the Plt may be put to election, the Deft must show a case of actual vexation, and that there is no necessity for harassing him by a double litigation: *Peruvian Guano Co. v. Bockwoldt*, 23 Ch. Div. 225; *McHenry v. Lewis*, 22 Ch. Div. 397; and *a fortiori*, the Plt applying as against the Deft, see *Hyman v. Helm*, 24 Ch. Div. 531, 540; see also *The Mali Ivo*, L. R. 2 A. & E. 356, that if it is established that there is a *lis alibi pendens* before a (foreign) Court which can afford a complete remedy, whether the proceedings are *in rem* or *in personam*, the proceedings in the English tribunal will be suspended, or the parties put to their election; and a Plt who has commenced actions in a foreign (Irish) and in the English Admiralty Court will not be allowed to proceed with the English until he has actually abandoned the foreign action: *The Catterina Chiazzare*, 1 P. D. 368; *The Delta*, 1 P. D. 393; and where in a foreign action *in rem* against a ship, the ship is released on bail given or on a guarantee *inter partes*, an arrest of the ship in an action by the same Plts in this country is contrary to good faith, and such action may be stayed: *The Christiansborg*, 10 P. Div. 141.

A plea of judgment recovered in an action in a foreign (consular) Court,

5. *Judgment establishing Right to Oyster Fishery and quieting in Possession, with Perpetual Injunction.*

UPON motion, proof of title, and affidavit of service on the Defts ; Declare that the Plt and his assigns, and every other the person or persons claiming or to claim under or by virtue of the will of &c., is and are entitled to the exclusive right to use the piece or parcel of ground (land), part of the soil or bed of the Straits of Menai, lying and being between &c., and the water or waters covering the same, as beds or a bed for oysters or oyster spat, and to put down and replace, and to dredge, take, and carry away oyster spat and oysters therefrom ; And adjudge that the Plt be quieted in the exclusive possession of the oyster fishery or oyster fisheries situate, lying, and being upon or within the said piece or parcel of ground (land), or the water or waters covering the same ; And Let the Defts J., K. &c., and each and every of them, their and each and every of their agents, servants, and workmen, be perpetually restrained by injunction from using the said piece or parcel of ground (land), water or waters, and every part thereof, as beds or a bed for oyster spat or oysters, and from putting down, or dredging, taking and carrying away any oyster spat and oysters thereupon or therefrom, and from moving or in any manner disturbing the oyster spat or oysters now or at any time lying and being upon or within the said piece of ground (land), water or waters, and from interfering with or in any way hindering the enjoyment, use, or occupation by the Plt and his assigns, and every other the person or persons claiming or to claim under or by virtue of the said will of the said &c., of the said piece or parcel of ground (land), and the water or waters covering the same, as an oyster bed or oyster fishery.—*Bulkeley v. Jones*, M. R., 23 July, 1856, A. 1560.

For declaration that Plts were entitled against the Deft to the benefit of the decree dated, &c., made in the cause in the pleadings mentioned, establishing their right to toll on coals ; with a perpetual injunction to restrain the Deft from disputing, denying, putting in issue, or calling in question in, by, or at, or upon the occasion of the trial of the action in the pleadings mentioned, or any other action, suit, or proceeding whatsoever, the right of the Plts, as owners of —, to demand and receive toll, &c. ; but without prejudice to any other question which the said Deft might or ought to be at liberty to raise by or at the trial of the said action, &c., according to his pleadings therein, and the due course of law in that behalf ; and Deft to pay Plts' costs of suit, see *Corp. of Rochester v. Owlett*, V.-C. S., 24 Feb. 1853, B. 469 ; and see *Corp. of Rochester v. Lee*, 2 D. M. & G. 427, where Plts' right had been established on an issue.

NOTES.

DISCHARGING INJUNCTION.

An application to discharge an injunction must be by motion on notice ; and an injunction until answer "or further order" was not *ipso facto* dissolved by putting in a sufficient answer : *Ooddeen v. Oakley*, 2 D. F. & J. 158 ; and see *Mollett v. Enequist* (2), 26 Beav. 467.

An application to dissolve by a stranger to the suit who is injuriously affected, might, it seems, be properly made by petition : *Bourbaud v. B.*, 12 W. R. 1024.

Pending a motion for production of documents, the Court refused to hear a motion to dissolve an *ex parte* injunction: *Storer v. Jackson*, 12 Sim. 503.

Upon motion to dissolve, a new injunction in terms different from those originally prayed cannot be granted: *Burdett v. Hay*, 4 D. J. & S. 41.

As already stated (*sup.* p. 459), on applications *ex parte* for injunctions, there must be *uberrima fides*; and injunctions obtained *ex parte* on misrepresentation, suppression of, or omission to bring forward material facts, will on that ground, without reference to merits, be discharged: *Hilton v. E. Granville*, 4 Beav. 130; *Dalglish v. Jarvie*, 2 Mac. & G. 236; *Wood v. W.*, 10 Eq. 193, 207; even where Plt swore that he was not aware of the importance of, or forgot, the facts misstated, concealed, or omitted: *Dalglish v. Jarvie*, *sup.*; *Clifton v. Robinson*, 16 Beav. 355; *Sheurd v. Webb*, 2 W. R. 343; and see *Thorpe v. Hughes*, 3 My. & C. 742; *White v. Steinwacks*, 19 Ves. 83; *Brown v. Newall*, 2 My. & C. 558.

And this rule has been applied when the cause in which the *ex parte* injunction was thus improperly obtained had been transferred to another branch of the Court: *Sturgeon v. Hooker*, 1 D. & S. 484; or where the injunction had been granted by the L. C. in vacation, with leave to move before a V.-C. to dissolve it: *Pinchin v. L. & Bl. Ry.*, 5 D. M. & G. 851.

Where an *ex parte* injunction has been dissolved on the ground of concealment or suppression of material facts, the Plt may again apply for an injunction on the merits: *Fitch v. Rochfort*, 18 L. J. Ch. 458; *Joyce*, 1267; and where on motion for an injunction or, in the alternative, to continue an interim order, it appears that the interim order was obtained by suppression, the Court may discharge the *ex parte* order, though there is no cross notice of motion, and, upon evidence, grant the injunction asked for: *Boyce v. Gill*, W. N. (91) 108.

A motion to discharge an *ex parte* injunction as having been obtained by misrepresentation, may be properly made, though the injunction is about to expire: *Wimbledon Local Bd. v. Croydon San. Authority*, 32 Ch. Div. 421.

An *ex parte* injunction, granted on an undertaking to amend the writ which was not fulfilled, was dissolved on motion: *Spanish Agency v. Spanish Corporation*, W. N. (90) 158.

On dismissal of the action, the injunction is dissolved: *Green v. Pulsford*, 2 Beav. 75; as also, formerly, on allowance of a demurrer, even with leave to amend: *Schneider v. Lizardi*, 9 Beav. 461, 468; and see *Harding v. Tingey*, 10 Jur. N.S. 873.

The bankruptcy of a sole Plt does not dissolve an injunction previously obtained, but the Deft might apply to have the bill dismissed without costs if the trustee did not adopt the suit within a reasonable time; if this were not done, the injunction would be dissolved: *Joyce*, 1275; *Robson*, 546, 547.

An injunction granted on the merits was not in general dissolved by a subsequent amendment of the bill, though the amendment was made without expressly saving the injunction: *Harvey v. Hall*, 11 Eq. 31; unless the record was changed, *e.g.*, by adding a Plt: *A. G. v. Marsh*, 16 Sim. 572; or the equity on which the injunction was obtained was displaced or materially altered by the amendment: *Kerr*, 635.

And though it has been the common practice, it is not necessary for the order giving leave to amend to state that the amendment is made "without prejudice to the injunction": *Warburton v. L. & Bl. Ry.*, 2 Beav. 253; and see *Pickering v. Hanson*, 2 Sim. 488; *Pratt v. Archer*, 1 S. & S. 433.

For cases in which an injunction has been granted, with leave to apply to dissolve if circumstances should occur to make its continuance unreasonable, see *Ecc. Commrs. v. Kino*, 14 Ch. Div. 213; or upon the rendering of an account directed by the order, *Macleod v. Jones*, 24 Ch. Div. 289.

Delay and acquiescence in an injunction may deprive a Deft of his right to dissolve: *Glascott v. Lang*, 3 M. & Cr. 451; 2 Ph. 310; *Feistel v. King's Coll., Camb.*, 10 Beav. 491; *Bell v. Hull and Selby Ry.*, 1 Ry. Ca. 616; *Gordon v. Chelt. Ry.*, 5 Beav. 229.

A motion to dissolve was not allowed to stand over to enable Plt to cross-examine Deft's witnesses: *Normanville v. Stanning*, 10 Ha. xx.; and see *Morg*, 185.

As to the costs of a motion to dissolve, which, as in all proceedings in the High Court, are, by O. LXV. 1, now in the discretion of the Court, see *Norton v. Nichols*, 4 K. & J. 475; *Spottiswoode v. Clarke*, 2 Ph. 154; *Cory v. Yarmouth Ry.*, 3 Ha. 593; *Dan*, 1528.

## PERPETUAL INJUNCTIONS.

Injunctions are made perpetual at the trial (hearing) for the purpose of protecting the Plt, when his right has been established in the action, by putting an end to harassing and vexatious litigation, and preventing the continuance or repetition of illegal and unauthorized acts; or wherever this form of injunction is applicable to the nature of the relief to which the Plt may be entitled: *Kerr*, 132; *Dan*. 1530; *Joyce*, 1315.

Perpetual injunctions have been granted—

- against “setting up a legal estate to overturn a decree for performance of trusts”: see *Askew v. Poulterers’ Co.*, 2 Vez. 89; *Acherley v. Vernon*, 2 Eq. Ca. Ab. 527;
- against repeated litigation of the same question at law: see *E. Bath v. Sherwin*, Prec. Ch. 261; 4 Bro. P. C. 373;
- to prevent multiplicity of suits in equity in respect of the same subject-matter: see *Sheffield Waterworks v. Yeomans*, 2 Ch. 8; *Weale v. W. Middlesex Co.*, 1 J. & W. 358;
- to quiet possession after verdict, and account of meene profits: *Edwin v. Morris*, L. C., 26 Jan. 1747, A. 217; *Allen v. Donnelly*, 5 Ir. Ch. 236;
- against disturbing any person nominated to an incumbency pursuant to the right established by verdict, and staying further proceedings in prohibition: *Hodgson v. Benison*, L. C., 31 Jan. 1747, A. 310; and see *sup.* Form 1, p. 610.

Injunctions have also been made perpetual at the hearing to prevent the repetition of acts for which the Deft has no legal authority, as—

- in copyright cases: see *Macklin v. Richardson*, *sup.*; *Delfe v. Delamotte*, 3 K. & J. 584;
- and in trade mark cases: see *Cartier v. Carlile*, 31 Beav. 292; *Collins Co. v. Walker*, 7 W. R. 222; *Henderson v. Jorsa*, *sup.*, Sect. VI., Form 5, p. 536.
- in cases of threatened acts of trespass and spoliation in assertion of an alleged right to property: see *Loundes v. Bettie*, 12 W. R. 399; *Re Davies*, 21 Q. B. D. 241.

And see on this head of equitable relief, *Kerr*, 132—136; *Joyce*, 1317; and for further instances, see *sup.* pp. 464, 483—489, 496, 498, 505, 506, 512, 514, 519, 520, 522, 523, 528, 530, 535, 536, 538, 548, 549, 571, 572, 574, 582, 586, 591, 598, 610, 627, 628.

As a general rule, the injunction cannot be made perpetual except at the hearing of the cause (trial of action): see *Day v. Snee*, 3 V. & B. 170; but it may be done on motion by consent: *Morrell v. Pearson*, 12 Bea. 284; and in *Hume v. Beale*, 31 Jan. 1838, MSS., the only object of the suit being an injunction, the Court, at Deft’s instance, made it perpetual, and stayed all further proceedings in the cause on payment of Plt’s costs of suit, though Plt opposed the motion.

A perpetual injunction was not granted in aid of a legal right, unless clear, except by consent, before trial at law: *Mayor of Cardiff v. C. W. Co.*, 4 D. & J. 596; and see this question discussed in *A. G. v. Boyle*, 10 Jur. N.S. 309, *sup.*, Form 4, p. 627.

The fact that the injunction has been acquiesced in, without repetition of the acts complained of, is no objection to the injunction being made perpetual at the hearing: *D. Beaufort v. Morris*, 6 Ha. 340, 350.



## SECTION XXII.—BREACH OF INJUNCTION.

1. *Committal for breach of Injunction*—O. XLII. 7.

WHEREAS by an order dated &c. [*recite order for injunction*], Now upon motion &c., and upon [*if the Deft appears, hearing counsel for the Deft and*] reading [*if the Deft does not appear, an affidavit of &c., filed &c., of service of notice of this motion on the Deft*] the said order, the affidavit of &c. [*enter evidence*]; And this Court being of opinion, upon consideration of the facts disclosed by the said affidavit of &c. [*or the said affidavits*], that the said Deft has been guilty of a contempt of this Court by a breach of the said injunction, doth order that the said Deft A. do stand committed to Holloway prison for his said contempt.

The order for committal for breach of an injunction should state the affidavit of service of the injunction or restraining order, and either the affidavit of service of notice of motion to commit, or the appearance of counsel for the Deft on that motion: *Stephens v. Workman*, 11 W. R. 503; *Gooch v. Marshall*, 8 W. R. 410.

Since *Re Van Sandau*, 1 Ph. 605, it is usual to insert in the order an express adjudication on the contempt, as held the better form in a case of special contempt; but such adjudication is not essential: *S. C.*; and for orders not containing any, see *Wilson v. Colson*, L. C., 26 Sept. 1850, B. 1210; *Truefitt v. Umpieby*, V.-C. K. B., 3 July, 1851, A. 894; *Bell v. Hustwick*, V.-C., 12 July, 1815, A. 1165.

For order to show cause against committal for breach of injunction, see *Blanchard v. Cawthorne*, 6 Sim. 156.

And for committal for breach, both sides appearing, see *St. John's Coll. v. Carter*, V.-C., 8 Feb. 1839, B. 173; 4 M. & C. 497.

2. *Order condoning Contempt—Deft paying Costs of Motion.*

THIS Court being of opinion that the Defts have committed (been guilty of a contempt of this Court by) a breach of the said injunction, doth order that the Defts, the Mayor &c., do pay unto the Plts their costs of this motion, to be taxed &c. (but at the suggestion of the Plts' counsel this Court doth not make any further order thereon).—*Bigg v. Mayor, &c. of London*, V.-C. B., 17 Nov. 1870, A. 2828; and see *Witt v. Corcoran*, V.-C. B., 12 Nov. 1875, B. 1798; 2 Ch. 69.

3. *Sequestration against Local Board for Breach of Injunction.*

RECITAL as in Form 1.—“And this Court being of opinion, upon consideration of the facts disclosed by the said affidavits, that the Local Board of Health of L—, in the county of &c., have been guilty of a contempt of this Court by a breach of the said injunction, doth order that a commission of sequestration do issue directed to certain commrs to be therein named to sequester the personal estate, and the rents, issues, and profits of the real estate of the said Local Board of Health of &c., until the further order of this Court.”—

Deft W., as the clerk of the said Local Board, to pay Plt's costs of the application.—*Heath v. Wallington*, V.-C. W., 17 Jan. 1867, A. 210.

In this case the local board were sued by their clerk, as public officer, and were not named as the Defts in the record.

For similar order, see *Spokes v. Banbury Board of Health*, V.-C. W., 25 Nov. 1865, B. 2452; 1 Eq. 42. In this case the local board were made Defts, and the bill had before the hearing been dismissed against the clerk.

See also *Goldmid v. Tunbridge Wells Commrs.*, M. R., 1 Aug. 1867, A. 2538.

#### 4. Sequestration against Railway Company for breach of Undertaking.

WHEREAS by an order &c., the Defts, the M. &c. Co., by their counsel, undertaking &c. (*recite the order*); Now, upon motion this day made &c., who alleged that it appears by the affidavit of &c., that the Defts have not complied with their said undertaking, by permitting the Plts to use their said railway and conveniences connected therewith from C. to S., and upon hearing counsel for the Defts, and reading the said affidavits and the affidavit of &c.; And this Court being of opinion that the Defts, the M. &c. Co., have committed (been guilty of) a contempt of this Court in not complying with their said undertaking to &c. in the said order dated &c. mentioned, doth order that a commission of sequestration do issue &c. [Form 3.].—*G. N. Ry. v. Manchester Ry.*, V.-C. K. B., 19 July, 1850; Aug. 1850, Order varied, A. 1153, 1778, 1785.

See also *A. G. v. G. N. Ry.*, V.-C. K. B., 12 Nov. 1850, 4 D. & S. 89; and for further order on appeal, on Deft undertaking and paying Plt's costs, to stay proceedings, except to enforce the undertaking and payment of the costs, *Ib.* 96.

#### NOTES.

By O. XLII. 7, "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or committal;" and by r. 24, "every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

An order for an injunction or interim restraining order must be implicitly obeyed: *Harding v. Tingey*, 12 W. R. 684; *Daw v. Eley*, 1 Eq. 42; even though the order may not have issued regularly, in which case the party affected should move to discharge it: *Robinson v. L. Byron*; *Woodward v. King*, 2 Dick. 703, 797; 3 Swa. 626; or, in the case of a writ of prohibition, have been improvidently issued: *Iverson v. Harris*, 7 Ves. 255.

It is open to the party charged with breach of an injunction to show that the order is no longer in force, *e.g.*, by the determination of a patent in restraint of a breach of which the injunction was granted: see *Daw v. Eley*, 3 Eq. 496.

If the injunction goes beyond the terms in which others have been granted, or the reach of the principle, the party should apply to the Court to alter the terms: see *M. Downshire v. L. Sandys*, 6 Ves. 109.

But on application against persons guilty of a breach, the Court gives them the benefit of the fact that the order should not have been made: *Drewry v. Thacker*, 3 Swa. 546; *Partington v. Booth*, 3 Mer. 149.

It must be conclusively shown on a motion to commit that there has been an actual breach of the order: *Mann v. Stephens*, 15 Sim. 377; *Dawson v. Paver*, 5 Ha. 415, 424.

And see *Daugars v. Rivaz*, W. N. (66) 301.

To constitute a breach of the injunction it is not necessary that the order should be actually served; service of the signed minutes is sufficient, or even notice in writing, but the order should be served as soon as it can be obtained: see *sup.* p. 456. But there must be no delay in drawing up the order: *Bateman v. Wiatt*, 11 Bea. 587; and see *Joyce*, 1325.

Notice by telegram that the order has been made is sufficient: *Re Bryant*, 4 Ch. D. 98; *The Seraglio*, 10 P. D. 120; but in order to fix with contempt a person disregarding such a notice, it must be shown beyond reasonable doubt that he had, in fact, notice of the order: *Exp. Langley*, 13 Ch. D. 110; *United Telephone Co. v. Dale*, 25 Ch. D. 788; and if his *bonâ fide* belief that no injunction has been granted is not, in the circumstances, unreasonable, he will not be committed for breach: *Exp. Langley, sup.*

A person committing a breach of an undertaking is liable to be punished in the same way (by committal, or by payment of the costs occasioned by his breach) as if he had committed a breach of an injunction: *L. & Birm. Ry. v. Grand Junction Canal Co.*, 1 Ry. Ca. 224; *Lawford v. Spicer*, 2 Jur. N.S. 564; *G. N. Ry. v. Manchester Ry.*, *sup.* Form 4, p. 632; *Neath Canal Co. v. Ynisarwed Resolven Co.*, 10 Ch. 450; *Callow v. Young*, 55 L. T. N.S. 543.

The Court refused to enforce that part of an undertaking which has been given by mistake: *Mullins v. Howell*, 11 Ch. D. 763.

As to enforcing an undertaking by a solr given out of Court, see *Re Woodfin and Wray*, 51 L. J. Ch. 427.

An undertaking to make a road was enforced by giving the other party liberty to do the work, and apply to the Court for repayment of the expense: *Mortimer v. Wilson*, 31 W. R. 927.

In practice an actual committal is seldom pressed for or directed, the more usual order being that Deft do pay the costs of the application: see Form 2, p. 631.

And, *a fortiori*, when the breach is not wilful, the parties will not be committed, but be ordered to pay costs: *Bullen v. Ovey*, 16 Ves. 144; *Leonard v. Attwell*, 17 Ves. 386; and so when the injunction issued irregularly: *Partington v. Booth*, 3 Mer. 149; *Drewry v. Thacker*, 3 Swa. 546; or the Deft has taken some steps to put himself in the right: *Cornish v. Upton*, 4 L. T. N.S. 862; but motions to commit for the mere purpose of obtaining an apology and costs will not be encouraged: *Plating Co. v. Farquharson*, 17 Ch. D. 49.

Deft is entitled to appeal from such an order, which is virtually a decision against him on the merits, and not an order as to costs only within Jud. Act, 1873, s. 49: *Witt v. Corcoran*, 2 Ch. D. 69; *Stevens v. Met. Dist. Ry. Co.*, 29 Ch. D. 60.

And an appeal lies from a refusal to commit for contempt: *Jarman v. Chatterton*, 20 Ch. Div. 493; explaining *Ashworth v. Outram*, 5 Ch. Div. 943.

A party enjoined from doing a certain act, who is afterwards present aiding and abetting it when done, acts in breach of the injunction: *St. John's Coll. v. Carter*, 4 M. & Cr. 497.

Though an injunction does not embrace "servants and agents," if an agent knowingly aids in the breach, he may be committed for contempt: *L. Wellesley v. E. Mornington*, 11 Beav. 180, 181; and see *Hodson v. Coppard*, 29 Beav. 4, that an injunction to restrain A., his servants and agents, from carrying on a particular trade will not affect A.'s tenants; and *Avery v. Andrews*, 51 L. J. Ch. 414, where an appointment of new trustees was held to be a device to evade an injunction against existing trustees.

A Deft who has no notice of the order is liable to pay the costs of motion (to commit) for a breach of the order by his servants: *Rantzen v. Rothschild*, 14 W. R. 96; and see *Burgess v. Hills*, 26 Bea. 244, 249, that the right to an injunction carries costs.

A husband is not liable for the breach of an injunction (against himself and wife) committed by the wife living separate and apart from him: *Hope v. Carnegie* (1), 7 Eq. 254; and in such case he is entitled to an order for her to appear separately in all further proceedings in the suit: *S. C.* (2), 7 Eq. 263.

The breach of an injunction by a public body, or by persons having the privilege of Parliament, will be punished by sequestration: see *Spokes v. Banbury Board*, 1 Eq. 42; *Heath v. Wallington, sup.* Form 3; *Robinson v.*

*L. Byron*, 2 Dick. 703; *Rantzen v. Rothschild*, 14 W. R. 96; though cases of gross contempt by privileged persons, or individual acts of setting the order of the Court at defiance by members of a public body, may be punished by committal: *Lechmere Charlton's case*, 2 M. & Cr. 316; *Wellesley's case*, 2 R. & M. 639; *Cumberland v. Richards*, M. R., 8 June, 1859, B. 1776 (order to commit members of the Croydon Local Board individually for breach of injunction issued against the board generally).

And generally as to breach of injunction, see *Kerr*, 637—646; *Joyce*, 1321; *Dan*. 1633.

## CHAPTER XXXII.

## RECEIVERS.

## SECTION I.—APPOINTMENT OF RECEIVER.

1. *Order for Receiver of Real and Personal Estate.*

LET a proper person be appointed to receive [*or* Let A., of &c., upon his first giving security, be appointed to receive] the rents and profits of the real [freehold and (or) leasehold] estates [*If so*, and to collect and get in the outstanding personal estate] of B., the testator [*or* intestate] in the pleadings named [*or* the rents and profits of the real &c. estates comprised in the indenture dated &c., in &c. mentioned]; And the tenants of the said real [freehold and (or) leasehold] estates are to attorn and pay their rents in arrear and growing rents to such receiver; (And Let the Defts C. and D., the exors of the will of the testator [*or* admors of the effects of the intestate], deliver over to such receiver all securities in their hands for such outstanding personal estate, together with all books and papers relating thereto;) And Let such receiver from time to time pass his accounts, and lodge the balances which shall be certified to be due from him in Court as directed in the schedule hereto.—[Add Lodgment Schedule, Form No. 5.]

For order made upon an *ex parte* application before service of the writ in the action, see *Hollingdrake v. Heaton*, 3 Dec. 1875, A. 1778; *S. C. (Re H.'s Estate, H. v. H.)*, 1 Ch. D. 276; followed in *Sutton's Estate, Vaughan v. Murphy*, V.-C. H., 21 Dec. 1878, B. 2057.

For the appointment *ex parte* of a receiver when service of the (bill) on Deft could not be effected from his having absconded, see *L. & S. W. Bunk v. Facey*, 19 W. R. 676.

The directions to allow a salary, and for giving security, and for leave to sue for debts are now omitted, as unnecessary, the Judge in Chambers having all requisite powers: and see O. L. 16—18.

2. *When Receiver is to act before Security given.*

THIS Court doth order that A. be appointed to receive &c. [Form 1]; and the said receiver is to act at once, the Plt by his counsel undertaking to be responsible for his receipts until security given as herein-after directed; And Let the said receiver on or before the &c. give security pursuant to O. L. 16.—Directions to pass accounts and lodge balances [Form 1].—See *Tyler v. Charrington*, M. R., 23 March, 1876, B. 750.

### 3. *Plaintiff appointed Interim Receiver before Appearance.*

UPON the appeal &c. (*ex parte*), and the Plt by his counsel undertaking &c., Let the Deft E. be restrained from parting with any of the furniture and chattels of the Deft mentioned in &c., until &c.; Let a proper person be appointed to receive the said furniture and chattels; And Let the Plt be appointed to receive the said furniture and chattels for fourteen days from the date of this order, or until the appointment of such receiver; Let the Deft E. deliver over the said furniture and chattels to the Plt as such receiver.—*Taylor v. Eckersley*, C. A., 16 March, 1876, B. 410; 2 Ch. D. 302.

For interim injunction against parting with or dealing with racehorses, with order appointing Plt interim receiver without giving security, and ordering Deft to deliver over the horses to Plt as such receiver, Plt undertaking not to part or deal with them except under the direction of the Court, see *Johnson v. Bayley*, V.-C. B., 30 Nov. 1876, A. 1847; and for a similar form of order, see *Harrison v. Kidd*, M. R., 16 Dec. 1876, A. 1994.

For interim appointment upon interlocutory application by mortgagee of a receiver and manager of an hotel without giving security, with injunction restraining Defts (mortgagors) from interfering with the management of the business and the possession of the hotel, with directions for appointment of a proper person, upon first giving security, to receive the rents and profits and to manage the business, the interim receiver to deliver up to the receiver and manager, when so appointed, all the stock-in-trade and effects of the business, and all licences, books, and papers relating thereto, see *Truman & Co. v. Redgrave*, 18 Ch. D. 547, 550; and see also *Taylor v. Soper*, 62 L. T. N.S. 828.

### 4. *Interim Receiver and Manager by Consent.*

UPON motion &c.—And the Plt and the Defts by their counsel consenting to this order, This Court doth order that the Plt E. be appointed interim receiver and manager to collect, get in, and receive all debts due and owing to the business of the late partnership, which existed between the Plt and M., deceased, and all other the assets, properties, or effects becoming payable or transferable thereto and generally to manage and superintend the said business until the said motion for a receiver shall have been disposed of; And Let the said E. pass his accounts and pay the balances that shall be certified to be due from him as the Judge shall direct; And Let the said motion for a receiver stand over until &c.—*Elwon v. Hill*, M. R., 21 July, 1876, A. 1299.

### 5. *Receiver pending Proceedings in Probate Court.*

“LET a proper person be appointed until a legal pers. represve of the estate of M., the testator &c., has been constituted by (the Probate Division of Her Majesty's High Court of Justice) to receive, collect, and get in the personal estate of the testator; And Let the Defts B. and E. his wife, who is the executrix named in the will of the testator, deliver over to such receiver all securities in their hands for such outstanding personal estate, together with all books and papers relating

thereto."—Receiver to pass his accounts and pay in balances &c.—*Maxwell v. Du Boison*, V.-C. W., 11 July, 1872, B. 2070.

For the appointment *ex parte* of a receiver and manager of an intestate's business before grant of admon, see *Blackett v. B.*, 19 W. R. 559.

For the appointment of a receiver of personal estate pending the grant of probate, and of the rents of real estate, neither the devisee nor the heir-at-law being in actual possession, see *Parkin v. Seddons*, 16 Eq. 34.

For appointment on application of Plt in creditor's action, after decree and death of sole exor (Deft), of interim receiver whose powers were to extend for ten days after the appointment of an admor *de bonis non*, the Plt undertaking to use all possible speed in obtaining the appointment of such admor, and to accept short notice of motion to discharge the receiver, see *Re Parker*, *Cash v. Parker*, 12 Ch. D. 293.

#### 6. *Either of the Parties to propose himself, and to act without Salary.*

AND either of the parties is to be at liberty to propose himself as such receiver and manager to act without salary.—*Pilling v. P.*, M. R., 3 Dec. 1861, B. 2109.

The order in this form is not to be considered as a direction to the Chief Clerk to appoint either party: see *Hamer v. H.*, M. R., 15 Dec. 1876, Reg. Min. 275.

#### 7. *The Like, as to Defendant only, without Salary or Security.*

LET the Deft A. be at liberty to propose himself as such receiver without giving security, he by his counsel undertaking to act without salary in case he shall be appointed.

For the addition of the words "without salary" to an order upon trustees, "undertaking to continue to act as receivers" of the trust property, to pass their accounts, see *Pilkington v. Baker*, 24 W. R. 234.

For order by the Court of Appeal, pending an appeal from a judgment for the Deft in an action for specific performance of an agreement to accept a lease of a farm, appointing Plt receiver and manager of the farm, without security, on his undertaking to abide by any order the Court might make in the matter, see *Hyde v. Warden*, 1 Ex. Div. 309.

For order that receiver deliver to the sheriff a statement in writing of the goods, &c. in possession of the sheriff claimed by the receiver, and for sheriff to withdraw from possession of such parts of the said goods, &c., as the receiver shall so specify, see *Wilmer v. Kidd*, V.-C. W., in Chambers, 14 July, 1853, B. 1091.

For order to appoint receiver without salary, with a preference to Plt's nominee, and option to receiver to let to the life tenant on security, see *Baylies v. B.*, 1 Col. 548.

For order for receiver of a moiety of the estate, and tenants to pay him a moiety of their rents, see *Taylor v. Jardine*, V.-C., 8 March, 1841, B. 447; *Egarr v. E.*, M. R., 23 June, 1853, A. 1213.

For order letting Plt, who would be tenant for life on attaining twenty-five, into possession of part of the trust estates at twenty-one, on his giving security, and continuing as to the rest the former receiver of the whole, see *Wilkinson v. Bewicke*, M. R., in Chambers, 2 July, 1860, B. 1475.

For order for receiver of rents of realty pending actions at law, and of rents of leasehold and of personalty, pending litigation as to admon, in case of intestacy, and the Crown claiming, see *Williams v. A. G.*, M. R., 8 May, 1861, B. 1055.

For orders at the hearing that the receiver appointed in the cause be continued, and that he (keep down the interest on the mortgages therein mentioned, and) pass his accounts and pay his balances (following the terms of the original order as to payment of balances into Court, &c.), see *Greene v.*

Warne, V.-C. W., 20 Nov. 1848, A. 560; *Gibson v. L. Montfort*, 25 June, 1750, A. 583; 1 Vez. 485; Amb. 93.

It has been usual to continue the receiver at the hearing (as in the cases above mentioned); but there appears to be no foundation for the notion that the powers and authority of a receiver cease at the hearing, if not then continued; *per* M. R. in *Crane v. Smith* (C. A.), 10 Dec. 1879; and see *Re Underwood*, U. v. U., 37 W. R. 428.

#### 8. *Further Order in Chambers, where Receiver not named in the First.*

UPON the application of the Plt, and upon hearing the solr for the Deft, and the Judge having approved of A., of &c., as a proper person to be appointed to receive &c., pursuant to the order dated &c.; and the said A. having given security pursuant to O. L. 16, by entering into a recognizance, together with C. and D. as his sureties, dated &c., which has been approved by the Judge, and duly enrolled, The Judge doth order that the said A. be appointed to receive the rents and profits [*If so*, and to collect and get in the outstanding personal estate] of &c. [Form 1, p. 635]; And it is ordered that the said A., on the — day of —, and the same day in each (every) succeeding year [*or other period fixed*], leave at the Chambers of the Judge his (annual) account as such receiver; And it is ordered that the said A., within fourteen days after the date of the Chief Clerk's certificate of the allowance of each such account [*or*, on the — day of — next, and the same day in each succeeding year] lodge the balance that shall be (thereby) certified to be due from him on such account, or such part thereof as shall be certified to be proper to be so paid in Court as directed in the schedule hereto.—[Add Lodgment Schedule, Form 5.]

#### 9. *Appointment of Receiver in Chambers without previous Reference.*

UPON the application of &c., and the Judge having approved of P., of &c., as a proper person to be appointed to receive the rents and profits of the real estate, subject to the trusts of the will of M., the testator in the pleadings named, and to get in his outstanding personal estate, and the said P. having given security pursuant to O. L. 16, by entering into a recognizance dated &c., together with V. and E. as his sureties, the Judge doth order that the said P. be appointed to receive the rents and profits of the said real estate, and to get in the outstanding personal estate of the testator.—Directions for tenants to attorn and pay their rents in arrear and growing rents to such receiver, and for Defts, the exors &c., to deliver over all securities.—Directions to leave accounts and pay in balances.—*Wade-Gery v. Handley*, V.-C. B., 21 Jan. 1876, B. 180.

#### 10. *On Parties failing to give Security within Limited Time—Alternative Order.*

UPON motion &c.—And the Plt and the Deft R. by their counsel undertaking to act without salary, and the Deft D. by his counsel submitting



to be bound as if he had duly appeared in the action, and undertaking to enter an appearance forthwith, Let the Plt, upon his giving security within fourteen days from the date of this order, be appointed receiver and manager of the business carried on at &c., under the style or firm of &c., in the first paragraph of the Plt's affidavit mentioned, hereinafter called the &c. business, and Let the Deft R., upon his giving security within fourteen days from the date of this order, be appointed receiver and manager of the business carried on under the style or firm of &c., at &c., in the said affidavit mentioned, hereinafter called the &c. business. And Let, if the Plt and the Deft R. or either of them shall fail to give such security within fourteen days, a proper person be appointed receiver and manager of the said businesses or of such one of them in respect of which such default shall have been made; And Let the Plt deliver over to such other receiver or manager (if any) of the &c. business, the stock in trade, goods, and effects of the said business, and all books and papers relating thereto; And Let the Deft R. deliver over to such other receiver and manager (if any) of the &c. business, the stock in trade, goods and effects of the said business, and all books and papers relating thereto; And Let the Plt and the said Deft or such other receiver and manager (if any) out of the first moneys to be received pay the debts due from the said business of which he is receiver and manager; And Let the Plt D. and the Deft R., or such other receiver and manager, from time to time pass their respective accounts and lodge the balances in Court &c. to separate accounts.—*Dodson v. Richardson*, V.-C. H., 14 June, 1876, A. 1503.

For form of certificate of security, the receiver having given security, see Dan. Forms, 1838.

For forms of recognizance, see R. S. C., Appx. L., No. 21; Dan. Forms, 1839.

### 11. *Appointment of Receiver of Estate in Mortgage.*

LET a proper person be appointed &c., without prejudice to the rights of any mortgagees or mortgagee of the said estates or any or either of them [or But the appointment of such receiver is not to affect any prior incumbrancers upon the said estates who may think proper to take possession of the said estates by virtue of their respective securities]. Tenants without prejudice, and subject as aforesaid, to attorn; Inquiry as to incumbrances and priorities [Direction for keeping down interest and payments, see *inf.*, Sect. III., Form 6, p. 671].—See *Stronge v. Hawkes*, V.-C. K. B., 11 Dec. 1847, B. 170; *Davis v. D. Marlborough*, L. C., 5 March, 1818, A. 873; 2 Swa. 115; 1 Swa. 74; *Preston v. Scott*, M. R., 9 Feb. 1874, B. 401; and see, as to the reason for the words “without prejudice,” &c., *Underhay v. Reed*, 20 Q. B. Div. 209, 218.

For order for receiver of mortgaged estates, and receiver to pay the rents into Court, but order not to affect Defts admitted by Plt to be incumbrancers prior to him, nor any other prior incumbrancers, Plt dis-

puting the priority of some, see *Cook v. Erswell*, V.-C. S., 19 Dec. 1861, A. 2383.

For order in action by mortgagee against mortgagor appointing receiver and manager of an hotel, and restraining any interference with management, see *Truman v. Redgrave*, 18 Ch. D. 547.

Where the mortgagor is in occupation, the proper form is to direct the Deft to give up possession to the receiver, instead of to attorn: *Hawkes v. Holland*, W. N. (81) 128; but see *Taylor v. Super*, 62 L. T. N.S. 828.

### 12. *Receiver appointed on Application of a Judgment Creditor.*

UPON motion for judgment &c.—Let a proper person be appointed to receive the rents and profits of the real estate set forth in the third paragraph of the defence of the Deft I. J., but without prejudice to the right of any prior incumbrancer, and if any prior incumbrancer is in possession, then without prejudice to such possession, and the tenants of the said real estate are, subject as aforesaid, to attorn and pay their rents in arrear and growing rents to such receiver.—Receiver to pass his accounts and pay balances into Court.—*Wells v. Kilpin*, M. R., 25 May, 1874, B. 1590; 18 Eq. 298.

See, as to attornment clause in this form, *Hewett v. Mansell*, M. R., 16 April, 1880, 24 Sol. Journ. 485 (that if the first receiver be in possession, no attornment clause should be inserted in the order).

For form of order appointing a receiver by way of equitable execution without security, see *Hewett v. Murray*, 54 L. J. Ch. 572; 52 L. T. N.S. 380.

And see *inf.*, Sect. II., p. 666.

### 13. *Receiver and Manager of Partnership Business—Sale.*

“LET a proper person or persons be appointed, either jointly or separately, to collect, get in, and receive the debts now due and outstanding, and other assets, property, and effects, belonging to the said partnership business of &c., at &c., and out of the first moneys to be received to pay the debts due from the said business, and to manage the same, so far as relates to any contract subsisting on the — day of —, and either of the parties is to be at liberty to propose himself as such receiver and manager to act without salary; And Let the Plt and the Deft deliver over to the person or persons so to be appointed all the stock in trade and effects of the said partnership, and also all securities in their, or either of their, hands for such outstanding partnership estate, together with all books and papers relating thereto.”—Directions that all the partnership property and effects, other than stock in trade, and the goodwill of the partnership be sold, either as a going concern, or otherwise as the Judge shall direct, and either of the parties, not having the conduct of such sale, to be at liberty to bid.—Liberty to apply in Chambers as to the payment of any liabilities of the partnership prior to the appointment of such receiver and manager, or receivers and managers.—Usual directions to pass accounts, and lodge balances in Court to be invested and accumulated.—*Pilling v. P.*, M. R., 3 Dec. 1861, B. 2109.

For order for appointment of a receiver to collect, get in, and receive, at such times and in such manner as may be convenient, the debts and other

assets, property, and effects, of the firm of W. & K., but so as not to injure the said business as a going concern, with liberty to pay salaries and wages and working expenses, and also the debts due from the business as a going concern, see *Clapham v. Randall*, L. JJ. for V.-C. W., 20 Feb. 1873, A. 1761.

#### 14. *Interim Payments.*

AND this order is to be without prejudice to the payment by the Defts K. & K., or either of them, in the meantime, until the receiver or receivers be appointed, of any growing debts or liabilities of the partnership out of the assets of the partnership.—*Kidd v. K.*, V.-C., 25 April, 1838, A. 596.

For appointment of a receiver of rents and profits of leaseholds, and of the partnership debts and effects, and out of the money to be received in respect of the rents, debts, and effects, to pay the ground-rents and debts due; and to become due from the partnership, see *Hunt v. H.*, V.-C. W., in Chambers, 13 March, 1856, A. 648; *Harden v. Glover*, L. C., 10 Aug. 1810, A. 924; *S. C.*, 18 Ves. 281.

For order for reference to arbitration, and appointment of receiver and manager of a farm carried on in partnership, see *Oslar v. O.*, V.-C. B., 11 Nov. 1875, B. 3194; *S. C.*, *sup.* p. 352.

#### 15. *Interim Receiver and Manager, with Limited Power to contract Liabilities.*

UPON motion for a receiver &c., by counsel for the Plt, and upon hearing counsel for the Deft, and all parties by their counsel consenting to treat motion as motion for judgment, Let partnership be dissolved.—Let partnership property &c. and goodwill be sold as a going concern or otherwise as the Judge shall direct.—Parties to be at liberty to carry proposals for sale or purchase into Chambers.—Usual partnership accounts.—Settled accounts not to be disturbed.—Reference to appoint receiver and manager, and appoint Plt as interim receiver and manager.—Interim receiver not to enter into any contract involving a liability exceeding £200, except by consent or leave of the Judge.—*Taylor v. Neate*, Chitty, J., 3 Aug. 1888, B. 1123.

#### 16. *Partnership Debts.*

UPON motion &c., Let C., of &c., accountant, upon his first giving security, be appointed to collect, get in, and receive the debts now due and outstanding, and other assets, property, or effects belonging to the partnership subsisting between the Plt and Deft, as in the indorsement of the writ issued in this action mentioned, and out of the first moneys to be received to pay the debts due from the said partnership; And Let the Plt and Deft deliver over to the said C. as such receiver, all the effects of the said partnership, and all securities in their hands for such outstanding partnership estate, together with all books and papers relating thereto.—Usual directions to pass accounts, and lodge balances in Court to be invested &c.—*Hollingsworth v. Mann*, V.-C. H., 30 March, 1876, A. 773.

### 17. *Receivers and Managers of several Partnership Businesses.*

UPON motion for a receiver and injunction &c., And the Defts by their counsel undertaking to act without salary and to pass their accounts, and to pay their balances as the Judge shall direct, and the Plt and the Deft by their counsel consenting to this order; Let, without prejudice to any question in this action, the Defts be appointed receivers and managers to collect, get in, and receive all debts due and owing to the several partnership businesses in the statement of claim mentioned, and all other the assets, properties, and effects becoming payable or belonging to the said partnership businesses, and generally to manage and conduct the same and all the branches thereof until further order.—*Lonsdale v. L.*, V.-C. H., 13 June, 1876, B. 1078.

### 18. *Receiver appointed to wind up Solicitor's Partnership Business.*

DIRECTIONS to appoint a proper person to "receive, collect, and get in the outstanding debts due to the partnership."—And Plt and Deft to deliver to receiver all partnership effects and securities in their hands for outstanding partnership estate, and all deeds, books, and papers relating thereto; Liberty to receiver out of the money received to pay the debts due and to become due from the partnership, and to pass his accounts and pay his balances into Court; Deft, within a limited time, to give Plt a list of the several deeds, books, papers, and writings removed by him from the office of the late partnership—"And Let, previously to the appointment of the said receiver, any of the deeds, books, papers, and writings in the possession of either of them, the said Plt and Deft, be delivered to the other, in case the person or persons to whom such deeds, books, and papers belong shall signify in writing his or their wish that the same should be so delivered; And Let the receiver, after he shall have been appointed, and the said deeds, books, and writings belonging to the said late partnership shall have been delivered to him, in like manner, on receiving such written authority, deliver the same to either of them the said Plt and Deft; but such delivery is to be subject to any lien the said late partnership may have on such deeds, books, papers, and writings, or any of them." *Smith v. S.*, V.-C. W., 1 Dec. 1854, B. 148.

For decree continuing order for receiver and dissolving the partnership, and declaring the exors of deceased partner W. entitled to all account books and letter books relating exclusively to the business of the old firm of W. and B., or any preceding firm, and to the custody of all deeds and papers of the clients of the old firm who had had no dealings with the late firm of W. B., and B.; with accounts of partnership dealings and assets; and inquiry what deeds, books, and papers belonged to the exors of W.; and the receiver at the exors' request to deliver such deeds, &c., as the parties could agree, or as should be certified to belong to the exors, to them; and receiver, after a week's notice to each party, or by consent, to dispose of the deeds, &c., in custody of the partnership, according to the directions of the clients, or otherwise, but subject to any existing lien; and in case of any objection, inquiry how such deeds, &c., should be disposed of,

such deeds, &c., meanwhile, to remain in the receiver's custody, and all parties to have access thereto; and receiver to make out the bills of costs owing to the partnership, and to get in the debts, and be allowed his costs and expenses, see *Rawlinson v. Moss*, V.-O. W., 14 March, 1861, B. 513.

### 19. *Solicitor's Partnership Business—Special Directions as to Papers.*

UPON motion &c.—Let the Deft W., within four days after service of this order, in all cases of clients who have not directed him to retain their papers, and from whom there is any money due to the firm in respect of their business, deliver over such papers to O. the receiver, who is to retain the papers until the bills of costs shall be paid or until further order; and if and when the bills of costs shall be paid, Let the said receiver hand over such papers to the client, or as he shall direct; And Let the Deft W., in all cases in which there are papers of clients in his hands relating to business which is still pending, or to clients who have given him notice not to part with their papers (there being in each of the above cases money due to the firm), give to the receiver free access to such documents without expense at the Deft's office, to enable the said receiver to make out the bills; and the said Deft is, on payment of such bills, to deliver the papers to the client, or as the client may require; And Let the said Deft, in all cases (if any) of clients from whom money is due to the firm who shall desire their papers to be delivered to the Plt C., deliver such papers to the said receiver, who when the bill of costs in respect of such papers is paid is to deliver such papers to the said Plt or as the Court may direct; and in case any such papers relate to pending business, Let the said receiver, if so requested by the client, deliver such last-mentioned papers to the Plt upon his undertaking to give to the receiver full access to such papers without expense at the Plt's office to enable the receiver to make out the bills; and the Plt is, on payment of such bills, to deliver such papers to the respective clients, or as they may respectively require; And Let the said Deft deliver over to the said receiver the bundle of papers, No. 155, referred to in the said affidavit of documents filed &c.; but the receiver is not to part with the same to any person unless and until the promissory note, dated &c., given by the said Deft and the Plt, shall be delivered over, with the Deft's signature duly cancelled, to the said receiver.—Costs reserved, to be dealt with on further consideration.—*Clift v. Watkin*, M. R., 11 Nov. 1875, A. 1801.

For further order on summons adjourned into Court, giving special directions as to papers, see *Rawlinson v. Moss*, V.-O. W., 21 June, 1861, B. 1337; 9 W. R. 733; *Ormond v. Townsend*, M. R., 16 Dec. 1875, B. 2099.

### 20. *Manager and Receiver of Partnership Colliery, until Sale.*

DECREE for dissolution and for accounts and sale [*inf.* Chap. XLIX., "PARTNERSHIP"]—"And Let a proper person be appointed to take and have the management of the partnership colliery, stock, and effects in

the meantime, and until the sale thereof as aforesaid, and to have the direction and superintendence of the works of the said partnership business, and to collect and get in the outstanding debts and effects belonging to the said partnership; and any of the Defts are to be at liberty to propose themselves as such manager and receiver; And Let the Plt and Defts deliver over to such manager and receiver all securities in their hands for such outstanding partnership debts and effects, together with all the stock, goods, effects, books, and accounts belonging to the said partnership; And in case it shall be necessary to put any of the debts in suit, for the recovery thereof, the same is to be done with the approbation of (the Judge); And the person so to be appointed is to be at liberty to make use of the names of the said Plt and Defts, who are to be indemnified therein out of the stock, goods, and effects of the said partnership, and out of the money to be received in respect of the said debts by such manager and receiver; And Let him pay the debts due and to accrue due from the said partnership, and from time to time pass his accounts, and after retaining in his hands such sum as shall be deemed sufficient for carrying on the said colliery, lodge the balances that shall from time to time be certified to be due from him in Court, &c."—*Clegg v. Fishwick*, M. R., 2 June, 1852, A. 1103; 1 Mac. & G. 294; following *Jefferys v. Smith*, *inf.*

And for order to appoint a person to take and have the management of the colliery stock and effects, and to have the direction and superintendence of the working of the mines and the carrying on of the trade, and to collect and get in the outstanding debts, with like direction, see *Clarke v. Smith*, V.-C. W., 3 Aug. 1849, A. 2138.

For like order, and each partner in the colliery and trade, who should show he was a partner, regularly admitted, and legally entitled to a share of the mines, and to receive a share of the profits, to be at liberty to propose himself, or such other person as he should think fit, being a practical miner, see *Jefferys v. Smith*, L. O., 29 April, 1820, A. 2556; 1 J. & W. 298.

## 21. *The Like, until a given Time, with Special Provision as to Debts.*

UPON the application of the Plts &c.—And the Defts by their solrs consenting to this order, and the Plts by their solr undertaking to supply the receivers and managers hereinafter named with such moneys, not exceeding in the whole the sum of £15,000, as shall from time to time be required for the carrying on the business of the co. by such receivers and managers until the 1st March, 1877, and the discharge of such of the present liabilities of the co. as it may be necessary or proper to discharge for the purpose of preserving the business, including the repayment of a loan made by the L. J. S. Bank, on which about £— is now due, all moneys so advanced to carry interest at the rate of £7 p. c. per ann. from the date of advance, and to be a charge upon the property comprised in the indenture dated &c., in the statement of claim mentioned, the Judge doth appoint the Deft R. R. and the Plt C. F. R. (without giving security, and on such terms as to salary or remuneration as the Judge in Chambers shall approve) to manage, carry on, and work the collieries, mines,

and works comprised in the said indenture dated &c., and to conduct the business of the said co. at the said collieries, mines, and works, and to receive the produce and profits thereof; And Let the said receivers and managers pay and discharge the rents and expenses of performing the covenants reserved by and contained in the leases under which the said collieries and mines are held, and all current expenses and charges of working the said collieries and mines and carrying on the said business; And Let the Deft — deliver up to the said receivers and managers the said collieries, mines, and works, and all plant and stock, machinery, chattels, and effects comprised in the said indenture dated &c.; And Let the said R. R. and C. F. R., as such receivers and managers, on &c., pass their account and lodge the balance which shall be certified to be due from them in Court &c.; And the Deft co. is to be at liberty to apply for the discharge of the said receivers and managers and for payment and transfer to them of the moneys paid in as aforesaid, and the investments thereof in payment of all principal and interest moneys owing on the debentures in the statement of claim mentioned and in arrear, and all moneys advanced in pursuance of the undertaking hereinbefore contained, with interest at the rate aforesaid; And the Deft co. by their solr undertaking in case any principal or interest money shall be owing on the said debentures and in arrear on &c., or in case any moneys advanced in pursuance of the aforesaid undertaking of the Plts or any interest on such moneys shall be unpaid on &c., to submit to an immediate decree for the execution of the trusts of the said indenture dated &c., and for a sale of the property therein comprised (such sale not to be made before &c.), or at the option of the Plts to consent to an order for the delivery up by the receivers of possession of the property comprised in the said indenture dated &c. to the trustees of the said indenture, the Deft co. waiving all notices required by the said indenture, and the Defts F. R. and the said R. R., the trustees of the said indenture, undertaking not to proceed to a sale until &c., Let all proceedings in this action, except for the purpose of carrying this order into effect, be stayed until &c., or until further order.—Liberty to apply in Chambers for the purpose of carrying the order into effect. [Add Lodgment Schedule, Form No. 5.]—See *Rodewald v. Wayne's Merthyr Steam Coal and Iron Works, Limited*, V.-C. M., 25 May, 1876, B. 1524.

For order appointing Deft receiver and manager of mines and property (slaves) in Brazil, with directions to apply moneys to be received in liquidating the existing and future liabilities of the co. in the ordinary course of business, to carry on the working of the mines in the ordinary course of business, and to pass his accounts and pay in his balances half-yearly, unless otherwise directed, with inquiry in what manner the slave property should be dealt with, and injunction, see *Sheppard v. Ozenford*, 1 K. & J. 501.

## 22. Receiver and Manager of Testator's Business until Sale.

“LET a proper person be appointed to collect, get in, and receive the debts now due and outstanding, belonging to the trade or business in

the pleadings mentioned, carried on by the testator, and since by the Defts M. and C., and by the Deft M., and out of the first moneys to be received to pay the debts due from the said trade or business, and to manage the same until the sale thereof."—"And Let the Plts and Defts deliver over to such person all the stock in trade, goods, effects, books and accounts belonging to the said business."—Directions to pass accounts and pay in balances.—*Sparke v. Mann*, V.-C., 16 Feb. 1835, B. 418.

For order to carry on and wind up farming business, see *Ruston v. Hudson*, V.-C. E., 13 July, 1843, B. 1465; and to offer for sale and to sell manuscripts, see *Berry v. A. G.*, V.-C. E., 14 March, 1846, A. 948.

For order on the bankruptcy of one partner for sale of the partnership property and effects, and appointing one of the solvent partners receiver and manager, without salary, see *Wilson v. Greenwood*, 1 Swa. 483, 1817, B. 1729.

### 23. Receiver of Testator's Business and Personal Estate.

UPON motion &c.—Injunction to restrain Defts J. W., and A. his wife, until &c. from continuing to carry on the business of a publican formerly carried on by the above-named testator, —, and from using in the said business any part of the testator's estate.—"And Let the Deft B. be appointed receiver of the said business, and to collect and get in the outstanding personal estate of the testator, until the Plt's notice of motion for a receiver, which is to be given for the — day of —, 1876, shall be disposed of; And Let the Defts J. W., and A. his wife, deliver over to the said Deft B. all securities in their hands for such outstanding personal estate, together with all books and papers relating thereto; And Let such receiver pass his accounts and pay the balances which shall be certified to be due from him as the Judge shall direct, he by his counsel undertaking not to deal with the property, except under the direction of the Court."—*Re Strafford*, *Strafford v. Warren*, M. R., 19 July, 1876, B. 1180.

### 24. Receiver and Manager of Testator's Mines and Realty.

"LET a proper person be appointed to manage, carry on, and work the mines devised by the will of the testator H., and to raise, sell, get, and dispose of the coal, ironstone, quarystone, and other minerals from the said mines, and to receive the produce of such sales, and the rents and profits of the said mines, and pay and discharge the current expenses and charges of working the same, and to receive the rents and profits of the lands (and hereditaments) in or under which the said mines are now lying or being, and to collect and get in the outstanding debts belonging to the said business."—"And the tenants of the said lands are to attorn &c.; And Let the Defts T. &c., deliver up the possession of the said mines to such manager and receiver, as from &c., and also all securities in their hands in respect of such outstanding debts, and the stock, goods, effects, and accounts belonging to the said mining business."—Direction to pass accounts,



and pay in balances.—*Shale v. Hodson*, V.-C. E., 13 Jan. 1846, B. 429.

For order for receiver of mines, see *Crockford v. Salmon*, V.-C. W., 27 April, 1844, A. 991.

25. *Receiver of Manor to hold Courts and account for Fines.*

AND Let such Courts as have been usually held, and are proper to be holden, for any manor or manors vested in the Plts as trustees of the will of the testator, be from time to time held by the said receiver or receivers in the name or names of the person or persons in whom the legal estate may be; And Let the said receiver or receivers bring into his or their accounts all such fines and other profits as shall be taken by them in respect of the said manors.—*Thellusson v. Woodford*, M. R., 2 Aug. 1852, B. 1156; and see *S. C.*, L. C., 19 Feb. 1801, B. 937; 13 Ves. 209; 4 Mad. 420.

26. *Order appointing Steward of Infant's Manors.*

LET P., of &c. (*the receiver*), be appointed steward of the several manors of &c., and of all other, if any, the manors or lordships, or reputed manors or lordships, of or to which the infant Plt is seised or entitled for an estate in tail male under the indenture of settlement dated &c., in the pleadings mentioned, or otherwise howsoever; And Let all necessary documents for carrying into effect such appointment be settled by the Judge.—*Pym v. P.*, M. R., in Chambers, 11 Dec. 1861, B. 2293.

When a receiver of a manor had been appointed, the Court, in the absence of misconduct on the part of the steward, refused to order the Court books, rolls, and papers to be delivered over to the receiver: *Windham v. Giubilei*, W. N. (71) 119.

27. *Person to be appointed to hold Courts.*

“LET a proper person be appointed to hold courts for the manor of — in &c. mentioned; And Let the Plt and the Deft join in giving proper authorities to the person so to be appointed to hold the said courts; And Let the court rolls, and other necessary books and papers for holding the said courts, be delivered to him for that purpose.”—See *Barker v. Mariott*, L. C., 20 June, 6 July, 1767, A. 429, 483.

28. *Receiver of Heirlooms.*

DEFT to pay into Court a deposit, by way of security, to a separate account; But in default—“Let a proper person or persons be appointed to have the care and custody of the several articles at B., particularly specified and set out in the inventory in the (bill) mentioned, and which are specifically bequeathed by the will and codicil of G., late Duke of M., upon the trusts therein contained.”—Directions for allowance to receiver, and for his giving security—“to take due care of such several articles, and deliver up the same as this Court shall hereafter

direct"—and to deliver the articles to him.—*E. Shaftesbury v. D. Marlborough*, L. C., 28 March, 1820, A. 792.

As to the life tenant giving security for heirlooms, see *Conduitt v. Soane*, 1 Coll. 285; and as to their custody, see *Ellis v. Maxwell*, 12 Beav. 104.

### 29. Receiver of Settlement Funds.

"LET a proper person be appointed to receive the funds subject to the trusts of the indenture of settlement dated &c., in the pleadings mentioned, and to receive and get in the moneys payable under the mortgage dated &c., therein also mentioned; And Let the Defts W. and B. deliver over to such person so to be appointed all securities &c." Receiver to pass accounts and pay in balances &c.—*Brown v. Walter*, V.-C. W., 26 June, 1873, A. 1837.

For order for appointment of receiver of leasehold houses at instance of trustees for the purpose of enforcing obligation to repair against tenant for life in possession, see *Re Fowler, F. v. Odell*, 16 Ch. D. 723, 726.

### 30. Appointment of Official Receiver as Receiver in a Debenture Holders' Action—53 & 54 V. c. 63, s. 4 (6).

UPON motion &c. by counsel for the Plt, and upon hearing counsel for the Defts, Let Charles John Stewart, the Official Receiver attached to this Court, be appointed to collect, get in, and receive the property comprised in the debenture issued by the Deft co., and he is to pass his accounts as the Judge shall direct.

The above form of order is applicable where the Official Receiver has already been appointed liquidator of the co., and sends his accounts to the Board of Trade. In other cases more definite directions as to passing accounts before the Judge in Chambers would be necessary.

### 31. Receiver and Manager on behalf of Debenture Holders.

UPON motion &c.—Let A. C., on his first giving security, be appointed receiver and manager on behalf of the Plt and other debenture holders of the Deft association of all the property and assets of the Deft co. comprised in or subject to the securities and charge created by the debentures issued by the Deft co. to the Plt and the other debenture holders, subject and without prejudice to the rights of the receivers and managers appointed by the said order dated &c., and also to manage and work such of the collieries and coal mines comprised in the said securities as shall not for the time being be managed and worked by the managers and receivers under the said order dated &c.; And Let the said A. C. from time to time pass his accounts and lodge the balances to be certified to be due from him in Court &c.; And Let the Deft deliver over to the said A. C., as such receiver and manager, all books, leases, deeds, papers, and documents relating to the said property and assets comprised in the said securities other than such as the receivers and managers appointed under the said order

dated &c., may for the time being be entitled to during the continuance of such order.—[Add Lodgment Schedule, Form No. 5.]—See *Huntington v. The Coal Consumers' Association, Limited*, V.-C. M., 9 March, 1876, A. 491.

For an interim order for the appointment of a manager of a mining co. in a foreclosure action by debenture holders, see *Peek v. Trinsmaran Iron Co.*, M. R., 11 Feb. 1876, B. 246; 2 Ch. D. 115.

And for a case in which a receiver and manager of collieries was appointed, although the colliery business was not specifically comprised in the mortgage, see *Campbell v. Lloyd's Bank*, 58 L. J. Ch. 424.

For order giving leave to receiver appointed by debenture holders under their deed to take possession, notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the powers of the receiver, other than the power to take possession and to sell the property, see *In re Henry Pound, Son and Hutchins*, 44 Ch. Div. 402.

For order directing that the business of the co. was not to be carried on by the receiver and manager for a longer period than six months, without the leave of the Judge in Chambers, and that if any further time should be required, an application for further time must be made before the expiration of the six months, see *Day v. Sykes, Walker & Co.*, 55 L. T. N.S. 763; Chitty, J., 18 Dec., 1886, A. 1833.

For order appointing receiver of property of a co. and manager of the business of the co., the Plt undertaking to advance money for workmen's wages, see *Makins v. Percy Ibotson & Sons*, Kay, J., 4 Nov. 1890, B. 2110; S. C., (1891) 1 Ch. 133.

For order appointing receiver and manager, Plt debenture holder undertaking to realize the property without delay, and also to be responsible for the receipts of the receiver and manager, see *Makins v. Percy, Ibotson & Co.*, Kay, J., W. N. (90) 180.

### 32. Receiver and Manager of Railway.

UPON the petition of A. B. &c., and upon hearing counsel for the Petr and for the X. Y. Z. Ry. Co., Let C. D., of &c., be appointed manager and receiver until further order, to manage the undertaking of the X. Y. Z. Ry. Co. as defined and referred to in the X. Y. Z. Ry. Act, 18—, and the works and property comprised in such undertaking or connected therewith, and to secure the tolls and sums of money arising upon or out of the said undertaking; And Let the said manager and receiver out of the money to be received by him pay all expenses, if any, proper and necessary to be paid by him for the maintenance, management, and working of the said railway, and other proper outgoings in respect of the said undertaking, and the costs of the Petr and respondents of the said petition to be taxed &c.—Usual directions to pass accounts and pay balances into Court.—And Let the following inquiries be made, that is to say:—(1.) An inquiry what is due to the Petr upon his judgment debt in the petition mentioned; (2.) an inquiry whether there are any other and what debts of the said co., and whether the same and which of them are incumbrances or charges on the undertaking, or tolls and moneys arising out of the same, or any and what part of the same respectively, and how the same respectively were created, and what are the rights and priorities of the persons for the time being interested therein.—Liberty to apply.

—[Add Lodgment Schedule, Form No. 5.]—*Re The Scarborough and Whitby Ry. Co.*, Kay, J., 19 Dec. 1887, B. 2903.

### 33. Receiver of Railway.

UPON the petition &c., Let P., the secretary of the co., upon his first giving security, be appointed receiver of the undertaking of the said co.; And Let the said P., out of the moneys to be received by him as such receiver, provide for the working expenses of the railway and other outgoings in respect of the undertaking, and from time to time pass his accounts as such receiver.—Usual directions to lodge balances in &c.—And Let an inquiry be made what are the debts and liabilities of the said co., and what are the rights and priorities of the persons interested in the moneys to come to the hands of the said P. as such receiver.—Liberty to apply.—*Re Manchester and Milford Ry. Co.*, V.-C. H., 23 July, 1875, B. 2038.

In a subsequent stage of this case (C. A., 14 Ap. 1880, B. 780; 14 Ch. Div. 645), the order for the appointment of a manager upon the application of a judgment creditor was "without prejudice to any application by the directors to be appointed managers by the Court."

### 34. Receiver of Tolls on Application of Debenture Holders.

UPON motion &c., Let a proper person be appointed receiver of the undertaking of the Defts the B. C. Ry. Co., as defined by the (*special Acts*), and of all the tolls and sums of money arising by virtue of the same Acts, and of all the estate, right, title, and interest of the said co. in the same, and of all the property of what kind soever included in the Plt's said mortgage deeds, and subject thereto; And Let the receiver out of the money to be received by him pay all expenses proper and necessary for the maintenance, management, and working of the said undertaking; And Let the receiver pass his accounts as the Judge shall direct, and lodge balances in Court.—Liberty to apply as to any payments to be made by receiver and generally.—Let an inquiry be made what debenture creditors there are on the said undertaking and tolls arising therefrom and their priorities.—*Griffin v. The Bishops Castle Ry. Co.*, V.-C. W., 25 April, 1867, A. 972.

For order for receiver of canal tolls, rates and dues, on bill by a mortgagee of the co., and for him to pay his balances, after payment of the costs, charges, and expenses of carrying on the business of the co., and the interest of the mortgages created by them, to be verified by affidavit, see *Potts v. Warwick, &c. Canal*, Kay, 143.

For order for receiver of tolls, rates, and duties, and all the rents and profits of the real estate of a canal co., omitting the word "manage," and delivery of books to him; moneys received to be applied, first, in maintaining the canal and paying salaries of receivers, collectors, and of the other officers, and then of the interest of the mortgages, without prejudice to the rights of prior incumbrancers, and to the right of the managing committee to control the trade; on bill by one of several mortgagees whose interest was in arrear: see *Fripp v. Chard Ry.*, V.-C. W., 29 June, 1853, A. 1347; and see *De Winton v. Mayor of Brecon*, 26 Beav. 533, that the receiver of tolls, &c., of a corporation authorized by their special Act to be mortgaged, will not have

committed to him any powers of management which ought properly to be exercised by the corporation itself.

And for decree, with direction for receiver of the rents, profits, and income of tolls, toll gates, and toll houses of turnpike roads, and application of moneys received, on bill by mortgagee, see *L. Crewe v. Edleston*, 1 D. & J. 93.

For form of order directing inquiry what was due to judgment creditors of a railway company, and what lands and property had been extended under writs of *elegit*, see *In re Hull, Barnsley, and West Riding Junction Railway Co.*, 40 Ch. Div. 119.

### 35. Receiver of Freight of Ship (with Injunction).

INJUNCTION to stay Deft collecting, getting in, or receiving any moneys on account of the ship or vessel called &c., or the freight due, or to accrue due, in respect of her present voyage, until further order—"And Let a proper person be appointed to collect, get in, and receive such moneys and freight; And Let the Plt and Deft deliver over to such person so to be appointed all documents in their or either of their hands relating to such moneys and freight."—Directions to pass accounts, and pay in balances, and for investment and accumulation.—*Roberts v. R.*, V.-C. W., 23 Feb. 1854, B. 448.

And for order appointing a person to receive the homeward cargo and get in the freight, see *Gibson v. Lee*, V.-C. E., 1842, A. 1637.

For orders, appointing a ship's husband, at the suit of some of the part owners against the others, who were under contract ship's husbands; and for receiver and manager of the ship's machinery removed by Defts; and staying actions in respect of same matters, see *Brenan v. Preston*, 10 Ha. 331; and staying ship's husbands interfering with her sailing by detention of the machinery, and for receiver of it, *S. C.*, 2 D. M. G. 813, *sup.*, p. 614.

For the addition of a direction that receiver be at liberty to apply in Chambers for leave to realize the cargo, see *Skelton v. Edwards*, V.-C. B., 7 Dec. 1876, B. 1905.

## NOTES.

### APPOINTMENT OF RECEIVER.

By the Jud. Act, 1873, s. 25 (8), a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and the order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and see sect. 24, sub-sect. 7, enabling the Court in every cause or matter pending to grant, either absolutely or on reasonable terms, all such remedies as the parties may appear entitled to in respect of any and every legal or equitable claim brought forward therein.

The expression "interlocutory order" includes orders made after as well as before final judgment: *Smith v. Cowell*, 6 Q. B. Div. 75; and the power given by section 25 can be exercised at the trial of the action as well as upon an interlocutory application: *Re Prytherch, P. v. Williams*, 42 Ch. D. 590, and so long as the judgment remains unsatisfied the action is "pending" within sect. 24, sub-sect. 7: *Salt v. Cooper*, 16 Ch. Div. 544; *Hart v. H.*, 18 Ch. D. 670, 680; but after final foreclosure of property, subject to an equitable charge, though an assignment of the mortgaged premises to the Plt (not required by him) remains to be settled, the action is at an end, and the Plt cannot obtain the appointment of a receiver: *Wills v. Luff*, 38 Ch. D. 197; and as to the extensive nature of the power conferred by the Act, see *Re Coney, C. v. Bennett*, 29 Ch. D. 993, and cases *inf.*, Section II., pp. 667 *et seq.*

By O. L. 6, an application for a receiver may be made to the Court or a Judge by any party. If the application be by the Plt, under sect. 25, sub-sect. 8, it may be made either *ex parte* or with notice, and if by any other party, on notice to Plt, and at any time after appearance by the party applying. The application *ex parte* may be made before service of the writ or appearance: see *Taylor v. Eckersley*, 2 Ch. D. 302, *sup.*, Form 3; *Re H.'s Estate, H. v. H.*, 1 Ch. D. 276, *sup.*, p. 636; *Colebourne v. C.*, 1 Ch. D. 690; and may be entertained in cases of emergency, e.g., for receiver of estate of supposed lunatic, pending an application for an inquisition: *Re Pountain*, 37 Ch. Div. 609; and see *Fuggle v. Bland*, 11 Q. B. D. 711, where a judgment creditor of husband and wife was, on his application *ex parte*, appointed receiver of the income of the wife's reversionary interest; but, even after judgment, the order ought not to be granted *ex parte*, except in cases of emergency: *Lucas v. Harris*, 18 Q. B. D. 127, 134.

Under this rule, a receiver may be appointed, on the application of either party, either before or after judgment: *Salt v. Cooper*, 16 Ch. Div. 544; *Bryan v. Bull*, 10 Ch. D. 153; *Anglo-Ital. Bank v. Davies*, 9 Ch. D. 275; *Smith v. Cowell*, 8 Q. B. Div. 75. The Deft, therefore, may now, before judgment, apply for a receiver: *Sargant v. Read*, 1 Ch. D. 600; though this was not the case under the old practice: *Robinson v. Hadley*, 11 Beav. 614; *Hiles v. Moore*, 15 Beav. 175; *Barlow v. Gains*, 8 Beav. 329; from which it appears that the Deft could not apply for a receiver before decree, and that his application should have been made by petition.

In any case of urgency an *ex parte* application may be made; and such an application may be made by a Deft under sect. 25, sub-sect. 8, notwithstanding the provision of r. 6 as to notice to Plt: *Hick v. Lockwood*, W. N. (83) 48.

Although under the old practice a receiver might, under special circumstances, be appointed before appearance (*Ramsbottom v. Freeman*, 4 Beav. 145; *Meaden v. Sealey*, 6 Ha. 620; *Dowling v. Hudson*, 14 Beav. 423, 424, n.), and before service, when service could not be effected by reason of the Deft having absconded (*L. & S. W. Bank v. Facey*, 19 W. R. 676), a receiver was not appointed before decree unless the bill prayed such appointment; and leave to amend would not in general be granted: *Pare v. Clegg*, 29 Beav. 589; *secus* at the hearing: *Osborne v. Harvey*, 1 Y. & C. C. 116; or, in a case of urgency, on motion after decree: *Thomas v. Davies*, 11 Beav. 29; *Bowman v. Bell*, 14 Sim. 392; *Wright v. Vernon*, 3 Drew. 112.

But although, under the new practice, if the appointment of a receiver is a substantial object of the action, the writ should be so indorsed, the indorsement may be amended under O. XXVIII. 1, and upon such amendment an interim receiver (or injunction) may be obtained: *Colebourne v. C.*, 1 Ch. D. 690; and also though not claimed by the indorsement of the writ, original or amended: *Norton v. Gover*, W. N. (77) 206; *Salt v. Cooper, sup.*

Leave cannot be granted for service out of the jurisdiction of a summons after judgment calling on Deft to show cause why a receiver should not be appointed: *Weldon v. Gounod*, 15 Q. B. D. 622; distinguishing *Crédit Gerundese v. Van Weede*, 12 Q. B. D. 171; *v. sup.* Chap. II., p. 17.

The order should state distinctly over what property the receiver is appointed: *Crow v. Wood*, 13 Beav. 271; or else refer to the pleadings or some other document describing it.

A receiver may be appointed in an action commenced by summons: *Re Francke, Drake v. F.*, 57 L. J. Ch. 437; 58 L. T. N.S. 305; *Weston v. Levy*, W. N. (87) 76; and see *Gee v. Bell*, 35 Ch. D. 160; or where the application is by consent: *Blackborough v. Ravenhill*, 16 Jur. 1085; or where a vacancy occurs by the decease or otherwise of a receiver already appointed: *Grote v. Bing*, 9 Ha. App. 1; *Booth v. Coulton*, 16 W. R. 683.

And for the appointment, upon *ex parte* motion, of a receiver in place of one deceased, see *Molloy v. Hamilton*, I. R. 8 Eq. 499; *Re Stone, ib.*, 9 Eq. 404.

As to the appointment of a receiver in an admon action commenced in a district registry, see *Re Capper*, 26 W. R. 434.

The costs of a motion for a receiver are sometimes reserved until the hearing: *Chaplin v. Young*, 6 L. T. N.S. 97; even though the application is refused: *Coope v. Cresswell*, 12 W. R. 299.

On the question of the jurisdiction to appoint a receiver over estates in

Ireland or out of the jurisdiction, which seems upon the authorities cited to be in the nature of a recommendation to the Irish Court rather than an appointment by this Court directly of such receiver, see *Re Trant*, 2 Sol. Jour. 11; *S. C.*, *M. R.*, in Chambers, 8 July, 1857, B. 1366, and cases collected on the subject in *Penn v. L. Baltimore*, 2 L. C. Eq. 923; *Houlditch v. M. Donegal*, Beat. 146; 8 Bli. N.S. 301.

As to the power of the Court to appoint a receiver and stay all further proceedings, with a view to a reference to arbitration, see *Compagnie du Senegal v. Woods*, 53 L. J. Ch. 16, and *sup.*, p. 534.

As to the jurisdiction of the Court to appoint a receiver and manager of property in the colonies or abroad, see *inf.*, Section IV.

#### PERSON TO BE APPOINTED.

The right to the appointment of a receiver belongs in the first instance to the parties interested in the suit, and not to a stranger: *A. G. v. Day*, 2 Mad. 246; but the selection is matter for the discretion of the Court: *Morison v. M.*, 4 M. & Cr. 216.

The most fit person should be appointed, without regard to which party may propose him: *Lespinasse v. Bell*, 2 J. & W. 436; but generally the person having the carriage of the order has the right of nominating, and effect will be given to his nomination, unless good cause to the contrary is shown by the other side.

Leave of the Court must be obtained before a party to the suit can propose himself as receiver: see *Davis v. D. Marlborough*, 2 Swa. 118.

A person whose duty it is to watch and check the receiver when appointed is ineligible: *Sutton v. Jones*, 15 Ves. 584. Thus the Plt's solicitor will not be appointed, even by consent: *Allen v. Lloyd*, 12 Ch. Div. 447; and as to the next friend or guardian of an infant being ineligible, see *Simpson*, 438.

The selection of a receiver by a Judge will not be disturbed by the Court of Appeal, except in extreme cases, or on some objection in point of principle: *Cookes v. C.*, 2 D. J. & S. 526; *Perry v. Oriental Hotels Co.*, 5 Ch. 450; *Nothard v. Proctor*, 1 Ch. D. 4; *Ley v. L.*, 27 L. T. 267.

Except in very special cases (see *Sargant v. Read*, 1 Ch. D. 400; *Taylor v. Eckersley*, 2 Ch. D. 302), one of the parties to the action will not be appointed receiver without the consent of the other party: see *Allen v. Lloyd*, 12 Ch. D. 447, 451.

#### SALARY AND ALLOWANCES.

The usual allowance was formerly 5*l.* p. c. on the gross rental of the estates: *Day v. Croft*, 2 Beav. 488; but 3*l.* p. c. is now very commonly given. There is, however, no settled scale: *Prior v. Bagster*, 57 L. T. N.S. 760; *W. N.* (87) 194; and the amount must depend on the circumstances of the particular case.

Where the rental is very considerable, a percentage at a lower rate has been allowed, or a fixed salary may be given; and if there is any special difficulty in collecting the rents, the allowance has been increased; if facility, diminished: *Day v. Croft*, *sup.*

The scale allowed to liquidators is no guide: *Prior v. Bagster*, 57 L. T. N.S. 760.

By Order as to Supreme Court Fees, 1884, Sched., item 72, the Court fee on taking an account of a receiver or consignee is 1*s.* for every 100*l.* or portion of 100*l.* of the amount found to have been received, without deducting any payment.

A receiver may be entitled to an allowance beyond his salary for extraordinary trouble and expenses: *Potts v. Leighton*, 15 Ves. 276; but not without previous order: *Re Ormsby*, 1 Ba. & B. 189.

He is not entitled to expenses of journeys abroad and proceedings there, without the Court's express sanction, though they may be allowed where the proceedings are successful; and for the practice of the Court as to extraordinary allowances, see *Malcolm v. O'Callaghan*, 3 M. & Cr. 52. And see, as to receiver in bankruptcy, *Exp. Izard*, *Re Bushell*, 23 Ch. Div. 75.

He has been held entitled to repay himself such sums as have been reasonably expended in the collection of rents (including a salary or

percentage to a collector), before applying the rents in satisfaction of the arrears of interest on mortgages: *Gilbert v. Denely*, 3 Scott, N. R. 364.

When a trustee is appointed on his own undertaking to act as receiver of the trust property, he is not ordinarily entitled to a salary, though the words "without salary" ought, it seems, to be inserted in the order: *Pilking-ton v. Baker*, 24 W. R. 234.

And a party interested proposing himself is usually required to act without salary, unless by consent.

In bankruptcy, the receiver is entitled to his costs next after the costs of realizing the estate: *Exp. Royle*, 23 W. R. 908.

#### SECURITY.

By O. L. 16, when an order is made directing a receiver to be appointed, unless otherwise ordered, he is first to give security to be allowed by the Court or a Judge, and taken before a person authorized to administer oaths, duly to account for what he shall receive as such receiver, and to pay the same, as the Court or Judge shall direct; and the person so to be appointed shall, unless otherwise ordered, be allowed a proper salary, or allowance. The above directions, formerly inserted in the order to appoint a receiver, are therefore now omitted.

The security is to be by recognizance of the receiver, in Form 21, in R. S. C. Appx. L. In *Poole v. Wood*, V.-C., 21 Dec. 1832, leave was given to pay part of the sum to be secured into Court, and to give security for the rest.

By O. L. 17, where a named receiver is appointed in Court, the Court or a Judge may adjourn to Chambers the cause or matter then pending, in order that the person named as receiver may give security, and may thereupon direct the judgment or order to be drawn up.

Where a receiver is appointed merely for the purpose of securing a charge, e.g., by way of equitable execution, security may be dispensed with: *Hewett v. Murray*, 54 L. J. Ch. 572; 53 L. T. N.S. 380; and see Forms 1, 2, inf. p. 666; and for the preservation of property pending an appeal, the Plt was appointed interim receiver and manager of a farm without security on his undertaking to abide by any order of the Court: *Hyde v. Warden*, 1 Ex. Div. 309; and see *Taylor v. Eckersley*, 2 Ch. Div. 302; *Gardner v. Blane*, 1 Ha. 381.

After reference the Court will not dispense with the usual security, even with the consent of the parties interested. If the parties desire it, they should nominate of their own authority, and then apply that the receiver appointed by themselves shall not be required to give security: *Manners v. Furze*, 11 Beav. 30; *Ridout v. E. Plymouth*, 1 Dick. 68. And the parties so applying must be *sui juris*: *Tylee v. T.*, 17 Beav. 583.

And for the appointment under special circumstances of a receiver on his own recognizance only, see *Hibbert v. H.*, 3 Mer. 681; *C. Carlisle v. L. Berkley*, Amb. 599.

In *Bainbrige v. Blair*, 3 Beav. 421, the receiver was discharged on the trustees undertaking, without recognizance, to account half-yearly like a receiver.

It was questioned whether the bond of an incorporated guarantee association (though sufficient as a security for costs: *Plestown v. Johnston*, 2 W. R. 3), would be accepted instead of the usual recognizance: *Manners v. Furze*, 11 Beav. 30; but see *Clarke v. Thornton*, inf. Sect. III., Form 6, p. 678; *Carpenter v. Solicitor to Treasury*, 7 P. D. 235; *Colmore v. North*, 42 L. J. Ch. 4; 27 L. T. N.S. 405; 21 W. R. 43; and such a bond is commonly accepted now.

The security is usually for double the annual rental; though two sureties are usual, the number may be increased, to reduce the amount of each.

Money due from a receiver, whether an ascertained balance or not, is, so long as the recognizance is existing, a debt of record: *Seagram v. Tuck*, 18 Ch. D. 296.

By O. LXI. 14, no recognizance shall be enrolled after six months from the acknowledgment thereof, except under special circumstances, and by an order made by the Court or a Judge upon motion for the enrolment thereof after that time. Leave may be given to enrol it *nunc pro tunc*: *Bothomley*



v. *Fairfax*, 1 P. W. 334, 340; *Vaughan v. V.*, 1 Dick. 90; for such order, see *Marchant v. M.*, M. R., 3 Nov. 1853, B. 15; but it will be made so as not to prejudice intervening incumbrances: *Bothomley v. Fairfax*, *sup.*; and see *Fothergill v. Kendrick*, 2 Ver. 234. The enrolment precedes the appointment: see Form 8, *sup.* p. 638.

By O. Lx. 4, where, by the practice of the Ch. Div., recognizances are required to be given, such recognizances shall be given to the two senior chief clerks for the time being of the Judge to whom the cause or matter is assigned; and when the same are, by any judgment or order, directed to be vacated, the proper officer shall, on due notice thereof, attend one of the said chief clerks, who shall thereupon vacate such recognizances in the usual manner.

The sureties must be resident within the jurisdiction: *Cockburn v. Raphael*, 2 S. & S. 453; and upon any event, such as death or bankruptcy, happening, which would prevent the recognizance being effectually put in force against them, an order will be made at Chambers on summons, directing the receiver to give a new security.

Additional security has been required when the property over which the receiver has been appointed has since increased in value: *Dan.* 1687, citing *Spence v. Hangford*, M. R., in Chambers, 17 Feb. 1865.

#### EFFECT OF APPOINTMENT.

The appointment of a receiver, so far as it affects the rights of creditors or third parties, dates not from the order appointing him, but from the completion of the security required to be given by the order; and, accordingly, until the appointment has been perfected by certificate that the security has been completed, a judgment creditor is not debarred from proceeding to execution: *Edwards v. E.*, 2 Ch. D. 291; and see *Exp. Evans, Re Watkins*, 13 Ch. D. 252, 255. But if no security is required (which should appear on the face of the order), the appointment is complete upon possession being taken under the order: *Morrison v. Skerne Ironworks Co.*, 60 L. T. N.S. 588.

His liability to account in respect of moneys received and expended by him as receiver at once arises, whether the security has been completed or not: *Smart v. Flood*, 49 L. T. N.S. 467.

His possession is the possession of the Court, and the effect of his appointment is to remove the parties to the suit from possession: *Russell v. E. Ang. Ry.*, 3 Mac. & G. 104; *Ames v. Birkenhead Docks*, 20 Beav. 350; and, as against the subsequent trustee in bankruptcy, to exclude the doctrine of reputed ownership: *Taylor v. Eckersley*, 5 Ch. D. 740; and as to the appointment of a receiver and manager of a co. operating as a discharge to the co.'s servants, see *Reid v. Explosives Co.*, 19 Q. B. Div. 264.

He is entitled to rents in arrear when he is appointed: *Codrington v. Johnstone*, 1 Beav. 524; and his right to collect a sum admitted to be due to the estate cannot be disputed by the person making the admission: *Wood v. Hitchings*, 2 Beav. 294.

Money due to him in his character of receiver was a debt, legal or equitable, upon which a debtor's summons might be grounded under the Bankruptcy Act, 1869, ss. 6, 7 (see now Bankruptcy Act, 1883, ss. 4, 6, sub-s. 1(d)): *Exp. Harris*, 2 Ch. D. 423.

He is not "owner" within the Public Health Act, 1875, and, consequently, service on him of notices as to improvement expenses, under sect. 150, is bad: see *Corp. of Bacup v. Smith*, 45 Ch. D. 395.

A solr receiving rents must pay them over to the receiver without reference to any lien for costs, though it might have been proper for him to receive them: *Wickens v. Townshend*, 1 Rus. & M. 361, 363.

But the right of the receiver to collect will not prevent payment of money into Court by a debtor to the estate, on the petition of parties interested, to save the receiver's poundage: *Haigh v. Grattan*, 1 Beav. 201.

As against a receiver appointed by the Court, an exor cannot retain a debt due to him: *Davenport v. Moss*, 14 W. R. 453; *Re Jones, Culver v. Laxton*, 31 Ch. D. 440 (following *Re Birt*, 22 Ch. D. 604; *Richmond v. White*, 12 Ch. D. 161).

A partner who had got in debts adversely to the receiver was ordered,

within a week, to make an affidavit of the amount, and pay such amount to the receiver, or in default to be committed: *Parker v. Pocock*, 30 L. T. N.S. 458.

A receiver who has been appointed under the ordinary power in a mortgage deed is in possession for all purposes as the agent of the mortgagor: *Jefferys v. Dickson*, 1 Ch. 183; *Law v. Glenn*, 2 Ch. 634; Conveyancing Act, 1881, s. 24, sub-s. 2.

A receiver appointed by will is a proper party to an admon suit: *Consett v. Bell*, 1 Y. & C. C. 569.

The right of a Plt to damages for detention of property by the Deft is not lost by the appointment of a receiver of the property by consent pending the trial of the action: *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66 (see *S. C.*, on appeal, 43 Ch. Div. 316); following *Williams v. Peel River Co.*, 55 L. T. N.S. 689.

The receiver's possession does not alter the rights of parties as regards the Statute of Limitations: *Harrison v. Duignan*, 2 Dr. & War. 295.

#### AS REGARDS PERSONS CLAIMING BY PARAMOUNT TITLE.

Leave is given to persons claiming by title paramount to the receiver to pursue their remedies, provided there has been no delay in the assertion of their rights: *Fish. Mort.* 387, 388.

As to the rights of a landlord after the appointment of a receiver as against the tenant, see *Sutton v. Rees*, 9 Jur. N.S. 456. He should come to the Court, and ask for authority to distrain, notwithstanding the possession of the receiver. If the landlord gives the receiver notice of his claim for rent, but takes no other steps, and the receiver sells the furniture, the landlord has no priority over other creditors in the proceeds: *S. C.*

His right to distrain for rent is limited by the Bankruptcy Act, 1883, s. 42, as amended by the Bankruptcy Act, 1890, s. 28, to six months' rent accrued due prior to the order of adjudication, including an order for the admon of the estate of a debtor whose debts do not exceed 50*l.*, or of a deceased person who dies insolvent: *Exp. Cochrane*, 20 Eq. 282; *Exp. Till*, 16 Eq. 97.

The appointment of a receiver of the tolls, profits, and income of a railway in a suit on behalf of rent-charge holders was held not to affect the right of the owner of a rent-charge to distrain for his arrears on the goods and chattels of the promoters of the undertaking, given by the L. C. C. Act, 1845, s. 11: *Eyton v. Denbigh, &c. Ry.*, 6 Eq. 14; see also *Ib.* 488 (on a similar application in the same co.).

And see *Bowen v. Brecon Ry.*, 3 Eq. 541, where, upon a petition (after the appointment in a debenture holder's suit of a receiver of a railway undertaking) by a debenture holder for leave to issue execution on his judgment, an inquiry whether it would be for the benefit of the debenture holders that any proceedings should be taken by the receiver for the purpose of making such judgment available for them, was directed.

A mortgagee whose interests are not provided for in the order for the receiver may apply to be examined *pro interesse suo*: *Hunt v. Priest*, 2 Dick. 540; so also if a receiver has been improperly, or by mistake, put in possession of goods, the proper course for the judgment creditor of the owner is not to apply for leave to levy execution, but to move to discharge the order, or apply to be examined *pro interesse suo*: *Fowler v. Haynes*, 2 N. R. 156; and see *Kerr*, Recrs. 126, 130; and *sup.* Chap. XXVII., "EXECUTION," p. 369.

The creditor of a party to whom a receiver appointed by the Court was directed to pay the rents was allowed, on petition, to sue out and execute such writs as advised: *Gooch v. Haworth*, 3 Beav. 428. But a judgment creditor recovering merely under an order at law money of his debtor in a receiver's hands, had to repay it, and he, and the receiver who had not resisted, had to pay costs; a party interested may apply at once to stay such payments: *De Winton v. Mayor of Brecon*, 28 Beav. 200.

In *Neate v. Pink*, 15 Sim. 450, an inquiry went on petition by a stranger to the suit to ascertain his right to rent paid into Court by the receiver; but see *Wastell v. Leslie*, *Ib.*, 453, n.; *Blundell v. B.*, W. N. (86) 125; explaining *Neate v. Pink*, and deciding that a judgment creditor, not a party to an action, has no *locus standi* to apply for payment of money to him

by a receiver, though the debt be one properly payable out of the funds in the receiver's hands: *Brocklebank v. E. London Ry. Co.*, 12 Ch. D. 839.

Where, after appointment of a receiver in a partnership action, a creditor of the firm obtained judgment, an order was made giving him a charge on the partnership moneys coming to the receiver, upon his undertaking that the charge was to be dealt with according to the order of the Court: *Kewney v. Attrill*, 34 Ch. D. 345; see Form 6, *inf.* p. 666; and see *Re Cowan's Estate*, *Rapier v. Wright*, 14 Ch. D. 638, where a receiver in an admon action, who had been directed to pay to a legatee a quarterly sum, was ordered to pay the debt and costs of judgment creditors of the legatee.

If a receiver has exceeded his authority, the person injured thereby ought not, without leave of the Court, to bring an action against the receiver, but should apply for relief in the action in which the receiver was appointed: *Searle v. Choat*, 25 Ch. D. 723.

And as to the remedies of a judgment creditor or prior incumbrancer against the owner and the receiver, as to surplus rents, or the establishment of his rights, see *Lewis v. L. Zouche*, 2 Sim. 388; *Smith v. E. Effingham*, 2 Beav. 232; 7 Beav. 357.

Rent received by the receiver before the mortgagee took possession, but not paid to her till after, was (under the circumstances of the case) assumed to go in discharge of interest due when she took possession; *secus*, as to rent which did not appear to have been received before she took possession: *Horlock v. Smith*, 1 Coll. 287.

If the receiver has paid to the tenant for life money which he ought to have paid into Court for the benefit of creditors, and is afterwards compelled to pay the same amount into Court, the receiver's right to the surplus which may remain after satisfaction of the creditors will have priority over any claim by the tenant for life; but if the wrongful payment has been made by the solr in the cause as his agent, the receiver's right to the surplus is subject to all liabilities between the solr and the person wrongly paid: *Gurden v. Badcock*, 6 Beav. 157.

#### INTERFERENCE WITH RECEIVER.

The Court will not allow its receiver to be interfered with, though erroneously appointed: *Ames v. Birkenhead Dock*, 20 Beav. 332; *Randfield v. R.*, 1 Dr. & S. 310. But leave to try a right which is claimed against the receiver will not be refused, unless the claim is clearly without foundation: *S. C.*, on appeal, 3 D. F. & J. 766.

Interference with a receiver appointed by the Court (*e.g.*, by advertisements tending to prejudice the management of a business carried on by a receiver and manager under order of the Court) is a contempt punishable by a committal: *Helmores v. Smith* (2), 35 Ch. D. 449; *Hawkins v. Gathercole*, 1 Drew. 12; which, after notice from the receiver, renders the persons interfering, whoever they may be, and even though enforcing legal rights, liable for the consequences of their contempt: and see *Exp. Cochrane*, 20 Eq. 282; but it is not interference with the receiver of a co. to apply for leave to issue execution against him, upon judgments recovered against the co., in respect of money due from him in his capacity of shareholder: *Re West Lancashire Co.*, W. N. (90) 165.

It may be punished by committal by order absolute in the first instance: *Broad v. Wickham*, 4 Sim. 511; but more usually, as in the case of breach of an injunction, by payment of all costs and expenses occasioned by such improper conduct: *Lane v. Sterne*, 3 Giff. 629.

And the particular act of interference may be restrained by injunction, which, in a proper case, may be obtained *ex parte*: *Tink v. Rundle*, 10 Beav. 318; *Evelyn v. Lewis*, 3 Ha. 472; *Randfield v. R.*, 1 Dr. & S. 310. And in *Bayly v. Went*, 51 L. T. N.S. 764, an injunction was granted to restrain a mortgagor from distraining for rent, on the allegation that the receiver appointed by the mortgagee had been negligent in collecting it.

A motion to commit for disturbance of a receiver's possession, made for the purpose of extorting costs, rather than to protect such possession, will not, however, be encouraged: *Ward v. Swift*, 6 Ha. 312.

Whether the sheriff may be committed for the act of his under-sheriff in

**Legal Title:—**

The general rule has been that the Court will not appoint a receiver against a person in possession under a legal title, except in cases of fraud and danger to the estate: *Lloyd v. Passingham*, 16 Ves. 59.

**Mortgagor and Mortgagee:—**

On the principle that Courts of Equity would not assist a person who had a full legal remedy, a receiver would not formerly be appointed at the instance of a mortgagee who had the legal estate (*Berney v. Sewell*, 1 J. & W. 648), or of an annuitant, or equitable incumbrancer, with power to distrain given by deed (*Buxton v. Monkhouse*, G. Coop. 41; *Kelsey v. K.*, 17 Eq. 495), or superadded by stat. 4 Geo. 2, c. 28 (*Sollory v. Leaver*, 9 Eq. 22), or except under special circumstances: see *Ackland v. Gravenor*, 31 Beav. 482; or where the arrears could not have been recovered by distress: *Foster v. F.*, 2 Ver. 386; *Cupit v. Jackson*, 13 Pri. 721; *Manly v. Hawkins*, 1 D. & Wal. 363; *Beamish v. Austen*, 1 R. 9 Eq. 361.

Under the extended powers given by the Jud. Act, 1873, s. 25 (8), a receiver may now be appointed over property of which the Plt is both legal and equitable mortgagee, without prejudice to the right of prior incumbrancers to take possession under their security: *Pease v. Fletcher*, 1 Ch. D. 273; see also *Habershon v. Gill*, W. N. (75) 231.

A legal mortgagee of business premises, prevented from taking possession by the mortgagor, may obtain the interim appointment of a receiver and manager, and an injunction restraining the mortgagee from interfering with the management: *Truman & Co. v. Redgrave*, 18 Ch. D. 547; but not an injunction before judgment restraining the mortgagee from remaining in occupation: *Taylor v. Soper*, 62 L. T. N.S. 828. And a receiver has been appointed so as to relieve a mortgagee from the liabilities incurred by taking possession: *Mason v. Westoby*, 32 Ch. D. 206; but the mortgagee has no absolute right to have such an appointment made, and if he has assumed the responsibility of taking possession, the Court will not in general assist him to relinquish it: *Re Prytherch, P. v. Williams*, 42 Ch. D. 590.

At the instance of a mortgagee of a share, a receiver of the whole has been appointed: *Sumsion v. Crutwell*, 31 W. R. 399; and in the case of collieries held under leases containing working covenants, a receiver and manager of the property and business was appointed, although the business was not specifically referred to in the mortgage: *Campbell v. Lloyd's Bank*, 58 L. J. Ch. 424.

And by the Conveyancing Act, 1881, s. 19 (1) (iii.), power is given to mortgagees in possession (to the same extent as if in terms conveyed by the mortgage deed, but no further), when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof. Notwithstanding this power, a mortgagee may still obtain a receiver by application to the Court: *Tillett v. Nixon*, 25 Ch. D. 238; and where an action is pending it is desirable that the appointment should be made by the Court: *Ibid.*

By sect. 24 (1), a receiver shall not be appointed by a mortgagee under the above power until he has become entitled to exercise the power of sale conferred by the Act. The powers, remuneration, and duties of the receiver are stated in sect. 24, sub-sects. 2—8.

As to the rights of the mortgagee's receiver to sue for rent in the name of the mortgagee's heir-at-law, on giving him indemnity, see *Fairholme v. Kennedy*, 24 L. R. Ir. 498; and that mortgagor distraining for rent will be restrained from such interference, *Bayly v. Went*, 51 L. T. N.S. 764.

Where a mortgagor is in possession, a receivership order, containing no direction that he attorn or deliver up possession, does not make his possession wrongful, nor can he be fixed with an occupation rent before demand made by the receiver: *Yorkshire Banking Co. v. Mallam*, 35 Ch. D. 125.

The rule of the Court is not to appoint a receiver at the instance of a second mortgagee or incumbrancer against a prior legal mortgagee, or against an incumbrancer of later date who has acquired the legal possession, to whom anything remains due. Such prior mortgagee, &c., is entitled to retain possession until he is fully paid, or he has rendered it impossible, from his negligence in keeping his accounts, to ascertain what is due to him: see *Berney v. Sewell*, 1 J. & W. 647; *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 175; *Bates v. Brothers*, 2 Sm. & G. 509.

When, however, there are prior mortgagees or incumbrancers who are not in possession, a receiver may be appointed without prejudice to such incumbrancers taking possession: *Forms* 11, 12, *sup.* pp. 639, 640; *Underhay v. Read*, 20 Q. B. Div. 209; *Bryan v. Cormick*, 1 Cox, 422; *Dalmer v. Dashwood*, 2 Cox, 383; *Norway v. Rowe*, 19 Ves. 153.

After judgment for foreclosure absolute, Plt (mortgagee) cannot obtain the appointment of a receiver: see *Wills v. Luff*, 38 Ch. D. 197.

In a suit by second mortgagee to redeem first mortgagee, who, by his deed, had power to appoint a receiver, the Court appointed a receiver, giving the nomination to first mortgagee: *Bord v. Tollemache*, 1 N. R. 177.

As against the mortgagor in possession, a receiver may be appointed on the application of an equitable mortgagee: *Aberdeen v. Chitty*, 3 Y. & C. 379.

As between a vendor, and a purchaser and his mortgagee, a receiver was appointed on bill by mortgagee: *Dawson v. Yates*, 1 Beav. 301.

And against a purchaser in possession: *Osborne v. Harvey*, 1 Y. & C. C. 116.

### Trust Estate:—

The cases in which a receiver of a trust estate may be appointed are collected in Lewin, 982 (ed. 8).

As a general rule, the trustees or exors will not, on slight grounds, be dispossessed of the trust property by the appointment of a receiver: *Barkley v. L. Reay*, 2 Ha. 308; *Wiles v. Cooper*, 9 Beav. 294; *Whitworth v. Whyddon*, 2 Mac. & G. 52.

On the appointment of new trustees, a receiver who had been appointed in the place of improper trustees was discharged on their undertaking, without recognizance, to pass their accounts half-yearly: *Bainbrigge v. Blair*, 3 Beav. 421.

If the trustee consents, a receiver may be appointed at the instance of all the *co. q. t.*: *Brodie v. Barry*, 3 Mer. 695; but the usual recognizances will be required: *Manners v. Furze*, 11 Beav. 30.

If the trustee has been guilty of misconduct or waste, or has not shown himself impartial between conflicting claims (*E. Talbot v. Hope-Scott*, 4 K. & J. 139; *Anon.*, 12 Ves. 5), or the property is endangered from the bankruptcy, insolvency, or great poverty of the trustee (*Scott v. Beecher*, 4 Price, 346; *Gladdon v. Stoneman*, 1 Madd. 143; *Everett v. Prytherch*, 12 Sim. 367; and *v. sup.* p. 659), or if he is incapacitated from acting (*Bainbrigge v. Blair*, 3 Beav. 421), or is of bad character or drunken habits (*Everett v. Prytherch, sup.*), a receiver may be appointed at the instance of any one *c. q. tr.*

As also when, from disputes between the trustees, the rents have fallen into arrear: *Wilson v. W.*, 2 Ke. 249.

Loss of part of trust funds is also ground for appointing a receiver: *Evans v. Coventry*, 5 D. M. & G. 911; 3 Drew. 75.

Or investments by two of the trustees in their own names without the consent of the third: *Swale v. S.*, 22 Beav. 584.

On the disclaimer of one of two trustees, a receiver was appointed, with leave to either trustee to propose himself: *Tait v. Jenkins*, 1 Y. & C. C. 492; though in *Browell v. Reid*, 1 Ha. 434, the disclaimer, inactivity, or absence abroad, of one of several trustees was not held sufficient ground.

Where trustees of leaseholds were directed by the will to repair according to the lessee's covenants out of rents, a receiver was appointed for the purpose of enforcing the obligation against the tenant for life: *Re Fowler, F. v. Odell*, 16 Ch. D. 723; *secus*, as between tenant for life and remainderman where there was no such direction: *Re Courtier, Coles v. Courtier*, 34 Ch. Div. 136.

### Married Woman's Separate Estate:—

A receiver may be appointed by way of equitable execution of a married woman's separate estate: see *Peace v. Waller*, 24 Ch. D. 405; *Bryant v. Bull*, 10 Ch. D. 153; *inf.* Sect. II. p. 668.

### Infant's Estate:—

A receiver may be appointed of an infant's estate when there is no guardian: *Hicks v. H.*, 3 Atk. 274; or the guardian is abroad: *Westly v. W.*, 2 C. P. Coop. 210; or when the estate is being mismanaged: *Aburrow v. A.*, 10 Sim. 602; *Bennett v. Colley*, 5 Sim. 181; and on petition or summons

without suit: *Re Leeming*, 20 L. J. Ch. 550; *Re Reynolds*, 19 L. T. N.S. 311; *Re Goode*, 1 Ir. Ch. 256; and the rules that apply to appointing a receiver of a trust estate are applicable where the person beneficially interested is an infant, with this addition, that the Court considers chiefly what will be most beneficial to the infant's interests: see *Simpson*, Law of Infants, 433 *seq.*

### Partnership:—

A receiver will be appointed of partnership property in cases of misconduct of one or more of the partners involving violation of the partnership contract, risk to the property, or the exclusion of the others or other from the right of personal intervention, or other unrighteous act whereby the due winding up of the affairs of the partnership might be endangered; but mere quarrels and disagreements are not a sufficient ground: *Wilson v. Greenwood*, 1 Sw. 481; *Goodman v. Whitcomb*, 1 J. & W. 589; *Marshall v. Colman*, 2 J. & W. 266; *Hale v. H.*, 4 Beav. 369; *Blakeney v. Dufaur*, 15 Beav. 40; *Baxter v. West*, 28 L. J. Ch. 169.

The effect of appointing a receiver is to exclude all the partners from the management, and not, as in the case of an injunction, the misconducting members of the firm only; and therefore an injunction may be granted in cases where a receiver will not be appointed, and the refusal of a receiver does not prevent the granting of an injunction: see *Lindl.* 550; *Kerr*, Recrs. 64; *Baxter v. West*, *sup.*, where *Kindersley*, V.-C., said that in such a case the Court would not appoint a receiver unless it saw that there was an actual present dissolution arising from the act of the parties, or that, at the hearing, it would, upon the merits, dissolve the partnership.

A receiver will be more readily appointed than a manager, as the Court will not interfere with the management of a partnership except for the purposes of winding up the concern and dividing the assets: *Const v. Harris*, T. & R. 517; *Waters v. Taylor*, 15 Ves. 13; *Goodman v. Whitcomb*, *sup.*, or until sale as a going concern, or for the purpose of preserving assets, carrying out contracts, and entering into necessary (but not speculative or onerous) contracts: *Taylor v. Neate*, 39 Ch. D. 538; see *Form 15*, *sup.* p. 641.

But the Court cannot confer on such a receiver greater powers than a partner could have had, *e.g.*, to accept shares in a co., though fully paid, in satisfaction of a debt due to the firm: *Niemann v. N.*, 43 Ch. Div. 198; explaining *Weikersheim's case*, L. R. 8 Ch. 831.

And where the object of the suit is not to dissolve, but to continue a partnership, the rule is not to appoint a receiver and manager, though there may be cases for such *interim* appointment: *Hall v. H.*, 3 Mac. & G. 79; 12 Beav. 414, 416, n.; *Roberts v. Eberhardt*, Kay, 148; *Rowlands v. Evans*, 30 Beav. 302; see also *Peek v. Trinsmaran Mining Co.*, 2 Ch. D. 115. Such an appointment (with direction for payment of debts) does not entitle a creditor, though his debt is ascertained and undisputed, to come to the Court for an order that the receiver should pay his debt: *Blundell v. B.*, W. N. (86) 125.

As to the right of one partner to a receiver as against his co-partners, with or without reference to a dissolution, see *Smith v. Jeyes*, 4 Beav. 503; and cases collected, *Lindl.* 546.

After dissolution, the right of one partner to a receiver for the protection of his interests as against the others is recognized in *Thomson v. Anderson*, 9 Eq. 533, in which case security was given by the Defts to answer any demand Plt might establish with respect to the partnership dealings and transactions: and see *Taylor v. Neate*, *sup.*

If the existence of the partnership is questioned, a receiver will not usually be appointed: *Fairburn v. Pearson*, 2 Mac. & G. 144; and see *Walker v. Hirsch*, 27 Ch. D. 460.

A retired partner who had advanced the capital, and was liable for the debts, was appointed receiver without salary: *Hoffman v. Duncan*, 18 Jur. 69.

On the decease of one partner, a receiver may be appointed against the survivors who insist upon employing the assets of the deceased in the business: *Madgwick v. Wimple*, 6 Beav. 495.

A receiver of partnership debts will be appointed upon motion by solvent partner against the other's assignees: *Freeland v. Stansfeld*, 2 Sm. & G. 479.

As to the right of a deceased partner's reprieve to a receiver, see *Clegg v. Fishwick*, 1 Mac. & G. 294; *Davis v. Amer*, 3 Dr. 64.

Where part of the assets of a deceased consisted of his share of a partnership business, the Probate Court would not, against the wish of the surviving partner, appoint an *admor pendente lite* unless on a strong case of improper dealing with the business: *Horrell v. Witts*, L. R. 1 P. & M. 103.

If part owners of a mine cannot agree as to the working, the Court will appoint a manager and receiver: *Jefferys v. Smith*, 1 J. & W. 298; and see *Lees v. Jones*, 3 Jur. N.S. 954.

For the appointment of a receiver and manager of a colliery on the application of a purchaser in possession, who sought to rescind his contract on the ground of fraudulent misrepresentation, see *Gibbs v. David*, 20 Eq. 373.

Where tenants in common work a mine in partnership, or it is partnership property, the Court will not appoint a receiver and manager at the suit of one partner not seeking to dissolve; nor, if so seeking, before the hearing merely for non-co-operation; the managing partner can defray all necessary working expenses from profits: *Roberts v. Eberhardt*, Kay, 148.

Where a receiver has been appointed in a solr's partnership which has expired by effluxion of time, the Deft (the former managing partner) will not be compelled to deliver over to the receiver the partnership books and accounts, if free access for examination of the books, &c. in the office be offered by the Deft: *Dacie v. John*, M'Clel. 206.

The remuneration of a receiver and manager appointed by partners to wind up their business is to be *quantum meruit*, and is not governed by any scale: *Prior v. Bagster*, W. N. (87) 194.

There is no jurisdiction to restrain a manager of a business, after his official position has ceased, from soliciting orders from the customers on his own behalf: *Re Irish, I. v. I.*, 40 Ch. D. 49.

And see as to the appointment of receivers of partnership property, Lindl. 545—554.

#### Companies:—

The Court has jurisdiction, at the instance of an unpaid vendor, or mortgagee or debenture holder of a co. or corporation, to appoint a receiver and manager, for the protection of the property or security: *Boyle v. Bettws Colliery Co.*, 2 Ch. D. 727; *Peck v. Trinsmaran Iron Co.*, Ib. 115; *Hopkins v. Worcester, &c. Canal*, 6 Eq. 437; *Makins v. Ibbotson & Sons*, (1891) 1 Ch. 133; and where the debenture holders' security is in jeopardy through the insolvency of the co., a receiver may be appointed, though the principal money is not immediately payable, and there has been no default in payment of interest: *McMahon v. North Kent Ironworks Co.*, (1891) 2 Ch. 148.

But where debentures constitute merely a charge upon a public undertaking, such as a railway or waterworks co., and confer no power to sell or stop the undertaking, the Court will not (in the absence of express stipulation or statutory enactment) appoint a manager at the instance of a debenture holder: *Blaker v. Herts and Essex Water Co.*, 41 Ch. D. 399, 406; *Gardner v. London, Chatham and Dover Ry. Co.*, L. R. 2 Ch. 201, 212; *Potts v. Warwick and Birmingham Canal*, Kay, 142; *Re Yerbury*; *Ker v. Dent*, 62 L. T. N.S. 55.

The independent jurisdiction of the Court is not affected by the Cos. Cl. Act, ss. 53, 54, providing that the appointment of a receiver on behalf of mortgagees of an undertaking shall be by two justices: see *Fripp v. Chard Ry.*, 11 Ha. 241.

Similar provisions for the appointment on behalf of debenture holders in railway and other joint stock cos., whose interest is in arrear, are contained in the Cos. Cl. Act, 1863 (26 & 27 V. c. 118), ss. 25, 26.

A receiver and manager of a joint stock co. was appointed, while there was no properly-constituted governing body, until a meeting could be called: *Trade Auxiliary Co. v. Vickers*, 21 W. R. 836; and see *sup.*, Chap. XXXI., p. 602.

In winding up, the official liquidator is in the position of the receiver of the property of the co. appointed by the Court for the benefit of all parties interested: *Campbell v. Cie. Gen. de Bellegarde*, 2 Ch. D. 181; *Perry v. Oriental Hotels Co.*, 5 Ch. 420.

In the absence of special circumstances, he will generally, when a receiver is applied for in a debenture holders' action, be the person appointed: *Giles v. Nuttall*, W. N. (85) 51; and although there is no general rule that a

receiver already appointed must be displaced by the liquidator (see *Bartlett v. North Avenue Co.*, 53 L. T. N.S. 611, 612), a receiver appointed before winding up has been removed, and the liquidator appointed in his place: *Tottenham v. Swansea Zinc Co.*, 51 L. T. N.S. 61; 53 L. J. Ch. 776; *Perry v. Oriental Hotels Co.*; *Campbell v. Cie. Gen. de Bellegarde, sup.*; *Palm. Comp. Prec.* 625; and this course will ordinarily be taken where there are outstanding assets which can be more expeditiously and inexpensively got in under the winding-up machinery provided by the Companies Acts: *Re Stubbs, Barney v. Stubbs*, (1891) 1 Ch. (C. A.) 475.

But where, after a winding-up, and appointment of a liquidator, debenture holders, having under their deed power to appoint a receiver to carry on the company's business, and manage and dispose of their undertaking and property, appointed a receiver, the Court held that the right of the debenture holders ought not to be interfered with, and gave leave to the receiver to take possession, but without prejudice to any question as to his powers other than of taking possession and selling the property: *Re Pound, Son & Hutchins*, 42 Ch. Div. 402; citing *Re David Lloyd & Co.*, 6 Ch. D. 339; and see *Re Stubbs, sup.*

Where the Judge has refused to displace the receiver, the Court of Appeal will not interfere with his discretion in the absence of special circumstances: *Re Stubbs, sup.*

By the Companies (Winding-up) Act, 1890, s. 4 (6), where an application is made to the Court to appoint a receiver on behalf of the debenture holders or other creditors of a company, the official receiver may be so appointed.

Under special circumstances, the unpaid vendor of an insolvent company in voluntary liquidation was appointed receiver without security or salary: *Boyle v. Bettws, &c. Co.*, 2 Ch. D. 726.

The costs and remuneration of the receiver and manager in a debenture holder's action have priority over the costs of the Plt: *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317.

As to the right of an unpaid vendor to an injunction and a receiver for the purpose of enforcing his lien against a railway co., see *sup.*, Chap. XXXI., Section XIII., p. 593.

#### **Railway Companies Act, 1867:—**

The Ry. Cos. Act, 1867 (30 & 31 V. c. 127), s. 4, which takes away from the judgment creditor of a railway co. the right of taking in execution the rolling-stock and plant of the co., enables him to obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the co., on application by petition: see *Re The Scarborough and Whitby Ry. Co.*, Form 30, p. 649; *Re Manchester & Milford Ry. Co.*, 14 Ch. Div. 645.

Applications under the Ry. Cos. Act, 1867, s. 4, are regulated by Gen. Ord. 24 Jan. 1868 (see L. R. 3 Ch. xxxv.), which provides (r. xxxi.) that every order appointing a receiver and manager under this section shall direct such accounts and inquiries as the Court may think fit for ascertaining the debts of the co., and the rights and priorities of the persons interested in the moneys to come to the hands of such receiver and manager.

The effect of this section is that a judgment creditor of a railway co., whose debt is unsatisfied, is entitled as of right to the appointment of a receiver, and, if the business of the co. is to be continued as a going concern, a manager will be appointed: *Re Manchester & Milford Ry. Co.*, 14 Ch. Div. 645.

No priority is gained by the judgment creditor who obtains an order under the section; but his receiver will not be discharged until all judgment creditors, whose judgments were so recovered as to entitle them to a receiving order, have been satisfied, and a second receiver will not be appointed while there is a receiver already in possession: *Re Mersey Ry. Co.*, 37 Ch. Div. 610.

The provisions of the section apply to "every co. constituted by Act of Parliament for the purpose of constructing, maintaining, and working a railway either alone or in conjunction with any other purpose" (sect. 3), even though the railway is merely ancillary, and not the primary object of the co. (e. g., a dock co., with power to construct a short line connecting the dock with other railways): *Re E. & W. India Dock Co.*, 38 Ch. Div. 576; *G. N. Ry. Co. v. Tahourdin*, 13 Q. B. D. 320.



But a co. which has never commenced to acquire the land or construct the line authorized by the Act is not an "undertaking" of which a receiver can be appointed: *Re Birming. & Lichfield Junc. Ry. Co.*, 18 Ch. D. 155.

As a general rule, the directors, or secretary, or some of them, will be appointed managers, when they are acting fairly: *Re Manchester & Milford Ry. Co.*, *sup.*; and while the concern is going the debenture holders have no voice in the management: *Re Hull, Barnsley, &c. Ry. Co.*, 57 L. T. N.S. 82.

Where a scheme of arrangement under the Act has been filed, a judgment creditor who has previously served a notice of motion for equitable execution will not be regarded as in an exceptional position: *Devas v. E. & W. India Dock Co.*, 58 L. J. Ch. 522; 61 L. T. N.S. 217.

The protection of the rolling-stock continues, although the railway is afterwards closed for traffic: *Midland Wagon Co. v. Potteries Ry. Co.*, 6 Q. B. D. 36.

The moneys received by such a receiver must be applied in the first place in providing for "working expenses": *Re Eastern and Midland Ry. Co.*, 45 Ch. Div. 367; *q. v.* as to the meaning of that expression.

As to the effect of the appointment of a receiver of the tolls, profits, &c., of the undertaking, see *Eyton v. Denbigh, &c. Ry.*, 6 Eq. 14, *sup.* p. 636.

#### **Rates:—**

According to *Drewry v. Barnes*, 3 Russ. 94, there can be no receiver of (parish) rates which are to be assessed at a future period; for until the assessment there is nothing to collect. See also *Preston v. Corp. of Yarmouth*, 7 Ch. 655, negating the right of creditors secured by bonds on the rates, and paid off by periodical drawings, to obtain immediate payment, or a receiver of the rates.

But in *Gibbons v. Fletcher* (cited 11 Ha. 251), Lord St. Leonards affirmed the right of mortgagees, under a special Act, of parish rates to a receiver.

#### **Ship:—**

See *Burn v. Herlopson*, 56 L. T. N.S. 722; *The Amphill*, 5 P. D. 224.

#### **Benefice, Office:—**

A receiver may be appointed of the profits of a college fellowship: *Feistel v. King's Coll.*, 10 Beav. 602; though in the earlier case of *Berkeley v. King's Coll.*, *Id.* 602 (V.-C., 6 Aug. 1830), the incumbencer's motion for a receiver was refused with costs.

And see *Grenfell v. Dean of Windsor*, 2 Beav. 544, for the appointment of a receiver of a canonry without cure of souls.

But as a benefice with cure of souls cannot be charged (see 13 Eliz. c. 20, repealed by 43 Geo. 3, c. 84, but revived by 57 Geo. 3, c. 99, and unaffected by 1 & 2 V. c. 110; Kerr, 91), there cannot be a receiver of the profits of an ecclesiastical benefice: *Hawkins v. Gathercole*, 6 D. M. & G. 1; or of a pension allowed to a retiring incumbent under the Incumbents' Resignation Act, 1871 (34 & 35 V. c. 44), and thereby charged upon the revenues of the benefice: *Gathercole v. Smith*, 17 Ch. D. 1; *secus*, sums payable by way of compensation to a retired incumbent under the Union of Benefices Act, 1860 (23 & 24 V. c. 142), which can be validly mortgaged, and *semble* a receiver of which can be appointed: *McBean v. Deane*, 30 Ch. D. 520; and see *Bates v. Brothers*, 2 Sm. & G. 509.

A receiver of the office of master forester of the royal forest of Wyersdale was granted, with an injunction to stay owners of land in the forest from sporting therein: *Blanchard v. Cawthorne*, 4 Sim. 566; 6 Sim. 155.

#### **Newspaper:—**

Receiver and manager of, may be appointed until the hearing, on undertaking to print, publish, and edit the paper in the meantime, and forthwith to register himself as proprietor according to the statute: *Chaplin v. Young*, 6 L. T. N.S. 97; *Kelly v. Hutton*, 17 W. B. 425.

#### **Pension:—**

A receiver may be appointed of a government pension: *Noad v. Backhouse*, 2 Y. & C. C. 529; or it may be sequestrated: *Willcock v. Terrell*, 3 Ex. D. 323; *Dent v. D.*, L. R. 1 P. & D. 366; provided the pension has not been made inalienable by the Legislature (*e.g.*, under the Army Act, 1881, 44 & 45

V. c. 58, s. 141): *Lucas v. Harris*, 18 Q. B. D. 127; *Birch v. B.*, 8 P. D. 163; *Heald v. Hay*, 3 Giff. 467.

In respect of an annual allowance in the nature of fees payable by the Treasury, for which no action could be maintained, a receiver was refused: *Cooper v. Reilly*, 1 R. & M. 560; 2 Sim. 560; and see *Ib.* 564, n.

Pending an inquiry as to the validity of the assignment, a receiver of the profits of the office of clerk of the peace of the county was appointed: *Palmer v. Vaughan*, 3 Sw. 173.

## SECTION II.—RECEIVER BY WAY OF EQUITABLE EXECUTION.

### 1. *Appointment of Receiver by way of Equitable Execution.*

UPON motion &c., by counsel for the Plts, and upon hearing counsel for the Deft and for C. D., Let X., the receiver in this action, appointed by an order dated &c., and who by the said order dated &c., was appointed interim receiver of the share and interest hereinafter mentioned, be continued as such receiver without further security to receive the share and interest of the Deft in a syndicate or joint undertaking known as &c., and of and in the property or effects belonging in equity to the persons comprising such syndicate, by way of equitable execution for enforcing against the Deft the said order dated &c., whereby the Deft was ordered to pay into Court &c., Deft to hand over to such receiver all scrip and other papers relating to such share and interest.—Usual directions to pass accounts and lodge balances in Court.—[Add Lodgment Schedule, Form No. 5.]—*Re Coney, C. v. Bennett*, Chitty, J., 12 June, 1885, A. 1849.

### 2. *Another Form.*

UPON motion &c. by counsel for the Plt, and upon hearing &c. for the Deft C. D., Let A. B. of &c. be appointed without salary or security to receive the taxed costs of C. D. in an action of &c. in the Court of Chancery of the County Palatine of Lancaster, which, by an order in that action, are directed to be paid to C. D., and to satisfy thereout (so far as the same will extend) £—, the amount of principal &c. remaining unsatisfied payable to the Plt in this action under the judgment dated &c. Liberty to receiver to apply to Palatine Court for payment of such costs to himself. Injunction against C. D. applying for, dealing with, or receiving the said costs payable to him under order of Palatine Court until payment of the said £—.—*Westhead v. Riley*, Chitty, J., 21 Dec. 1883, B. 1684.

And see Form 12, *sup.* p. 640.

### 3. *Charging Funds in hands of Receiver with Amount of Judgment in another Action.*

UPON motion &c. by counsel for A. B., and upon hearing counsel for the Plt and the Deft, Declare that the said A. B. is entitled to a charge

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for the amount of his judgment debt, interest, and costs recovered against the Deft by judgment dated &c., in an action in the Q. B. Div. of C. v. D., and for the costs of the said order dated &c., and of this application to be taxed &c., upon the assets which now are in or may hereafter come to the hands of the receiver in this action, the said A. B. by his counsel submitting that such charge shall be dealt with in such manner as the Judge shall direct, the intention of the Judge being to preserve to the said A. B. such legal rights as he would have had if the sheriff had seized under the execution and sold on this day.—*Kewney v. Attrill*, Kay, J., 21 Dec. 1886, A. 1719; 34 Ch. D. 345.

NOTES.

Previously to the Jud. Acts, and to the stat. 1 & 2 V. c. 110, a Plt "having a judgment which, owing to legal impediments, could not be enforced at law, came into equity, not for the purpose of enforcing such a right by way of charge as is given by the Act of 1 & 2 V. c. 110, but to have what is called equitable execution; that is to say, to have the lands delivered in execution to him in equity when he would have got them at law in the ordinary process but for certain difficulties existing:" *Anglo-Italian Bank v. Davies*, 19 Ch. Div. 275, 290, per Cotton, L. J., referring to *Neate v. The Duke of Marlborough*, 3 My. & C. 407; and in such a case relief was given by granting a receiver.

Equitable execution was most commonly required in cases where the judgment debtor was entitled to an interest in land not extendible under the writ of *elegit*. For a historical statement of the law on this subject, and as to judgments against *cs. q. t.*, see Lewin, 794 *et seq.*

Under the extensive power of appointing receivers conferred on the Court by the Jud. Act, 1873, s. 25 (8), this form of relief is of frequent occurrence; and the remedy by appointment of a receiver may now be regarded as available not merely—(1) for its primary purpose of the preservation of property, but (2) as a method of enforcing in many cases the judgments of the Court.

Where the issue of an *elegit, fi. fa.*, or the like process, would be ineffectual for obtaining payment of the judgment debt, the Court, since the Jud. Acts, which in this respect confirm and expand, where defective, the remedies of judgment creditors, will grant equitable execution by the appointment of a receiver on the application of a judgment creditor (by application in the action and not upon petition, under 27 & 28 V. c. 112, see *Re Nixon*, W. N. (86) 191); *Re Pope*, 17 Q. B. D. 743, 749; *Exp. Evans*, 13 Ch. D. 252; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 285; as also where (a) sequestration, see *Whiteley v. Learoyd*, 56 L. T. N.S. 846; *Bryant v. Bull*, 10 Ch. D. 153; (b) writ of attachment (in case of defaulting trustee), see *Coney v. Bennett*, 29 Ch. D. 399, would be the ordinary remedy, but could not be enforced.

But this mode of procedure, though called equitable execution, is in truth not execution, but equitable relief: *Re Shephard, Atkins v. S.*, 43 Ch. Div. 131; and is only available where there is some impediment in the way of execution at law, and special circumstances make the appointment "just or convenient" within the Jud. Act, 1873, s. 25 (8): *Hatton v. Haywood*, 9 Ch. 235; *Manchester and Liverpool District Banking Co. v. Parkinson*, 22 Q. B. Div. 173; *Re Shephard, Atkins v. S.*, *sup.*

A receivership order, though apparently made in a case where execution could have been had by *elegit*, was held to operate as a "taking in execution by process of law" within the meaning of a forfeiture clause in a will: *Blackman v. Fysh*, 39 W. R. 520.

By O. L. 15a, "in every case in which an application is made for the appointment of a receiver by way of equitable execution, the Court or a Judge, in determining whether it is just or convenient that such appointment should

be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment:" see also *J. v. K.*, W. N. (84) 63.

By 27 & 28 V. c. 112, s. 1, no judgment entered up after the 29th of July, 1864, is to affect any land (of whatever tenure) "until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment."

Formerly, before equitable execution was applied for, it was necessary to issue a writ of elegit, and the practice continued after the 27 & 28 V. c. 112; but it has been decided that the appointment of a receiver, although not perfected by the giving of security (*Exp. Evans, Re Watkins*, 13 Ch. Div. 252), amounts to actual delivery in execution by a lawful authority within the meaning of the section: *Hatton v. Haywood*, 9 Ch. 229; *Re Pope*, 17 Q. B. Div. 743; and that it is therefore not necessary to issue a writ of elegit: *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275; *Exp. Evans, sup.*; and if the land has been actually delivered in execution by the appointment of a receiver or other "process of execution," registration of such process is not necessary to give the creditor a charge on the land in priority to persons claiming under the debtor, including a purchaser for value without notice: *Re Pope*, 17 Q. B. Div. 743; but such registration is requisite before a summary order for sale can be obtained under s. 4 of the same Act: *S. C.*; and as to the remedy by sale, *v. inf.* Chap. XLVII., "MORTGAGES."

Since the Jud. Acts, it is not necessary for a creditor who has obtained judgment in a pending action to institute another action for the purpose of obtaining equitable execution; but application should be made in the action in which judgment was obtained: *Anglo-Italian Bank v. Davies, sup.*; *Salt v. Cooper*, 16 Ch. Div. 544; though the writ contains no claim for a receiver, and though final judgment has been given, as the action is "pending" within Jud. Act, 1873, s. 24 (7), so long as the judgment remains unsatisfied, and the expression "interlocutory order," in s. 25 (8), is not confined to orders before final judgment: *Salt v. Cooper, sup.*; *Hart v. Hart*, 18 Ch. D. 670, 680; *Smith v. Cowell*, 6 Q. B. Div. 75; and a receiver may be appointed to enforce payment of costs in proceedings for taxation under the Solicitors Act, s. 45: *In re Peace and Waller*, 24 Ch. Div. 495.

Where there is an existing receiver, the judgment creditor may obtain the benefit of his appointment; and where a receiver had been appointed in a partnership action in the Ch. D., a creditor who had recovered judgment against the firm in the Q. B. D., obtained an order in the Ch. D. giving him a charge on the partnership moneys coming to the receiver, but upon a submission that the charge was to be dealt with according to the order of the Court: *Kewney v. Attrill*, 34 Ch. D. 345; Form 3, *sup.* p. 666; and see *Hope v. Croydon and Norwood Tramways Co.*, 34 Ch. D. 730 (where upon judgment in a debenture holder's action, the powers of the existing receiver were extended so as to give the Plt equitable execution against property not comprised in the debentures); and the Court may appoint another receiver, but not to act until the earlier receiver has been discharged: *Salt v. Cooper*, 16 Ch. D. 544.

Where before judgment in an admon action, a creditor obtained judgment against the executor, the receiver in the action was directed to pay the debt and costs, without prejudice to the question whether they were to be allowed the executor: *Re Womersley, Etheridge v. W.*, 29 Ch. D. 557.

A receiver by way of equitable execution has been appointed to receive so much of a legacy to which a judgment debtor was entitled in expectancy, as, when receivable, would satisfy the debt and costs: *Macnicoll v. Parnell*, 35 W. R. 773; of a married woman's reversionary interest under a will: *Fuggle v. Bland*, 11 Q. B. D. 711; and of her separate property, in the absence of the trustees in proceedings by her for taxation of costs: *Re Peace and Waller*, 24 Ch. Div. 405; of the share of the debtor as one of the next of kin of a deceased intestate to whom admon had not been taken out: *Mullane v. Ahern*, 28 L. R. Ir. 105; of a life interest in settled funds: *Oliver v. Lowther*, 28 W. R. 381; 42 L. T. N.S. 47; of debts or sums of money payable to the judgment debtor to which garnishee proceedings were not applicable: *Westhead v. Riley*, 25 Ch. D. 413; and of the tolls and earnings

of a railway co.: *Kingston v. Cowbridge Ry. Co.*, 41 L. J. Ch. 152; *secus*, the pension of a retired officer, which is rendered inalienable by the Army Act: *Lucas v. Harris*, 18 Q. B. D. 127; or where it depends on the discretion of trustees whether anything should be paid to the judgment debtor: *Reg. v. Judge of Lincolnshire County Court*, 20 Q. B. D. 167.

Where a defaulting trustee ordered to pay money into Court was out of the jurisdiction, a receiver was appointed of his equitable interest in this country, notwithstanding O. XLII. 4, which, even apart from r. 8, is not to be deemed exhaustive: *Re Coney, C. v. Bennett*, 29 Ch. D. 993; and see *Re Whiteley, W. v. Learoyd*, W. N. (87) 37.

If the receiver is required merely for the purpose of giving a charge, and it is not intended he should take possession, the appointment may be made without security, on the judgment creditor and receiver undertaking that he shall not act without the leave of the Court: *Hewett v. Murray*, 54 L. J. Ch. 572. And see *Macnicoll v. Parnell*, *sup.*; *Fuggle v. Bland*, *sup.*

But as the equitable relief can be granted only when proper parties are before the Court, a receiver of the property of a deceased person, though upon application made before the death, cannot be appointed in the absence of any person to represent the estate: *In re Shephard, Atkins v. S.*, 43 Ch. Div. 131; and *quære* whether at law execution can be issued against the estate of a deceased person without any leave of the Court: *Ib.*

The receivership affects only the interest of the debtor: *Wills v. Luff*, 38 Ch. D. 200; and the judgment creditor cannot, by giving notice to the trustees, obtain priority over prior incumbrancers of a chose in action: *Arden v. A.*, 29 Ch. D. 702; *Scott v. Lord Hastings*, 4 K. & J. 633.

For cases in which injunctions have been granted in aid of equitable execution, see *Westhead v. Riley*, 25 Ch. D. 413; *Oliver v. Lowther*, 28 W. R. 381; *Archer v. A.*, W. N. (86) 66.

Before the Jud. Acts, the Court of Chancery would give assistance to a judgment creditor by way of equitable execution to recover money under the control of the Court which could not be reached by a *fi. fa.*: *Watts v. Jeffryes*, 3 M. & C. 412; and since the Acts a charging order can be made, without the appointment of a receiver, upon cash in Court; and having regard to S. C. F. R. 1886, r. 99, notice to the paymaster is sufficient, and no stop order is required: *Brereton v. Edwards*, 21 Q. B. Div. 488.

As against a railway co., a judgment creditor to whom the land has been delivered under an *elegit* is entitled to a receiver of the tolls and earnings: *Kingston v. Cowbridge Ry.*, 41 L. J. Ch. 152.

A receiver will not be appointed in favour of a judgment creditor of the rents of lands charged with a sum payable at the death of the tenant for life *in esse*: *Kenney v. K.*, Ir. Rep. 4 Eq. 181.

### SECTION III.—POWERS OF MANAGEMENT—SPECIAL DIRECTIONS.

#### 1. *Tenant to attorn and pay Rent.*

UPON motion &c., and upon reading an order [or orders] dated &c. [If so, and the chief clerk's certificate dated &c.], whereby it appears that A. has been duly appointed receiver of &c.; and an affidavit of the said A. and of B., filed &c., of personal service of the said order [or orders] [If so, and certificate], and of notice in writing, signed by the said A., on C. of &c., requiring the said C. to attorn to him as such receiver for the [Describe the property], occupied by him, situate at —, being part of the said estates, and to pay his rent in arrear and growing rent for the same to the said receiver; and of the said C.'s refusal [or neglect] to attorn to and become the tenant of the said

9. *Receiver to repair Farm Buildings in accordance with Specification.*

LET the works and repairs on the farm in the occupation of &c., at &c., mentioned in the affidavit of &c., be done and executed by &c., according to the specifications and estimates contained in the exhibits marked K. and L. in the said affidavit referred to; And Let the said works and repairs be done and executed under the direction and superintendence of the Deft T., the receiver of the rents and profits of the trust estates in question in these actions; And Let, upon the said works and repairs being certified to have been properly executed according to the said several specifications and estimates, the said receiver be at liberty to pay to the said &c., the sum of £—, and be allowed the same on passing his accounts; And Let timber of the value of £— be taken off the said trust estates for the said repairs and works.—*Thellusson v. Woodford*, M. R., in Chambers, 12 April, 1855, B. 714; and see *Dolman v. Curling*, V.-C. K., in Chambers, 28 July, 1853, A. 1325.

For order for receiver to lease and rebuild, using timber, see *Unwin v. U.*, V.-C. K., in Chambers, 16 March, 1853, B. 676.

For order for receiver to accept a surrender of a lease of part of the estates, on paying up arrears of rent and rates and taxes, see *Dyer v. D.*, V.-C. S., in Chambers, 20 May, 1859, A. 1622.

For order for receiver to grant a licence to get clay and brick earth on a part of the estate, and to manufacture bricks thereon, the licensee paying a rent according to the number of bricks made, see *Mellor v. Woodward*, V.-C. S., in Chambers, 10 May, 1859, 1858, B. 1622.

10. *Receiver to cut and sell Timber.*

LET W., the receiver appointed in this action, be at liberty to cut down the timber and other trees mentioned in the affidavit of &c., filed &c., and to sell the same, and include the proceeds thereof in his accounts as such receiver; And Let the said receiver pay and retain out of such proceeds the costs, charges, and expenses of the applicants properly incurred of this application, and of cutting down and selling the said timber and other trees, such costs, charges, and expenses to be ascertained at Chambers, and allowed the receiver in his accounts.—*A. G. v. Boothby*, V.-C. K., in Chambers, 7 Feb. 1860, A. 659.

11. *Inquiry as to cutting Timber, with consequent Directions.*

LET an inquiry be made whether there are any and what timber or other trees standing or growing on the estates &c., which are fit to be cut down; And Let such timber and other trees as shall appear to be fit to be cut down, be cut down and sold with the approbation of the Judge; And Let a proper person, upon his giving security, be appointed to receive the proceeds of such sale, and be at liberty to pay and retain thereout such costs, charges, and expenses of surveying, valuing, and selling such timber and other trees as the Judge shall

allow ; And Let such person within (fourteen days) after the date of the chief clerk's certificate, or such other time as shall be thereby appointed, lodge the residue of the proceeds of such sale in Court as directed in the schedule hereto.—[Add Lodgment Schedule, Form 5.]  
—See *Hitchcock v. H.*, V.-C., 10 Feb. 1827, A. 589.

#### 12. *Receiver to pay off Advance for renewing Leasehold.*

AND Let the said receiver pass his accounts &c. ; And Let the balances of the receiver's accounts be from time to time applied in paying the interest of the sum so to be advanced for such renewal as aforesaid, at the rate of £5 p. c. per ann., and in redeeming and paying off the principal of such last-mentioned sum, so far as the same will from time to time extend ; And Let such payments be allowed to him in passing his accounts ; And, after payment of such principal and interest, Let the residue (if any) of the receiver's balances be from time to time lodged in Court &c.—[Add Lodgment Schedule, Form 5.]  
—See *Long v. E. Macclesfield*, 28 Nov. 1796, MSS.

#### 13. *Receiver to pay Widow's Annuity.*

LET W., the receiver appointed &c., be at liberty out of the moneys from time to time received by him on account of the rents and profits, interest, dividends, and annual produce of the real and personal estate of L., the testator in &c., to pay to F., the annuity of £— bequeathed to her by the will of the testator during her widowhood ; And Let the receiver be allowed such payments in passing his accounts.—*Cranswick v. Pearson*, M. R., in Chambers, 1 March, 1862, A. 415.

#### 14. *Receiver to pay Annuities.*

LET the receiver appointed &c., out of the rents and profits of the real estates of H., the testator in &c., pay to the annuitants in his will named the arrears now due (to them in respect) of their several annuities, and also (keep down the growing payments of) such annuities, as the same shall from time to time become due, at the times and in the manner in the said will mentioned ; such payments to be allowed in his accounts.—*Hopkins v. Walker*, V.-C. K., 7 May, 1853, A. 1129.

For order for receiver to pay interest of mortgages, and annuitants, without prejudice, they agreeing to refund, should the Court so order, see *Reynolds v. James*, V.-C., 29 May, 1834, B. 1099.

#### 15. *Inquiry as to Rent-charges, and Receiver to pay the same pari passu.*

UPON motion &c.—Let, in addition to the inquiry directed by the order dated &c. [see *sup.*, Section I., Form 33, p. 650], the following inquiries be made, that is to say ; 2. An inquiry what rent-charges have been granted by the Defts, the M. and M. Ry. Co., to vendors to

them of lands purchased for the purposes of their undertaking; 3. An inquiry who are now entitled to such rent-charges respectively; 4. An inquiry how such rent-charges respectively are secured; 5. An inquiry what is now due in respect of such rent-charges respectively; And Let, notwithstanding the said order dated &c., the receiver appointed by that order apply any balances now or hereafter in his hands after payment of the working expenses of the railway in meeting arrears of rent-charges, and the accruing payments thereof rateably *pari passu* so far as the same will extend; And Let the Plt be at liberty to attend the proceedings under the said order dated &c.—*Forster v. The Manchester and Milford Ry. Co.*, V.-C. H., 9 Dec. 1875, A. 2037.

## NOTES.

## POSSESSION OR ATTORNMENT.

If the appointment is of the rents of real or leasehold estate, the owner, if in possession, will be ordered to deliver possession to the receiver: *Griffith v. G.*, 2 Vez. 401; *Davis v. D. of Marlborough*, 2 Swa. 116; *Baylies v. B.*, 1 Col. 548.

A writ of assistance, for which the writ of possession has been substituted (see O. XLVII. 2), might be issued to put a receiver in possession of land: *Sharp v. Carter*, 3 P. Wms. 379, n.; *A. G. v. Tastett*, V.-C. K., 31 Jan. 1855, Reg. Min. H. T. 125; but not to aid a receiver in distraining for rent: *White v. Phibbs*, Sau. & Sc. 88; and for the purpose of recovering possession of, and preserving, chattels which have been ordered to be delivered to a receiver, the writ may still be issued: see *Wyman v. Knight*, 39 Ch. D. 165; *Cazet de la Borde v. Othon*, 23 W. R. 110.

If the owner is not in possession, the tenants will be ordered to attorn and pay their rents in arrear and growing rents to the receiver: see *sup.* Form 1, p. 635; but this direction should be omitted where the estates are out of England (see as to Ireland, *Re Trant*, M. R., in Chambers, 8 July, 1857, B. 1366; *S. C.*, 2 Sol. Jour. 11; from which it appears that, on reconsideration, the M. R. considered the direction to tenants of Irish estates to attorn should not have been inserted).

For form where there are other incumbrancers, see Form 11, p. 639.

By the 11 Geo. 2, c. 19, s. 11, attornments by tenants to strangers were made void, unless made in pursuance of a judgment (at law, or) decree or order (of a Court of Equity).

If the person in possession refuses to attorn, application should be made that he do: *Reid v. Middleton*, 1 T. & R. 455; the order is without costs; but if his tenancy appears, an order may be obtained that he deliver up possession, or pay an occupation rent: *Hobhouse v. Holcombe*, 2 D. & S. 208; and a tenant who had not attorned was ordered to pay arrears in fourteen days, with costs: *Hobson v. Sherwood*, 19 Beav. 575; but the Court will not, by an interlocutory order before the hearing, charge a party in possession, and ordered to pay an occupation rent, with such rent previous to the date of the order: *Lloyd v. Mason*, 2 M. & Cr. 487.

And where the possession, as of the mortgagor, is rightful, occupation rent will be payable from the date of demand by the receiver, and not from the date of the order appointing the receiver: *Yorkshire Bldg. Co. v. Mullan*, 35 Ch. D. 125.

The further order to attorn and pay rent should be on notice, and should limit a time: O. XLI. 5; and may be enforced by attachment: O. XLII. 7, 26; and for order to turn over to the Queen's (Holloway) prison a tenant, brought up by *habeas* after attachment, for not attorning, see *Masterman v. Prance*, V.-C. P., 12 July, 1852, B. 906.

As to the effect of an attornment as creating a tenancy by estoppel between the tenant and receiver, but that it does not enure for the benefit of the person ultimately found to be entitled to the legal estate, see *Evans v. Mathias*, 7 E. & B. 602; Kerr, 142.



## LETTING.

Subsequently to 15 & 16 V. cc. 80, 86, and Cons. Ord. 24, r. 1 (see now O. LV.), a direction to manage or set and let has not been inserted, the Judge having power to give any direction as to the management.

When a receiver of the tolls and stallages of a corporation has been appointed at the instance of their mortgagees, such appointment will not be allowed to affect the powers of letting the stalls, &c., given to the corporation by their special Act, under which the mortgages were authorized: *De Winton v. Mayor of Brecon*, 26 Beav. 533, 542.

The power of a receiver to grant leases is limited to such parol leases as are authorized by the Stat. of Frauds (29 Car. 2, c. 2), s. 2: *Kerr*, 147; but in an ordinary case a receiver may, without applying for the sanction of the Judge, let for a year certain, or less, or for any term not exceeding three years: *Shuff v. Holdaway*, M. R., in Chambers, 27 March, 1863, Dan. 1699.

According to the older cases, a receiver could not let even for one year, or turn out tenants, or bring ejectment, without (the master's) approbation: *Wynne v. L. Newborough*, 1 Ves. jun. 165; though he had power to determine tenancies from year to year by notice to quit: *Doe v. Read*, 12 East, 57.

The Court would not even direct an inquiry whether it would be for the benefit of an infant entitled in remainder for the receiver to lease for years: *Gibbins v. Howell*, 3 Mad. 469.

But see *Re Bell*, 6 Ves. 419, where, the property being small, an order was made without reference for a trustee of an infant's estate to let with the master's approbation during the infant's minority.

And it has been held (*Wilkinson v. Colley*, 5 Burr. 2694; *Doe v. Read*, 12 East, 57, recognized in *Jones v. Phipps*, L. R. 3 Q. B. 567, 572), that notice given in his own name by a receiver appointed by the Court is a valid notice to quit.

## DISTRAINING.

Orders have been made that receivers might be at liberty to distrain: *ante*, p. 670; *Shelly v. Pelham*, 1 Dick. 120; *Mitchell v. D. Manchester*, 2 Dick. 787. But, it seems, if the tenants have attorned an order is unnecessary: see *Raincock v. Simpson*, 1 Dick. 120, n.; *Hughes v. H.*, 1 Ves. 161; 3 B. C. C. 87; *Pitt v. Snowden*, 3 Atk. 750. In *Brandon v. B.*, 5 Madd. 473, the practice was stated to be for a receiver to distrain upon his own discretion for rent in arrear within the year; but if in arrear for more than a year, that then an order was necessary.

In *Parkyn v. P.*, 19, 21 Dec. 1750, B. 92, 110, after inquiry, an order was made to compound for rents in arrear.

A receiver who defended actions arising out of a distress, without the Court's leave, was not allowed his costs: *Swaby v. Dickon*, 5 Sim. 629.

A receiver was not allowed, as solr, to bring actions against tenants, with the master's approbation, in the name of a trustee who opposed it: *Della Cainea v. Hayward*, M'Cl. & Y. 272.

The receiver was held entitled to distrain where, by the mortgagee's concurring in appointing, and the mortgagor's attornment to a receiver, the relation of landlord and tenant was created between the receiver and mortgagor: see *Jolly v. Arbuthnot*, 4 D. & J. 224.

And as to the right to distrain as incident to a lease by a receiver, see *Dancer v. Hastings*, 12 Moo. 34; cited in *Morton v. Woods*, L. R. 3 Q. B. 658, 668; and see *Re Threlfall*, 16 Ch. Div. 274.

As to the effect of an attornment clause in a mortgage, *v. inf.* Chap. XLVII.

## EXPENDITURE IN RESPECT OF ESTATE.

Since 15 & 16 V. c. 80, applications as to the management of the estate, including directions as to repairs, letting, cutting, and selling timber, are made to the Judge in Chambers, where the matter is inquired into without previous order before the particular act is authorized to be done.

A receiver was not entitled formerly to lay out any money on the estate at his own discretion, and without order of the Court, but the rule was relaxed; and where money was laid out by him without previous order, it

was usual to direct an inquiry if the transaction was beneficial to the parties, and if so, he was allowed the money laid out: *Tempest v. Ord*, 2 Mer. 56; and see *A. G. v. Vigor*, 11 Ves. 563; *Blunt v. Clitherow*, 6 Ves. 799.

And before advancing money a receiver and manager should apply to the Court for authority, and the Court, on granting it, generally allows him interest at 5 p. c. on the sum which it authorizes him to advance, and gives him a charge on the assets: *Exp. Izard, Re Bushell*, 23 Ch. Div. 75 (*per Jessel, M. R.*).

And generally it is improper for a receiver, guardian, or trustee to do, without the sanction of the Judge, anything that may involve the estate in expense. The limit of the amount which may be applied without sanction is stated to be 30*l.* a year: *Dan.* 1700.

#### APPLYING FOR DIRECTIONS.

Except in cases of necessity, a receiver should not originate any proceedings, but should apply to the Plt or to the parties having the conduct of the proceedings to make any necessary application to the Court; but on their default, he may be justified in himself applying: *Parker v. Dunn*, 8 Beav. 497; *Ireland v. Eade*, 7 Beav. 55; and see *Armstrong v. A.*, 12 Eq. 614, that a receiver, by proving without leave against the estate of a bankrupt legatee, a debtor to the estate, thereby discharges the debt, and entitles the legatee whose bankruptcy has been annulled to his legacy.

As to the liability of a liquidating debtor's solr at whose instigation receiver refrains from collecting debts, see *Exp. Hayward, Re Plant*, W. N. (81) 115.

An application by a receiver of real estate appointed by the Probate Court for directions as to letting and management was referred to the registrar of the Probate Court: *Neale v. Bailey*, 23 W. R. 418.

A receiver will not be allowed the costs of unsuccessfully defending actions without leave: *Swaby v. Dickon*, 5 Sim. 629; though, if successful, he may be entitled to be indemnified against extra costs incurred: *Bristowe v. Needham*, 2 Ph. 190.

A receiver in an admon action will not be permitted to carry on another admon action in the name of a bankrupt exor or admor: *Re Hopkins, Dowd v. Hawtin*, 19 Ch. Div. 61.

A receiver was allowed to retain out of a fund in his hands his costs (solr and client) occasioned by an adverse application, which failed, made against him by a Deft who was unable to pay costs: *Courand v. Hammer*, 9 Beav. 3.

And as to the receiver's functions and the management of estates, see *Dan.* 1698; *Kerr, Receivers*, 138; *Fish. Mort.* 378.

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### SECTION IV.—ACCOUNT AND PAYMENT.

#### 1. Receiver to bring in Account.

"LET C., the receiver appointed in (this action), on or before the — day of — [*or within — days after service of this order*], leave in the Chambers of the Judge his (fifth) account as such receiver, pursuant to the order dated &c., and on or before the — day of —, leave in the said Chambers his (sixth) account as such receiver."—Receiver to pay costs of application.—*Cave v. C.*, M. R., in Chambers, 18 Feb. 1860, A. 351.

2. *Account and Payment by one Surety, with leave to sue the other and the Receiver.*

"LET an account be taken of what is due from J., the receiver &c., in respect of his receipts and payments, as such receiver, since &c.; And Let the Petr D., one of the sureties of the said receiver, be at liberty to lodge in Court &c., what shall be certified to be due from the said receiver upon taking such account, and the sum of £—, the balance certified to be due from the said receiver by the (report) dated &c., so that the same together do not exceed £500, the amount of the said receiver's recognizance; But in case the same shall exceed £500, then Let the said Petr D. be at liberty to lodge in Court &c. the sum of £500, subject &c.; And Let the said J. be discharged from being such receiver; And Let the Petr be at liberty, in the names of the proper parties, to take such proceedings as he may be advised against the said J. and S., as the legal pers. repesve of V. the other surety of the said J., or either of them, upon the said recognizance, to compel the said J. to reimburse the Petr what he may pay as such surety, and to compel the said S., as such legal pers. repesve, to contribute a proportionate share of what the Petr may be compelled to pay in satisfaction of the said recognizance."—All parties' costs of the application to be taxed, and paid by the Petr.—[Add Lodgment Schedule, Form 5.]—See *Shackel v. D. Marlborough*, V.-C., 13 Jan. 1844, B. 409.

In this case the receiver had absconded to avoid attachment for non-payment of a balance reported to be due.

The discharge of the receiver should not be conditional on payment.

For order for one surety to pay in balance, and Plt to put recognizance in suit against the receiver and other surety, see *Stewart v. Hoare*, L. C., 8 March, 1796, B. 215.

For order by consent for one of the sureties to pass the final account and pay in balance, see *Hook v. Symon*, 31 May, 1875, A. 1408.

3. *Receiver to account at District Registry.*

THIS action coming on for trial &c., in the presence of counsel for the Plt and the Deft, Let A. B. be appointed to receive &c.; And Let such receiver leave at the Bradford District Registry his account as such receiver, on such days as the district registrar shall direct, and, within fourteen days after the date of the district registrar's certificate of the allowance of each such account, pay the balance that shall thereby be certified to be due from him, or such part thereof as shall be certified to be proper to be so paid, into Court as directed in the schedule hereto.—[Schedule, Form 5.]—*Re Dunn, Graham v. Halliday*, Chitty, J., 11th June, 1885, A. 1770.

4. *Putting Recognizance in Suit.*

LET the Plts (and the Deft C., the trustees of the will of P. the testator in &c.) be at liberty to put in suit the recognizance entered into by B., the late receiver in this action, together with D. and E.,

his sureties, dated &c.—*Ingle v. Neale*, V.-C. E., 22 April, 1844, B. 1198; *Arthington v. Hardcastle*, L. C., 25 July, 1745, A. 490; *Radcliffe v. R.*, M. R., 12 April, 1749, B. 313.

For order, where the receiver was in contempt for non-payment, to put recognizance in suit, in the name of the exors of the deceased, upon the petitioners' recognizance to indemnify his estate, see *Blair v. Toppitt*, M. R., 1 Aug. 1829, A. 2784; S. C., *inf.*

##### 5. *New Surety, instead of one Deceased or Bankrupt.*

LET a new security, to be given by B., the receiver appointed in this (action), duly to account for what he shall receive of the rents and profits of the estates in question &c., under the order dated &c., be approved by the Judge; And Let the said B. pass his accounts &c. up to the date of the new security, and pay the balance that shall be certified to be due from him into Court, pursuant to the said order dated &c.; And Let upon such new security being given and payment of the said balance into Court, the recognizance dated &c. be vacated.—See *Blandy v. B.*, 1847, A. 1350; *Peach v. Pigou*, 1847, B. 1628; *Johnstone v. J.*, 1814, A. 361; *Thellusson v. Woodford*, M. R., in Chambers, 12 April, 1855, B. 714.

For like order in case of bankruptcy, see *Franklyn v. Masson*, 1817, A. 786; and within a month, the surety having absconded: *Jones v. Tiffen*, V.-C. S., 30 June, 1854, A. 1227.

##### 6. *Subsequent Order.*

AND the Judge having directed J. A., the receiver appointed by the said order dated &c., to give a new security in the place of W. H., deceased, and E. H., the sureties named in the said recognizance dated &c., and the said E. H. by his solr desiring to retire, and the said J. A. having given such new security by entering into a recognizance dated &c., and also a bond, together with the Guarantee Society as his sureties dated &c., which recognizance and bond have been approved by the Judge and duly enrolled; Let the appointment of the said J. A. as such receiver be continued; And Let him pass his accounts, and lodge the balances that may be due from him in Court &c., as directed by the said order dated &c.; And Let the said J. A. also pass his accounts as such receiver up to &c., and lodge the balance which shall be certified to be due from him in Court &c. as directed by the said order dated &c.; And thereupon Let the recognizance entered into by the said J. A., together with W. H. and E. H. as his sureties dated &c., be vacated.—*Clarke v. Thornton*, M. R., 5 May, 1876, A. 1606; and see *Freeman v. F.*, 31 Jan. 1876, A. 194.

For order disallowing a receiver's poundage, and charging him with interest at 5 p. c. on the balances during the time the same were in his hands, see *Bristowe v. Needham*, 11 W. R. 926.

##### ACCOUNTING.

By O. L. 18, the Court or a Judge is to fix the days on which receivers are annually, or at longer or shorter periods, to leave and pass their accounts

and pay the balances appearing due on the accounts left, or such part as shall be certified to be proper to be paid by them; on their neglect, the Judge may, on their subsequent accounts, disallow their salaries and charge them with 5 p. c. interest on such balances, while in their hands, by yearly or half-yearly rests: see *Potts v. Leighton*, 15 Ves. 273; — *v. Jolland*, 8 Ves. 72; *Fletcher v. Dodd*, 1 Ves. J. 85; and this rule applies after he has been discharged: *Harrison v. Boydell*, 6 Sim. 211.

By r. 19, receivers' accounts are to be in Form 14, Appx. to R. S. C., with such variations as circumstances may require.

By r. 20, every receiver shall leave in the Chambers of the Judge to whom the cause or motion is assigned his account, together with an affidavit verifying the same, as in Form 22, Appx. L. An appointment shall thereupon be obtained by the Plt or the person having the conduct of the cause for the purpose of passing such account.

By r. 21, on default of a receiver in leaving or passing any account, or making any payment, the parties may be required to attend at Chambers, and directions there given for his discharge, and appointing another, and payment of costs.

And by r. 22, a certificate of the chief clerk, stating the result of a receiver's account, shall from time to time be taken.

A receiver may be directed to bring in his account, or pay his balance, by a four-day order, obtainable on summons, and not by a *fi. fa.*: *Whitehead v. Lynes*, 34 Beav. 161; 12 L. T. N.S. 332 (on appeal). The order must be indorsed, under O. XII. 5, and served personally, and may be enforced, under O. XLII. 7, by attachment or committal, or, without any leave from the Court, by writ of sequestration against his estate and effects: *Sprunt v. Pugh*, 7 Ch. D. 567; *Re Bell's Estate*, 9 Eq. 172, 173.

A receiver, bringing in irregular accounts, was ordered to bring them in in a stated form, and to pay the costs of the application: see *Bertie v. L. Abingdon*, 8 Beav. 53, and for the inquiry as to former balances, *Ib.* 60.

Though a receiver passes his accounts and pays his balances regularly, he cannot make interest, for his own benefit, of such sums as may from time to time be in his hands: *Shaw v. Rhodes*, 2 Russ. 539.

And a receiver depositing money with a bank, so as to part with the absolute control, though in sureties' names, to prevent its misapplication, was liable for the loss: *Salway v. S.*, 2 Russ. & M. 215; *White v. Baugh*, 3 Cl. & F. 44; but a receiver depositing money to a separate account is not liable for the banker's failure; *secus*, if in default in passing his accounts, and, although not in default, if taking interest: *Drever v. Maudesley*, 8 Jur. 547.

The fraudulent receipt and appropriation of trust money places the receiver under the same liability as the trustee from whom he received it (and the right of the party defrauded is not affected by anything done or omitted so long as he was ignorant of the fraud): *Rolfe v. Gregory*, 4 D. J. & S. 576.

Persons interested may at once apply to prevent the misapplication by a receiver of funds in his hands, without waiting until he passes his accounts to get the particular items disallowed: *De Winton v. Mayor of Brecon*, 28 Beav. 200.

The share of a defaulting bankrupt receiver being unduly paid into Court, his assigns were entitled to receive the whole: *Brandon v. B.*, 1 D. & S. 16, 19.

After the bill was dismissed, or the proceedings ordered to be stayed (*Paynter v. Curew*, Kay, App. xxxvi.), a receiver was ordered to pass his accounts and pay the balance to Deft: *Pitt v. Bonner*, 5 Sim. 577; and see *Hutton v. Beeton*, 9 Jur. N.S. 1339.

The objection, under O. L. 18, to allowing the receiver's poundage and costs, must be raised by the parties on taking the account: *Ward v. Swift*, 8 Ha. 139.

In *Drever v. Maudesley*, V.-C. E., 3 Dec. 1842, A. 235; *S. C.*, *sup.*, an order was made for payment of a balance, the receiver having brought in his account but not sworn to it, and that he should swear to it. But if he neglects to verify his account he should be disallowed the items charged by him against the estate as disbursements, and directed to pay in the full amount of his receipts.

In passing a receiver's accounts in Chambers, when the same solr appears for the receiver and one of the parties to the suit, only one copy of the accounts will be allowed between them on taxation: *Sharp v. Wright*, 1 Eq. 635.

A receiver's accounts though passed have been ordered to be reviewed on application by a late ward of Court, stating errors and neglect: *Wildridge v. M'Kane*, 2 Moll. 545; and a settlement of accounts, between the infant two days after coming of age and the receiver, did not prevent the receiver from being charged with interest at 4 p. c. from the decree until the infant came of age, on surplus rents omitted to be inserted pursuant to direction: *Hicks v. H.*, 3 Atk. 274.

The Court has no jurisdiction to make a summary order to account against the represves of a deceased receiver: *Jenkins v. Briant*, 7 Sim. 171; *Ludgater v. Channell*, 15 Sim. 479; though it seems that if the balance has been ascertained, the order may be made on petition that his recognizances be put in force against his real and pers. represves and against his sureties: *S. C.*, 3 Mac. & G. 175.

But where, on their application to pass his accounts, and pay in the balance, it had been so ordered in 1812, they were not allowed in 1841 to object want of assets: *Gurden v. Badcock*, 6 Beav. 157.

And see Dan. 1703—1714.

#### SURETIES.

The surety is answerable to the extent of the amount of the recognizance for whatever sum, principal, interest, or costs the receiver has become liable, and also for the costs of his removal and of appointing a new receiver: *Exp. Maunsell*, 3 J. & Lat. 251; *Re Lockey*, 1 Ph. 509; *Smart v. Flood*, 49 L. T. N.S. 467; *Dawson v. Raynes*, 2 Russ. 466, though under the particular circumstances of this case, payment of interest was not required from the sureties of a bankrupt receiver.

It has been held that the precise amount due must be shown by the certificate (report) before the recognizance could be put in suit: *Ludgater v. Channell*, 15 Sim. 479, 481. But on appeal (3 Mac. & G. 175) it was held that the recognizance might be enforced against the surety as well as against the real and personal represves of the deceased receiver without the amount due having been actually ascertained, and that the order might be made on petition.

The recognizance, after it has been allowed by the chief clerk by signing a memorandum in the margin, is sent from Chambers to the Enrolment Office, and receipt taken for it from the Clerk of Enrolments.

Enrolment will not be allowed after six months from acknowledgment except under special circumstances, and by order made by the Court or a Judge upon motion for enrolment after that time: see O. LXI. 14.

An amount due from a receiver is a debt of record so long as his recognizance remains in force, so that the Statute of Limitations only begins to run from the time when the recognizance is vacated: *Seagram v. Tuck*, 18 Ch. D. 296.

For the practice as to putting recognizances in suit, and as to vacating them when the receiver has passed his final account, see Dan. 1716.

An action having been brought against a surety on his recognizance, an order by consent was made, on payment by the surety of the costs of the application, and of subsequent proceedings consequent thereon, for a reference to see what was due from the receiver, payment by instalments of the amount, not exceeding the amount of the recognizance, and an injunction to stay proceedings in the action: *Walker v. Wild*, 1 Madd. 528, 1815, B. 1125.

The surety is entitled to stand in the receiver's place, and be indemnified out of a balance in Court due to him: *Glossop v. Harrison*, G. Coop. 61; 3 V. & B. 134.

Accordingly, a receiver's shares of an estate which was being administered in Court, though excepted from a mortgage given as an indemnity to his surety, were liable to recoup the surety the amount paid by him for the receiver: *Brandon v. B.*, 3 D. & J. 524.

They will not be discharged at their own request, unless under special circumstances: *Griffith v. G.*, 2 Vez. 400; in *Swain v. Smith*, V.-C., 13 July, 1827, B. 1447, a surety was discharged on his own application, having become such in breach of his partnership articles.

On payment by surety to solr of Plt proceeding against him in the Petty Bag, and on notice of the application to Plt, his recognizance was discharged: *Mann v. Stennett*, 8 Beav. 189.

A surety was held answerable for costs of attachment against receiver for not accounting, and costs of appointing new receiver, and ordering tenants to pay rent to him: *Exp. Maunsell*, 3 J. & Lat. 251.

And the surety who has paid the debt of the receiver (his principal) is entitled to enforce the recognizance against his co-surety: *Woods v. Creaghe*, 2 Hog. 51; *Kerr, Receivers*, 196.

And as to the liabilities and rights of a receiver's sureties, see *Dan. 1717*; *Kerr, Receivers*, 193.

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## SECTION V.—RECEIVER AND MANAGER ABROAD.

### 1. *Receiver and Manager of Estates in India.*

LET B. and M., of &c., be appointed to manage the estates of &c., the testator in &c., named at &c., in British India, and to receive the rents, profits, and proceeds thereof, and to convert, get in, and remit the same to the Plts, to be accounted for by them as exors of the testator; And Let the Plts be at liberty to execute a proper power of attorney in favour of the said B. and M., for the purposes aforesaid.—*Logan v. Prin. of Coorg*, M. R., in *Chambers*, 9 May, 1860, B. 1151.

For order appointing one or more persons in succession in Calcutta, to receive and remit assets in India and China, and conduct and defend suits, and to take security, see *Hodson v. Watson*, L. Commrs., 24 June, 1788, A. 471; and see *Wood v. Lindsay*, V.-C., 18 Dec. 1826, B. 1938. For order directing a receiver to authorize a firm in Calcutta to receive assets in India, and remit the same to the receiver, see *Keys v. K.*, 1838, A. 767; 1 Beav. 425.

### 2. *Receiver of Property in N. S. Wales—Leave to appoint Agent.*

AN inquiry—"What real estate in New South Wales or elsewhere the testator U. was seised of or entitled to at the time of his death, and the nature and extent of his interest therein; And Let a proper person be appointed to receive the rents and profits of such part of the real estate of the Plts, the infants, as was derived through the will of the testator; And Let such receiver, with the approbation of the Judge, appoint a proper person or persons as his agent or agents in New South Wales or elsewhere to receive such rents and profits, and to remit the same to such receiver in this country, and make such agent or agents a proper allowance in respect thereof."—Receiver to pass accounts and pay in balances.—*Underwood v. Frost*, V.-C. S., in *Chambers*, 14 Feb. 1857, B. 543.

### 3. *Receiver of Property in Italy, with Agent there, and to litigate Rights.*

RECEIVER to be appointed to collect and get in the outstanding personal estate and effects of the testator, and to receive the rents and

profits of his real estate in Italy, and any money that may arise from the sale of his real estate in Italy; "And Let such receiver, with the approbation of the Judge, if expedient, appoint a proper person as his agent, living at or near L., or elsewhere in Italy, to collect the said rents and profits, and to receive and get in the (personal) estate and effects of the testator, and to see the same properly secured and transmitted to England, to be disposed of as this Court shall direct, and, if necessary, to continue the suit now instituted, and to litigate and contest any other suit which may arise (concerning), or have relation to, the testator's estate in Italy; And Let, if necessary, a proper instrument be executed by the Deft, to such person so to be appointed, for the purposes above mentioned, such instrument to be approved of by the Judge."—Plt and Deft to deliver over to receiver all securities, books, and papers; and he to pass accounts, and pay in balances.—*Hinton v. Galli*, M. R., 28 March, 1854, A. 720.

For order to appoint a person resident near Naples to get in testator's estate and effects, and contest any will set up there, see *Drewry v. Darwin*, M. R., 20 May, 1765, A. 252.

For order to appoint a person to receive property in America, and another here to receive remittances, and for allowance to each, and each to give security, with inquiry as to enforcing payment of debts there, and out of what fund the expenses and allowances should be paid, see *Hanson v. Walker*, M. R., 12 May, 1815, A. 1219.

For order directing the appointment of a person in Canada to receive the rents of testator's unsold estates there, and the proceeds of estates sold, and to enter into contracts and sell the unsold estates, according to a scheme, and Deft to execute a power of attorney to such person to enable him to enter into such contracts, and convey the lands sold; moneys received to be remitted to a person in London, he giving security, and the receiver and consignee both to pass their accounts, see *Tylee v. T.*, M. R., 8 Nov. 1856, B. 309.

For order on the application of C., the receiver of the rents and profits of the real estates of the testator at the Cape of Good Hope, &c., that C., as such receiver, be at liberty to sell the testator's real estate in South Africa, consisting of the several estates mentioned in the schedule, at the best prices which he could obtain, not being less than the sum set opposite the same in the same schedule; and that the receiver was not to be allowed any commission on such sales, but was to be allowed to charge all his costs out of pocket relating thereto; and that Defts do appoint the said C., the attorney of Defts, the exors of the testator, for the purpose of obtaining letters of admon in South Africa, with the will annexed, of the personal estate, &c., until the exors should obtain probate, see *Re Collison, Collison v. C.*, V.-C. H., at Chambers, 4 Dec. 1876.

#### 4. *Manager appointed with Direction to remit to Consignee here.*

LET (A. and B.) one or more proper person or persons be appointed at — in —, to manage the estates of C., the testator in &c., at —, and to receive the rents, profits, and produce thereof, and he or they is or are to remit the same to a proper person in London to be approved of for that purpose; And Let the person to whom the said rents, profits, and produce are to be so remitted, pass his accounts thereof from time to time, and lodge the balances which shall be certified to be due from him in Court, as directed in the schedule hereto.—[Add Lodgment Schedule, Form 5.]

For order, by consent, appointing persons to sell a cargo of sugar, and



directing them to pay the net proceeds, after deducting their broker's commission and all other proper charges, into Court from time to time, when the sums received amounted to 500*l.* and upwards, see *Blythe v. Scholefield*, M. R., 17 March, 1858, A. 729.

5. *Declaration as to Management of Colonial Estate—Consignee appointed ad Interim—Inquiry as to Liabilities—Scheme.*

DECLARE that it is fit and proper and for the benefit of all parties interested under the testator's will, that his estate and plantations in D. should be managed and carried on until the further order of this Court in the manner in which the same appear by the affidavit of A. and B., filed &c., to have been managed and carried on since the testator's death; And Let E., of the firm of &c., in the said affidavit named, on his giving security, be appointed consignee *ad interim* in this country of the produce of the said estate, upon the same terms as regards remuneration as (those on which) the said firm have heretofore acted on behalf of the testator; And Let the said consignee apply the rents, profits, and produce thereof under the direction of the trustees or trustee for the time being of the said will, until further order; And Let an inquiry be made whether any expenses and liabilities, and to what amount, have been incurred in such management, since the testator's decease, which remain unsatisfied, and whether the same, or any and what part thereof, ought properly to be raised or provided for out of or charged upon the said estates and plantations, or any and which of them, or in any and in what other manner; And Let a proper scheme be approved and settled for the management of the said estates and plantations for the time to come.—Any of the parties to be at liberty to propose such scheme.—*Porter v. P.*, M. R., 9 July, 1859, B. 2587.

For order to appoint manager and consignee for estate in Demerara, with stay of proceedings, see *Bunbury v. B.*, 1 Beav. 336, *sup.*

For order to appoint consignee, and proper person or persons, to act as manager or managers in Jamaica, in the event of the death, absence, or other incapacity to act of the present manager, to receive the rents, profits, and produce thereof, and remit the same to the consignee or consignees in London, see *Rutherford v. Wilkinson*, M. R., 31 May, 1823, B. 1241, and note, *inf.* p. 684.

For subsequent order, with security, see *S. C.*, 30 Nov. 1824, B. 146; and without security, *Plt's* counsel consenting, *S. C.*, 22 April, 1826, B. 903.

For order appointing resident in Jamaica to take out admon and get in estate there, with an allowance, and for appointment of manager and consignee of plantations and real estates, see *Hammett v. Reid*, V.-C., 11 Aug. 1827, A. 1990.

For orders appointing managers and consignees in the West Indies, with direction to keep down interest on charges, see *Quarrel v. Beckford*, L. C., 20 Feb. 1807, B. 269; *Wedderburn v. Clark*, L. C., 13 May, 1793, B. 320; *Cunyngham v. C.*, L. C., 31 July, 1750, A. 635; 1 Vez. 522; *Belt's* Supp. 232.

For order in the West Indian Encumbered Estates Court appointing a receiver and manager of an estate in Jamaica, see *Re Clarke's Estate*, 24 Feb. 1863, Cust. 147. And for the recognizance of the receiver, certificate of security, and order discharging the receiver in that case, see *ib.* 148, 9, 150.

## NOTES.

The Court has jurisdiction to appoint a receiver of real and personal property abroad: see *Houlditch v. L. Donegal*, 8 Bli. N.S. 343; and see *Barkley v. L. Reay*, 2 Ha. 308; *Faulkner v. Daniel*, 3 Ha. 204.

And accordingly receivers have been appointed to receive, convert, get in, and remit to this country the rents, profits, and proceeds of property:

—in East India: *Logan v. Princess of Coorg*, *sup.*, Form 1, p. 681; *Keys v. K.*, 1 Beav. 425;

—in China: *Hodson v. Watson*, *sup.* p. 681;

—in N. S. Wales: *Underwood v. Frost*, *sup.* Form 2, p. 681;

—in the West Indies: *Bunbury v. B.*, and other cases, *sup.* p. 683;

—in Canada: *Tylee v. T.*, *sup.* p. 682;

—in America: *Hanson v. Walker*, *sup.* p. 683;

—in Brazil: *Sheppard v. Oxenford*, 1 K. & J. 500;

—in Italy: *Hinton v. Galli*, *sup.*, Form 3, p. 681; *Drewry v. Darwin*, *sup.* p. 682;

—in Ireland: *Houlditch v. L. Donegal*, *sup.* And see *Re Trant*, M. R., in Chambers, 8 July, 1857, B. 1366, *sup.* p. 674;

—in Jersey: *Smith v. S.*, 10 Ha. Appx. lxxi. In this case the real estate was in England, but part of the personal estate consisted of personal chattels in Jersey.

By the West Indian Incumbered Estates Act, 1862 (25 & 26 V. c. 45), s. 3, power is given to the commrs appointed under the W. I. Incumbered Estates Acts, 1854, 1858, when they shall have made an absolute order for sale of any lands under the Acts, to appoint a receiver of the rents and profits of any lands within the jurisdiction of the Court of Chancery, in a suit relating to such lands; and the receiver so appointed shall have and possess all the powers, authorities, rights, and privileges possessed by receivers appointed by the Court of Chancery in England.

By the W. I. Incumbered Estates Act, 1864 (27 & 28 V. c. 108), s. 5, the power to appoint receivers, given by the Act of 1862, was extended by including live and dead stock, machinery, utensils, and other chattels and effects in the property of which a receiver might be appointed; and the appointment might be made after a conditional order for sale.

From the difference between a plantation and an estate in England, the former being in the nature of a business or trading concern requiring a large investment of capital and skilful management, the rights and liabilities of receivers and managers of West Indian property differed in many respects from those of an ordinary English receiver: see *Daniel v. Trotman*, 11 W. R. 717, 719; Cust, W. I. Estates, 9.

In some of the earlier cases it appears that the manager of West Indian property was not required to give security; and in *Forrest v. Timms*, L. C., 1789, A. 128, the appointment was "on his giving security to be approved, &c., for his duly managing the plantation and estates, and for his duly accounting for what he should receive, and for his consigning the produce of the said plantation, as far as the due management of the said estates required it, to the person, &c., to whom the Court had directed, or should direct, the consignments to be made."

See also *S. C.*, *nom. Morris v. Elme*, 1 Ves. jun. 139; *Cockburn v. Raphael*, 2 Sim. & S. 453.

And in *Rutherford v. Wilkinson*, *sup.* p. 683, 9 July, 1825, Lord Gifford, M. R., in making the order under the circumstances without security, said that in general, in order to dispense with security, it should appear that no manager could be found who would give security, or that the proposed person was fit to be appointed without, but made the order under the circumstances without security, by consent of such parties as could consent; but on a subsequent application in the same cause security was required: and see *Wedderburn v. Clark*, 1b.; and so in *Cobham v. C.*, V.-C., 30 April, 1841, A. 1801.

In the case of receivers of West Indian property appointed under the W. I. Incumbered Estates Acts, 1862 and 1864, the appointment is made "upon their first giving security:" see Forms in Cust, W. I. Estates, pp. 147, 149.

The lien of a consignee of West Indian property (not only on the produce,

but also on the *corpus* of the estate : see *Cust*, 275) for the balance due to him in respect of advances made by him for supplies, or for the interest of incumbrancers, takes priority not only over the interest of the owner, but over all estates, interests, and incumbrancers whatever ; and he will be allowed interest at 4 p. c. on the balances due : *Re Greatheed*, W. I. Estate Commrs., 12 May, 1859 ; *Cust*, 219 ; *Re McDowall*, *Ib.* 300 ; but this lien arises by implication of law, and may be limited or excluded by his taking a security containing express stipulations : *Leith's Estate*, *Chambers v. Davidson*, L. R. 1 P. C. 296.

And see *Morison v. M.*, 7 D. M. & G. 214 ; 2 Sm. & G. 564 ; *Scott v. Nesbitt*, 14 Ves. 438 ; *Sayers v. Whitfield*, 1 Knapp, P. C. 133.

The consignee is not bound to see to the application of moneys advanced by him under an agreement : *Daniel v. Trotman*, 11 W. R. 717 ; *Re Harriott*, *Cust*, 271, 277.

A receiver and manager appointed at the instance of a mortgagee of a W. I. estate is not entitled to the produce shipped, prior to his appointment, to the consignee, though it had not at the time of the order been received by the consignee : *Codrington v. Johnstone*, 1 Beav. 520.

When employed as manager by the owner of the incumbered estate, unless his possession has been so recognized by the mortgagees that he can be considered as acting on their behalf and for their benefit, he has not, as a general rule, any lien on the inheritance for advances which he has made for its cultivation : *Fraser v. Burgess*, 13 Moo. P. C. 340 ; but see *Bertrand v. Davies*, 31 Beav. 436, in which case the rule as to the lien of a manager appointed by the owner is somewhat differently stated.

When appointed as manager by a trustee in possession of the estate on behalf of all parties interested, or when appointed by the Court of Chancery, he is entitled to his ordinary commission and allowances, as against all persons interested in the estate, for the balance that shall be due to him on taking his accounts : *Bertrand v. Davies* ; *Fraser v. Burgess*, *sup.* ; *Re Harriott*, W. I. Commrs, July, 1863, *Cust*, 271.

See also *Scott v. Smith*, Burge, Col. Law, vol. viii. 357.

So long as he resides in the colony and acts personally in the management of the property, the manager is entitled to a commission as a reward for personal care and trouble : *Forrest v. Elwes*, 2 Mer. 68 ; *Chambers v. Goldwin*, 5 Ves. 834 ; 9 Ves. 254 ; *Kerr*, *Receivers*, 203 ; and to reasonable payments made to others for the management during his absence : *S. C.*

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## SECTION VI.—DISCHARGE OF RECEIVER.

### 1. *Discharge and Payment.*

LET A., the receiver of &c., appointed by the order dated &c., be discharged ; And Let him pass his final account, and lodge the balance which shall be certified to be due from him in Court &c. [or to (the Plt) B. or &c.] ; And thereupon Let the recognizance dated &c., entered into by the said A., together with C. and D., his sureties, be vacated.

### 2. *Payment by Receiver's Executors.*

LET J., the surviving exor of L., the receiver appointed in this action, be at liberty to carry in and pass the accounts of the receipts and payments of the said L., as such receiver, from the foot of his last account to the time of his decease, and lodge the balance which may

be certified to be due from the estate of the said L. in Court &c.; And thereupon &c. [Form 1].—Costs of the application and consequent thereon, as between solr and client, to be taxed and retained by the exor and allowed in his accounts.—[Add Lodgment Schedule, Form 5.].—See *Holmes v. H.*, V.-C. E., 25 Nov. 1843, A. 159.

For like order, by consent, and to appoint new receiver, see *Littleboy v. Spooner*, V.-C., 14 June, 1826, B. 1516; and see, on this case, *Ludgater v. Channell*, 15 Sim. 479, 483.

### 3. Receiver discharged as to Part, and Plt, on giving Security, let into Possession.

“By consent of the Defts B. and E., the trustees of the testator’s will, Discharge receiver as to such of the real estates in the pleadings mentioned as are not comprised in the term of — years created by the will of the testator.”—Receiver to pass his final account of the rents and profits thereof, and lodge the balance certified to be due in Court &c., as directed in the schedule hereto; Continue the receiver as to such of the said real estates as are comprised in the said term &c.—“And by consent of the said Defts, Let the Plt W. be let into receipt of the rents and profits of the estates not comprised in the said term, on giving security; And Let him cause his account to be delivered into (left in) the Chambers of the Judge on or before &c., and on the same day in each succeeding year, and lodge in Court, as directed in the schedule hereto, the balance (if any) which may from time to time be certified to be due from him in respect of the rents and profits of the said estates, or such part thereof as shall be certified to be proper, within fourteen days after passing his said accounts; And Let the Plt W. be at liberty from time to time to retain out of the said rents and profits, until he shall have attained the age of twenty-five years, or until further order, the annuity or clear yearly sum of £— allowed to him by the will of the said testator by equal quarterly payments, to be due on &c., and be allowed the same on passing his accounts.”—[Add Lodgment Schedule, Form 5.].—See *Wilkinson v. Bewicke*, M. R., in Chambers, 2 July, 1860, B. 1475.

For like order to discharge the receiver, and for tenant for life to be let into possession, see *Tewart v. Lawson*, V.-C. H., 12 June, 1874, B. 1776; *S. C.*, 18 Eq. 490.

For form of order for discharge of receiver, where money remains in his hands, see *Holt & Co. v. Bogle*, 55 L. T. N.S. 592.

#### NOTES.

A receiver appointed for the benefit of all parties interested will not be discharged on the *ex parte* application of the party at whose instance he was appointed: *Faulkner v. Daniel*, 3 Ha. 204; *Bainbrigg v. Blair*, 3 Beav. 421.

But when the object of his appointment has been fully effected (see *Tewart v. Lawson*, 18 Eq. 490), or his continuance becomes unnecessary, he will be discharged.

Where the legal estate was in dispute, the receiver was not discharged on the appointment of new trustees: *Reeves v. Neville*, 10 W. R. 335.

And where appointed for infants he was not discharged on one of them

attaining twenty-one; and a petition to discharge him was dismissed with costs: *Smith v. Lyster*, 4 Beav. 227.

He will not in general be discharged on his own application without showing special grounds: see Dan. Ch. Pr. 1715; Kerr, 186.

Where he had been wrongfully appointed over property of a person not a party to the action, he was discharged, although there had been an abatement by the death of the sole Deft: *Lavender v. L.*, 1 R. 9 Eq. 593.

On petition to discharge receiver and pay over balances, though served, he should not appear, and will not be allowed his costs of appearance: *Herman v. Dunbar*, 23 Beav. 312.

When the receiver has passed his final account, and paid his balances, his recognizances will be vacated: see O. LX. 4; Dan. 1716.

But where money due from him has not been brought into account, he is a trustee of the money, and cannot (unless, possibly, in some cases under the Trustee Act, 1888, s. 8) set up the Statute of Limitations: *Seagram v. Tuck*, 18 Ch. D. 296; and after his discharge payment may be enforced against him by attachment, as a person in a fiduciary position within sect. 4 of the Debtors Act, 1869: *Re Gent, Gent-Davis v. Harris*, 40 Ch. D. 190; and *v. sup.* p. 678.

The application to discharge and to vacate the recognizances may be by petition, or motion, or summons, or the direction may be given in the order on further consideration; and the recognizances will be vacated on a proper affidavit of payment to the party entitled to receive the balance, or on the Paymaster's or chief clerk's certificate; the rule to the contrary, as stated in *Lawson v. Ricketts*, 11 Beav. 627, is not now followed.

In case of an infant's estate, it is said the recognizances should not be vacated till a year after the party attains twenty-one: see 2 Madd. Ch. 298; and for a statement of the rule (Lord Alvanley's) by L. C. Hart, see *Kilbee v. Sneyd*, 2 Mol. 233.

Discharged receiver, not paying in balance by time fixed, was ordered to pay it in, and the amount of his salary, with interest at 5l. p. c. on both sums from the day appointed, and the costs of the motion: *Harrison v. Boydell*, 6 Sim. 211; Dan. 1707.

Where suit by third mortgagee was stayed, on motion by subsequent mortgagee, on payment of what was due to Plt and his costs, and the costs of the co-Defts, balances in the receiver's hands belonged to the person in possession, when he was appointed, and the receiver was discharged: *Puynter v. Carew, Kay*, xxxvi., 18 Jur. 417.

## CHAPTER XXXIII.

## PROHIBITION OF PROCEEDINGS IN INFERIOR COURTS.

1. *Order for Writ of Prohibition directed to an Ecclesiastical Court.*

UPON motion &c., by counsel for the above-named B., who alleged that pleas or actions in which the title to any corporeal or incorporeal hereditaments is in question cannot be impleaded or brought or adjudicated upon in the above-mentioned Consistorial Court of Llandaff, and that the above-named I. and H. have impleaded or cited the minister, parishioners, and inhabitants of the parish of L., and all others in several having or pretending to have any right, title, or interest in the premises, to show cause why a licence or faculty should not be granted to the said I. and H., the churchwardens of the said parish (for the purpose of new flooring and reseating the church of L. aforesaid, and of removing the present gallery in the said church, and also of taking down portions of the north wall and re-erecting the same on the same site, and placing two windows in the same north wall), in the said Episcopal and Consistorial Court of Llandaff aforesaid, wherein the title to certain hereditaments is in question, that is to say, the title to certain pews and seats in the church of the said parish of L., claimed to be part of and appurtenant to a certain freehold mansion-house, and a certain freehold farmhouse, and hereditaments of or to which B. is or claims to be seised or entitled; and upon reading an affidavit of W. in support of the said allegation filed &c., and the exhibits therein referred to, this Court doth order that the chancellor of the diocese of Llandaff and the said I. and H. be prohibited from further proceeding in the said pleas or action in the said Consistorial Court of the diocese of Llandaff, and that a writ of prohibition do issue accordingly.—*Exp. Bateman*, V.-C. J., 8 Feb. 1870, A. 195; 9 Eq. 660.

For order in vacation, since the 13 & 14 V. c. 61, prohibiting justices of Hants from holding plea of public footway, see *Re Dashwood*, V.-C. W., 16 Sept. 1853, A. 1532.

For order, on application of judgment creditor, prohibiting the bishop from executing writs of *sequestrari facias* against a vicarage, at the instance of subsequent judgment creditors, and enjoining them from proceeding with such writs, or on their judgments, see *Hawkins v. Gathercole*, 1 Sim. N.S. 75, 150; 1 Drew. 12; 6 D. M. & G. 1, 2, n., 16.

For order prohibiting the Consist. Court of Exeter from entertaining a proceeding as to tithes, see *Re Magor*, V.-C., 6 Dec. 1822, B. 61, T. & R. 314;

and for the mandatory part of the writ, *ib.* 316, n. In this case the writ was afterwards superseded, on the ground that it had been granted without the affidavit required by 2 & 3 Edw. 6, c. 13, s. 14: *ib.* 319. And for order superseding the writ with costs, see *Newsom v. Cooper*, L. C., 33 May, 1803, B. 443.

For order prohibiting the Prerog. Court of Canterbury from entertaining proceedings as to testator's estate, and enjoining parties until answer or further order from proceeding with their citation, see *Gianelli v. Fox*, 8 June, 1815, A. 867.

For *ex parte* order, but on affidavit of the facts, that a writ of prohibition issue, prohibiting the Insolvent Debtors' Court from adjudicating on or dealing with the surplus fund in the affidavit mentioned, except so far as was necessary under the Act 1 & 2 V. c. 110, s. 92, to give effect to the deed in the affidavit mentioned, see *Re Dyson*, L. C., 5 Aug. 1856, A. 1582. A petition for payment of same fund into Court was subsequently dismissed: *Cooke v. Sturgis*, C. A., 21 Dec. 1859; S. C., 3 D. & J. 506.

For order absolute in the first instance against the Mayor's Court, see *Jacobs v. Friedburg*, V.-C. M., 7 Jan. 1873, A. 12.

## 2. Order Nisi against Official Principal of the Arches Court of Canterbury.

UPON motion &c., by counsel for A. B., Let the Right Honourable James Plaisted Baron Penzance, the official principal of the Arches Court of Canterbury, and C. D., the promoter of the office of the Judge in a certain suit of *Combe v. De La Bere* in the said Arches Court of Canterbury, upon notice of this order to be given to the said official principal, or to his registrar, and the said C. D. or his solr show cause on &c., why a prohibition should not issue directed to the said official principal to prohibit him from carrying into execution, or otherwise giving effect to the sentence of deprivation pronounced in the said suit by the said official principal on &c., against the said A. B., such sentence being one which he had no jurisdiction to pronounce, and was pronounced without jurisdiction and in excess of jurisdiction.—*Re De La Bere*, M. R., 14 Jan. 1881, A. 14.

## 3. Prohibition Nisi of Police Magistrate.

UPON motion &c., by &c., who alleged that two summonses involving questions relating to the validity of the issue of certain shares which appeared upon the register of the B. Association, Limited, were, upon the application of B. B., issued by J. V., Esq., one of the magistrates of the Bow Street Metropolitan Police Court; that upon the return of the said summonses, counsel for the association took the preliminary objection that the magistrate had no jurisdiction; and upon reading an affidavit of &c., Let the said J. V. and other the magistrate or magistrates at the Bow Street Metropolitan Police Court be prohibited from further proceeding with the said summonses until this order shall be made absolute or be discharged; And the said B. B. is, on &c., to show unto this Court good cause why the said prohibition should not be made absolute.—And it is ordered that a writ of pro-

hibition do issue accordingly.—*Re Boaler*, Stirling, J., 25 April, 1888, A. 534.

For orders nisi and absolute against the Railway Commrs, see *The Great Western Railway Co. v. The Waterford and Limerick Ry. Co.*, M. R., 14 Feb. 1881, A. 183; C. A. 9 April, 1881, A. 697; also *East and West India Dock Co. v. Shaw*, Chitty, J., 6 July, 1888, A. 1051.

#### NOTES.

##### PROHIBITION—NATURE OF WRIT—INFERIOR COURTS.

The writ of prohibition is a writ issued out of the High Court to restrain inferior Courts from exceeding their jurisdiction by "intermeddling with or executing anything which by law they ought not to hold plea of": 2 Inst. 602, cited in *Mayor of London v. Cox*, L. R. 2 H. L. 239, 254.

For the history of this jurisdiction, and an exposition of the law and practice of the superior Courts relating to it, and as to the distinction between superior and inferior Courts, see *S. C.*

For form of writ of prohibition, see R. S. C. App. J. 11; Chitty's Forms, p. 785.

Although by the Jud. Act, 1873, s. 24 (5), "no cause or proceeding at any time pending in the High Court, or before the Court of Appeal, shall be restrained by prohibition or injunction," the inferior Courts, such as the County Courts, the Mayor's Courts, and the Diocesan Courts, not being branches of the Supreme Court (see Jud. Act, 1873, s. 3), are not affected by this provision, and prohibition will still lie to restrain them from exceeding their jurisdiction.

Before the Jud. Acts prohibition might be directed to the Admiralty Court, although for some purposes the powers and jurisdiction of a superior Court were given to that Court by 24 V. c. 10: see *James v. S. W. Ry.*, L. R. 7 Ex. 187; *Smith v. Brown*, L. R. 6 Q. B. 729.

But the Admiralty Court having, by the Jud. Act, 1873, s. 16, been constituted one of the Divisions of the High Court, prohibition will no longer lie in respect of Admiralty proceedings.

For cases in which prohibition has gone to restrain the Railway Commrs from executing their powers, see *Warwick Canal Co. v. Birmingham Canal Co.*, 5 Ex. D. 1; *G. W. Ry. Co. v. Waterford and Limerick Ry. Co.*, 17 Ch. Div. 493; Shortt, pp. 483, 484.

As to the constitution and jurisdiction of the present Railway Commission, and as to appeals from the decisions of the Commrs to the superior Courts of Appeal, and by leave to the House of Lords, see the Railway and Canal Traffic Act, 1888 (51 & 52 V. c. 25), ss. 2, 8, 17.

An application before the Jud. Acts for prohibition to the Chief Judge in Bankruptcy was refused, that Court being a superior Court: *Re Marcus Davis*, L. C., 23 Feb. 1873, Reg. Min. 150.

And prohibition against the issue by a bishop of a commission of inquiry under the Church Discipline Act (3 & 4 V. c. 86) until the *status* of the promoter should have been inquired into, was refused: *Exp. Edwards*, 9 Ch. 138.

And for an enumeration of the Courts to which prohibitions have issued, see Shortt, p. 431.

##### PROCEDURE TO OBTAIN WRIT.

To obtain the writ, a want of jurisdiction in the inferior Court to decide the case must be shown: *Burder v. Veley*, 12 A. & E. 263; *Mayor of London v. Cox*, L. R. 2 H. L. 239, 279.

The writ was obtained at law by special application to the Court on affidavit: see 1 Will. 4, c. 21, and not, as before that Act, by mere suggestions: *ib.* 279.

In Chancery, upon production of a proper affidavit, the writ has issued as of course without an order: see *Jacobs v. Brett*, 20 Eq. 1.

The writ must be indorsed with the names and addresses of the solrs



issuing it, and must state whether they issue it on behalf of the Plt, Deft, garnishee, or any other person.

The affidavit must show clearly and distinctly that the inferior Court has not jurisdiction, or has gone beyond it, and must, on the Crown side, be intitled "In the High Court of Justice, Queen's Bench Division:" Crown Office Rules, 1886, r. 7; Shortt, 488.

But in Chancery the order and affidavit have been entitled, "*Ex parte* (the applicants) in the matter of the suit in the Consistory Court": see *Re Bateman*, *sup.* p. 688; and see *Re Dashwood*, *sup.* p. 688, where the order and affidavit were entitled in the matter of the applicant.

For the form of the affidavit in support of the application for the writ to a County Court, of the summons, order for the writ to issue, and of the rule *nisi*, see Chitty's Forms, 782, 783.

By O. LIV. 12, prohibitions (as included in the orders mentioned in Jud. Act, 1873, s. 25 (8)) are excepted from the jurisdiction of the masters of the Queen's Bench, and of the registrars of the Probate, &c. Divisions.

The application for the writ may be made either by a party to the proceedings in the inferior Court or by a stranger, or, as stated in *Jacobs v. Brett*, 20 Eq. 5: "Either the Crown or any subject may intervene and inform a superior Court that an inferior Court is exceeding its jurisdiction, and it is the duty of the superior Court, when so informed, to confine the inferior Court within the limits of its jurisdiction." See also *Oram v. Brearey*, 2 Ex. D. 436.

For the grant of a writ of prohibition by the M. R. during the summer circuit to stay a County Court Judge from entertaining proceedings relating to the title to land, see *Wright v. Cattell*, 13 Beav. 81.

The difficulty that occurred in this case was remedied by 13 & 14 V. c. 61, s. 22, providing that any Judge of the Common Law Courts might as well in term time as in vacation hear and determine applications for writs of prohibition directed to the County Court Judges.

Applications in Chancery for a prohibition during term, though the matter originated there in vacation, were discouraged: *Re Foster*, 24 Beav. 428; *Montgomery v. Blair*, 2 Sc. & L. 136.

But under the new procedure this distinction is no longer applicable, as terms have been abolished, and the Superior Courts of Common Law and Equity have been consolidated into the High Court of Justice.

The practice in Chancery has been to grant an order absolute in the first instance, leaving it to the parties affected to move to dissolve it: *Re Bateman*, 9 Eq. 660; *Re Dashwood*, and other cases cited, *sup.* p. 688; though in *Re Dyson*, L. C. and L. J., 3 March, 1860, on subsequent motion to commit the Judge for disobedience to the writ, this was doubted.

#### WHEN GRANTED.

The writ is granted *ex debito justitiæ* to a party to the proceedings who is aggrieved; but on the application of a stranger, even when he shows with reference to the law and the facts that the inferior Court is exceeding its jurisdiction, the interference of the superior Court is discretionary: *Chambers v. Green*, 20 Eq. 552; *Re Forster*, 4 B. & S. 187; *Reg. v. Twiss*, L. R. 4 Q. B. 407; *Mayor of London v. Cox*, L. R. 2 H. L. 239, 280; *Broad v. Perkins*, 21 Q. B. Div. 533; but the rule does not affect the right of the Crown to claim a writ of prohibition at any stage: *S. C.*, at p. 535.

And generally for a review of the authorities as to whether the grant of prohibition is discretionary, and if so, to what extent, see Shortt, 441 *et seq.*

Where the objection to the jurisdiction is capable of being waived, and has been waived, by the applicant, prohibition will not be granted: *Moore v. Gamgee*, 25 Q. B. D. 244; *Mouflet v. Washburn*, 54 L. T. N.S. 16; *In re Jones v. James*, 19 L. J. Q. B. 257.

As to the distinction between cases where there is a total want of jurisdiction, and where the jurisdiction is contingent (*ex. gr.*, on leave to sue being obtained under the County Courts Act, 1888, s. 74), see *Moore v. Gamgee*, *sup.*

When the writ has been improperly granted in the first instance on the application of a stranger, and it does not appear that the inferior Court is

exceeding its jurisdiction, both with reference to the facts and to the law, the superior Court has jurisdiction to set it aside: *Chambers v. Green*, 20 Eq. 552.

A prohibition to the Mayor's Court (formerly issued out of the Petty Bag Office, which is now merged in the Central Office: R. S. C. Jan. 1889), might be set aside on the ground that the order for the goods and the delivery both took place within the jurisdiction of that Court: see *Taylor v. Jones*, 1 C. P. D. 87 (following *Dunlop v. Higgins*, 1 H. L. C. 381; *Evans v. Nicholson*, 32 L. T. N.S. 778, that the letter containing an order speaks from the place where and the time when it was posted).

But though the writ has been improperly issued, it must be obeyed until superseded: *Iverson v. Harris*, 7 Ves. 225.

As to the jurisdiction of a Judge at Chambers to set aside a writ of prohibition issued out of the Petty Bag Office, see *Amstell v. Lesser*, 16 Q. B. D. 187; and see Shortt, 490.

Under the former procedure, the Courts of Chancery and Common Law had concurrent jurisdiction to grant the writ, but—except as to applications for prohibitions directed to the County Court Judges, which, by 13 & 14 V. c. 61, s. 22, might be made and determined in vacation as well as in term time—the application for the writ during vacation could only be made in Chancery: see *Re Bateman*, 9 Eq. 660, and cases there cited.

By Crown Office Rules, 1886, r. 229: "All writs on the Crown side shall be issued at the Crown Office Department of the Central Office."

As to the preparation, teste and return of such writs, see rr. 230—232.

#### FORM OF ORDER.

As to the form of order, see *G. W. Ry. Co. v. Waterford and Limerick Ry. Co.*, 17 Ch. D. 493, 511; *E. and W. India Dock Co. v. Shaw, Savill and Albion Co.*, 39 Ch. D. 524, 533.

In lieu of granting prohibition, the Court will, where it is "just or convenient," within Jud. Act, 1873, s. 25 (8), grant an injunction *inter partes*, e.g., to restrain a landowner from taking proceedings before justices as an irregular notice under the Land Drainage Act, 1861 (24 & 25 V. c. 133): *Hedley v. Bates*, 13 Ch. D. 498.

At Common Law a rule *nisi* in the first instance for a prohibition was granted on application to either of the Superior Courts or to a Judge in Chambers: Chit. Arch. (Prentice) 1727; and see 19 & 20 V. c. 108, s. 40.

#### COUNTY COURT.

For the practice as to prohibitions directed to the County Courts, see Pitt-Lewis, County Court Practice, 130 *et seq.*; Annual County Court Practice, p. 76; County Courts Practice, 216; Pollock & Nicol, 249; and the cases in which the writ will and will not issue, see Chit. Arch. (Prentice) 1543; Pollock & Nicol, 251; Shortt, 475 *et seq.*

By the County Courts Act, 1888 (51 & 52 V. c. 43), s. 127, any Judge of the High Court, as well during sittings as in vacation, may hear and determine applications for writs of prohibition to any County Court, and make such orders as might have been made by the High Court.

By sect. 128, when an application is made to the High Court or a Judge thereof for a writ of prohibition to be addressed to a County Court Judge, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed.

The County Court Judge is not to be served with notice of the application, nor, except by order of the High Court Judge, to be required to appear, or liable to any order for payment of costs, but the application is to be heard in the same manner as a County Court appeal. As to service of the order on, or lodgment of the writ (if granted on an *ex parte* application) with, the registrar of the County Court, see sects. 129, 130.

By O. LIX. 8a, every application for a prohibition to a County Court, other than an application by the A. G., shall be brought by notice of motion served on the parties to the proceedings in the County Court, or such of them as may not be applicants for the prohibition. The mode of procedure under this rule is alternative to that of applications in Chambers under sect. 127, *sup.*: *King v. Charing Cross Bank*, 24 Q. B. D. 27.

And by sect. 132, if the writ be refused by one Court or Judge, no other Court or Judge may grant it; but the right of appealing from the Judge to the High Court itself is not affected, nor the right to make a second application to the same Court on different grounds.

The decision of the Judge in Chambers, if not appealed from, is conclusive in the County Court on the question of value: *Symons v. Rees*, 1 Ex. D. 416.

An appeal lies without leave from the decision of a divisional Court upon an application for a prohibition to a County Court, as sect. 128, *sup.*, is to be read as referring solely to applications to the High Court: *Lister v. Wood*, 23 Q. B. Div. 229.

A prohibition was granted against proceedings in the County Court to restrain an amalgamation of a friendly society under 38 & 39 V. c. 60, before any special resolution had been passed founding the jurisdiction under the Act: *Jones v. Slee*, 32 Ch. Div. 585; and for cases in which prohibition went in respect of excess of jurisdiction by a County Court, see *Rig. v. Lincolnshire County Court*, 20 Q. B. D. 167; *Reg. v. Shropshire County Court*, 20 Q. B. D. 242; *Reg. v. Greenwich County Court*, 37 W. R. 132; *Kenyon v. Eastwood*, 57 L. J. Q. B. 455.

The City of London Court, notwithstanding the County Courts Act, 1888, has jurisdiction to try an action when the Deft has employment within the city though he does not dwell or carry on business there: *Kutner v. Phillips*, 64 L. T. N.S. 628.

#### MAYOR'S COURT, LONDON.

The jurisdiction of the Mayor's Court has been somewhat restricted by recent decisions to the effect that in order to give that Court jurisdiction the cause of action must arise, and the garnishee reside within the city: *Read v. Brown*, 22 Q. B. Div. 128; *Cooke v. Gill*, L. R. 8 C. P. 107, 110; *Mayor of London v. Cox*, L. R. 2 H. L. 239; *Banque de Crédit v. De Gas*, L. R. 6 C. P. 142; *Robinson v. Emanuel*, L. R. 9 C. P. 414.

Or, again, that to enable the Plt to resist prohibition, he must show that the whole of the cause of action, or every material fact essential to constitute it, occurred within the jurisdiction of the Mayor's Court: *Gold v. Turner*, L. R. 10 C. P. 149; *Whitney v. Schmidt*, L. R. 8 C. P. 120.

And see *Washer v. Elliott*, 1 C. P. D. 169, for prohibition to the Mayor's Court from proceeding on an order for committal under the Debtors Act in respect of a debt on which judgment had been recovered in a Superior Court, the debtor not residing or carrying on business within the jurisdiction of the Mayor's Court when the summons issued.

On the other hand, the Superior Court is not bound to prohibit an action in the Mayor's Court unless satisfied that no one entire cause of action arose within the jurisdiction: *Taylor v. Nicholls*, 1 C. P. D. 242 (explaining *Evans v. Nicholson*, 32 L. T. N.S. 778; *Wallace v. Allan*, 23 W. R. 703).

An order by telegraph from without the city being accepted within it, there was a contract of agency made within the city: *Cowan v. O'Connor*, 20 Q. B. D. 640.

A clerk employed by a solicitor at offices in the city does not carry on business there within the Mayor's Court Extension Act, 1887: *Lewis v. Graham*, 20 Q. B. D. 780.

The process of foreign attachment in the Mayor's Court of London cannot be issued against a corporation aggregate as garnishees: *Corp. of London v. London Joint Stock Bank*, H. L. 6 App. Ca. 393. Such attachment, being merely process to compel appearance, does not suspend the operation of a garnishee order: *Richter v. Laxton*, 48 L. J. Q. B. 184.

When the Mayor's Court is proceeding without jurisdiction—notwithstanding the interpretation put upon the Mayor's Court Procedure Act, 1857 (20 & 21 V. c. clvii.), s. 15, in *Manning v. Farquharson*, 30 L. J. Q. B. 22; *Baker v. Clark*, L. R. 8 C. P. 121—the Deft in the Mayor's Court, or even any stranger, may obtain a writ of prohibition: *Jacobs v. Brett*, 20 Eq. 1; *Mayor of London v. Cox*, L. R. 2 H. L. 259; and see *Bridge v. Branch*, 34 L. T. N.S. 905.

Sect. 89 of the Jud. Act, 1873, empowering inferior Courts to grant in any proceeding relief, redress, or remedy as fully as the High Court might in

the like case, refers to the judgment, and not to the means of obtaining it. Thus, the Mayor's Court cannot, on motion for a new trial, direct judgment to be entered as a Judge of the High Court can under O. XL. 10; and where, judgment having been so entered in the Mayor's Court, there was an error on the face of the proceedings, appeal lay to the Court of Appeal (as successors of Exch. Chamber): *Pryor v. City Offices Co.*, 10 Q. B. Div. 504.

In cases within the Mayor's Court Procedure Act, 1857, s. 12 (debt under £50, and Debt carrying on business and cause of action arising within the City), the jurisdiction of the Mayor's Court is extended so as to exclude prohibition: *Hawes v. Paveley*, 1 C. P. Div. 418.

After the abandonment by Plt in the Mayor's Court of items in the action not arising within that jurisdiction, the prohibition may be discharged, but without costs: *Ellis v. Fleming*, 1 C. P. D. 237.

An action having been brought in the Mayor's Court and a counter-claim set up which is beyond the jurisdiction of that Court, that Court has no power to deal with the counter-claim to the extent of the amount of the Plt's claim: *Davis v. Flagstaff Silver Mining Co.*, 3 C. P. D. 228.

And as to the practice in prohibition to the Mayor's Court, see also Chit. Archb. 1546; Shortt, 471.

#### COSTS.

The costs of proceedings in prohibition are regulated by 1 Will. 4, c. 21, s. 1. It has been held that where the rule for a prohibition is made absolute without pleadings, there is no "judgment" within that section, so as to entitle to costs: *Exp. Everton Overseers*, L. R. 6 C. P. 245; *Rex v. Keeling*, 1 Dowl. 440; but see *Evans v. Wills*, 1 C. P. D. 229; and though the Court is not bound to award costs on making absolute or discharging the order, it may do so if it thinks proper: *Wallace v. Allen*, L. R. 10 C. P. 607; Shortt, 497.

As to the proper mode of procedure in a case where a police magistrate is exceeding his jurisdiction, see *In re Briton Medical and General Life Association*, 39 Ch. D. 61.

## CHAPTER XXXIV.

## TRANSFER, CONSOLIDATION, AND REMOVAL.

## SECTION I.—TRANSFER OF CAUSES AND ACTIONS IN THE HIGH COURT.

1. *Order for Transfer of Cause or Action from one Judge to another in Chancery Division—by Consent of Parties—O. XLIX. 1.*

UPON the petition &c., and the solrs for &c., having subscribed the said petition signifying their consent to the prayer thereof, It is ordered that this cause [*or action*], which has been assigned to Mr. Justice A., be transferred to Mr. Justice B., and that the same, when so transferred, be hereafter considered as a cause [*or action*] originally assigned to Mr. Justice B., [provided nevertheless that no order made by Mr. Justice A. in this cause [*or action*] be varied or reversed otherwise than by the Court of Appeal].

The proviso in brackets is now omitted, because only the Court of Appeal can reverse or vary an order on its merits, and it would be inconvenient that there should be no means of making alterations or corrections not of substance, or consented to, without going to the Court of Appeal.

Where the proviso was inserted, an *ex parte* order made by the one Judge might be discharged by the other: *Hart v. Sceptre, &c. Co.*, W. N. (79) 50.

For order with costs, on the motion of Plt in the first of two creditors' admon actions, for a transfer of the second action to the Judge by whom the decree had been made in the first action, see *Re Sharp, Bentall v. S.*, L. C., 16 Nov. 1876, B. 1738.

2. *Transfer from one Judge to another of the Chancery Division on Motion before the Lord Chancellor.*

UPON motion &c., unto the Right Hon. the Lord High Chancellor, by counsel for the Deft; Let this action, which has been assigned to Mr. Justice A., be transferred to Mr. Justice B.; And Let the same when so transferred be hereafter considered as an action originally assigned to Mr. Justice B.—*Hine-Haycock v. Hamerton*, L. C., 16 Feb. 1888, A. 158.

3. *Order for Transfer of particular Matter in Chancery Division—on Ex parte Application—O. XLIX. 1.*

UPON the petition of &c., this day preferred unto the Right Hon. the Lord High Chancellor, his Lordship doth order that the above-

mentioned matters, "The L. & S. Ry. Co.," "The B. & H. Ry. Act, 1845," and "The L. C. C. Act, 1845," which are now attached to the Court of (have been assigned to) Mr. Justice A., be respectively transferred to the Court of Mr. Justice B. [*If so*, so far as the same relate to money and securities in Court to the credit of *Ex parte* the President &c., of the College of &c.]; and that the same when so transferred be hereafter considered as matters originally attached (assigned) to Mr. Justice B.

4. *Transfer from Queen's Bench to Chancery Division*—O. XLIX. 1, 3.

UPON hearing the solrs on both sides, and by consent, I do order that this action be transferred to the Chancery Division of the High Court of Justice, and be assigned to the Court of Mr. Justice B., if the President of the Division shall consent thereto.—(Signature of Judge.)  
—*North Eastern Ry. Co. v. Spark*, 5 Jan. 1876.

*Consent of Lord Chancellor.*

THE Lord Chancellor, as President of the Chancery Division of the High Court of Justice, consents to the transfer to that Division of this action.  
(Signature of Principal Secretary.)

5. *Transfer from the Chancery Division to another Division*—

O. XLIX. 3.

UPON the application of &c., and upon reading the Plt's statement of claim, It is ordered that this action, commenced in the Chancery Division of the High Court of Justice, be transferred to the Q. B. &c. Division of that Court, if the President of that Division shall consent thereto.—*Giffard v. Corp. of Wolverhampton*, Kay, J., at Chambers, 1 May, 1885, A. 611.

6. *Transfer from Queen's Bench Division to Chancery Division*—

O. XLIX. 5.

UPON motion &c. by counsel for the Deft, Let the action of A. v. B., 18— &c., commenced in the Queen's Bench Division, be transferred to the Chancery Division of this Court, and be assigned to the V.-C. Sir C. Hall.—*Re Robinson, Whitaker v. R.*, V.-C. H., 17 July, 1877, B. 1258; W. N. (1877) 201; *Re The New Hollingbourne Paper Mills Co., Lim.*, North, J., 20 Dec. 1887, B. 1610.

7. *Transfer of Summons under O. XLIX. 6.*

UPON the application of the Deft under O. XLIX. 6, and upon hearing the solrs for the applicant, and for A. B., and the said A. B. by his solr consenting, Let the summons issued on the — day &c., in which A. B. is Plt and C. D. is Deft for the administration &c., the reference

to the record of which summons is &c., and is improperly marked with the name of Mr. Justice A., be transferred to Mr. Justice B.—And the costs of the said A. B. of the said action are to be dealt with in this action.—*Re Bright, Smith v. Druce*, Kay, J., at Chambers, 22 July, 1884, A. 1365.

8. *Transfer from the Chancery Division to County Court—  
Bankruptcy.*

UPON motion &c. by counsel for A. B. and C. D., creditors of E. F., deceased, and upon hearing counsel for the Deft, Let, pursuant to section 125 of the Bankruptcy Act, 1883, without prejudice to any application in Bankruptcy in respect of the rents of the estate, received by the said A. B. and C. D. since the death of the testator, E. F., this action, which is attached to the Court of Mr. Justice A., be transferred to the County Court of &c., holden &c., and that all original documents filed herein be transmitted to the said County Court.—Costs in action.—*Re York, Atkinson v. Powell*, Stirling, J., 2 July, 1887, B. 945.

For a like order, see *Re Edwards, Lovell v. E.*, 24 Sept. 1886, A. 1404.

9. *Removal of Action from District Registry—O. xxxv. 13.*

UPON motion &c. by counsel for the Plt, This Court doth order that this action be removed from the district registry at Derby to London.—*Buckston v. Rose*, M. R., 18 Jan. 1876, A. 42.

10. *Transfer by Court of Appeal from Lancaster Palatine Court  
to High Court of Justice, Chancery Division—Jud. Act, 1873,  
s. 18.*

LET this action be transferred to the Chancery Division of the High Court of Justice, and be assigned to the Court of Mr. Justice A., and the Defts T. and B. are to be at liberty to apply to the Vice-Chancellor of the Court of the Chancery of the County Palatine of Lancaster for an order directing the payment out of that Court to them of the money standing to the credit of this action, they undertaking to pay the same into Court to the credit of this action when so transferred.—And the costs of this application and of such application to the Vice-Chancellor are to be costs in the action.—*Phipps v. Tod*, C. A., 10 Nov. 1886, B. 1260.

TRANSFER OF CAUSES AND ACTIONS.

The transfer of causes is provided for by Jud. Act, 1873, s. 36, and by Jud. Act, 1875, s. 11, and O. XLIX.

By s. 36, any cause or matter may at any time and stage, and with or without application from any party, be transferred, by such authority and in such manner as the rules may direct, from one Division or Judge of the High Court to any other Division or Judge, or may be retained in the Division in which the same was commenced, though not the proper Division to which it should have been assigned.

By O. XLIX. 1, causes or matters may be transferred from one Division to another of the High Court, or from one Judge to another of the Chancery

Division by an order of the L. C., but no transfer is to be made from or to any Division without the consent of the President of the Division.

By r. 3, "any cause or matter may, at any stage, be transferred from one Division to another by an order made by the Court or any Judge of the Division to which the cause or matter is assigned: provided that no such transfer shall be made without the consent of the President of the Division to which the cause or matter is proposed to be transferred."

By r. 7, "any cause or matter transferred from any other Division to the Chancery Division shall, by the order directing the transfer, be assigned to one of the Judges of that Division to be named in the order."

By r. 8, "causes or matters pending in the same Division may be consolidated by order of the Court or a Judge in the manner in use before the commencement of the Jud. Act, in the Superior Courts of Common Law."

Applications for the transfer of actions from one Division of the High Court to another should be made on notice, and the sanction of the President of the Division to which it is to be transferred must be obtained: *Humphreys v. Edwards*, 45 L. J. Ch. 112.

The jurisdiction formerly exercised by the Court of Appeal in Chancery to direct a transfer from one Judge of the Court to another no longer exists, even as to suits or matters pending before the new procedure: *Re Huiley*, *Re Boyd's Trusts*, 1 Ch. Div. 11, 12; and see *Goddard v. Thompson*, 47 L. J. Q. B. 382.

Whether the Court of Appeal can order a transfer without the consent of the Presidents of both the Divisions, i.e., from and to which the transfer is made, *quere*: *Storey v. Waddle*, 4 Q. B. Div. 289.

In the case of a transfer to the Chancery Division, the L. C. will direct the transfer on a written application to his secretary, accompanied by the written consent of all parties. When the parties do not consent, the application must be made to the L. C. personally: see *Memorandum*, 1 Ch. D. 41.

The application is usually in the form of a petition to the L. C., which is left with the secretary after the written consents of all parties have been obtained. When the L. C.'s *fiat* has been obtained, the petition is taken to the senior registrar, who draws up the order, which is then left at the Writ Department, Central Office, for entry in the cause book. Where the application is opposed it is usually made by motion: see *Dan. Ch. Pr.* 1894; *Dan Ch. Forms*, p. 821.

By the Bankruptcy Act, 1883, s. 125 (4), where proceedings have been commenced for the admon of a deceased debtor's estate, jurisdiction is conferred, without the application of any creditor (see Bankruptcy Act, 1890, s. 21), on proof that the estate is insolvent, to transfer the proceedings to the Court exercising jurisdiction in bankruptcy.

The exercise of this jurisdiction is discretionary: *Re Baker, Nichols v. B.*, 44 Ch. Div. 262; and *semble*, the applicant must, before the order can be made, have proved his debt: *Re Weaver*, 29 Ch. D. 236; but the transfer may be ordered after judgment for admon: *Re York, Atkinson v. Powell*, 36 Ch. D. 233; *Senhouse v. Mawson*, 52 L. T. N.S. 745.

The existence of an exor's right of retainer, or the fact that he has exercised his liberty not to plead the Statute of Limitations, are not grounds for ordering a transfer: *Re Baker, sup.*, at p. 271.

On transfer from the Q. B. Division the proper officer of the writ department will, on production of the order, send a receipt to the master, who will file the order and receipt, and transmit the proceedings filed with him to be filed in the Chancery Division.

A similar course will be pursued on a transfer from the Chancery to another Division.

On an application, under O. XLIX. 1, for the transfer of an action in the Chancery Division to another Judge of that Division, the L. C. has not jurisdiction to stay the action, but simply to determine whether or not it is to be transferred: *Re Sharp, Bentall v. Sharp*, L. O., 16 Nov. 1876, Reg. Min. Fo. 112.

Although it was stated (2nd Nov. 1876), that a transfer from the Chancery to the Q. B. Division would not be ordered merely because the action was one for trial by jury, or for damages only (see *Cannot v. Morgan*, 1 Ch. D. 1), actions involving questions of fact proper for the decision of a mercantile jury will not, it seems, be retained in the Chancery Division: see



*China, &c. Co. v. Marine Insurance Co.*, W. N. (81) p. 89. So, also, actions for an account, being properly triable in the Chancery, will not be transferred to the Q. B. Division: *Ladd v. Puleston*, 31 W. R. 539; but a petition for revocation of patent, where an action between the parties was pending in the Q. B. Division, was transferred to that Division: *Re Edge*, 38 W. R. 698.

A transfer from the Q. B. Division to the Chancery Division has been ordered in an action by a purchaser for a return of deposit where there was a counter-claim by Deft for specific performance involving an inquiry as to title: *Holloway v. York*, 2 Ex. Div. 333; *London Land Company v. Harris*, 13 Q. B. D. 540; in an action to recover land where Deft counter-claimed for specific performance of a contract to grant a lease: *Hillman v. Mayhew*, 1 Ex. D. 132; though the mere fact that there is a counter-claim for specific performance is not a sufficient ground for ordering a transfer: *Storey v. Waddle*, 4 Q. B. Div. 289; and in an action against an exor for devastavit: *Re Temms*, 47 L. J. Ch. 831; in an action for accounts and winding-up of partnership: *Leslie v. Clifford*, 50 L. T. N.S. 590; but see *contra*, *Warne v. Dell*, W. N. (75) 259; and against a married woman on a guaranty to charge her separate estate: *Anon.*, W. N. (76) 22.

But in an action by reprieve of deceased mortgagee for balance of money lent, a transfer was refused on the ground that the accounts could be more conveniently taken before the official referee than before the chief clerk: *Newbould v. Steade*, 49 L. T. N.S. 649.

That the ground of action and the principles on which it is to be decided are not altered by the transfer, see *Noble v. Edwards*, 5 Ch. Div. 378, 393; *The Gertrude*, 13 P. Div. 105, 109.

By O. LIV. 12(c), the removal of actions from one Division or Judge to another is excepted from the jurisdiction of the masters of the Q. B. Division, and from that of the registrars of the Probate, &c. Division.

A transfer from the Palatine Court to the High Court was ordered where the principal Deft, whose conduct was specially impeached, had ceased to reside within the jurisdiction of the former Court: *Cooke v. Smith*, 44 Ch. Div. 72.

The jurisdiction to transfer from the Palatine Court of Lancaster to the High Court is vested in the Court of Appeal by the Jud. Act, 1873, s. 18.

#### REMOVAL OF ACTION FROM DISTRICT REGISTRY.

By Jud. Act, 1873, s. 65, any party to an action in which the writ shall issue from any district registry may apply to the Court, or a Judge of the Division to which the action may be assigned, to remove the proceedings from such district into the High Court; and the Court or Judge may grant such application, and any proceedings and documents filed therein shall, on receipt of such order, be transmitted by the district registrar to the proper office of the said High Court, and the action shall thenceforth proceed there.

By O. xxxv. 13, "In any action which would, under the foregoing rules, proceed in the district registry, the action may, subject to r. 14, be removed from the district registry as of right in the cases, and within the times following:—

- "(1.) Where the writ is specially endorsed, under O. III. 6, and the Plt does not, within four days after the appearance of such Deft, give notice of an application for an order against him, under O. XIV., then such Deft may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and the expiration of the time for doing so;
- "(2.) Where the writ is specially endorsed, and the Plt has made such application, and the Deft has obtained leave to defend under O. XIV., then such Deft may remove the action as of right at any time after leave to defend, and before delivering a defence, and the expiration of the time for doing so;
- "(3.) Where the writ is not specially indorsed, under O. III. 6, any Deft may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so."

By r. 14, a party desirous to remove an action as of right under r. 13 may

do so by serving the other parties to the action, and delivering to the district registrar a notice, signed by himself or his solicitor, that he desires the action to be removed to London, and the action shall be removed accordingly: Provided that the Court or a Judge, if satisfied that the Deft giving such notice is a merely formal Deft, or has no substantial cause to interfere in the conduct of the action, or that there is other good cause for proceeding in the district registry, may order the action to proceed in the district registry notwithstanding such notice.

By r. 16, in any case not provided for by rr. 13 and 14, any party to a cause or matter proceeding in a district registry may apply to the Court or a Judge, or to the district registrar, for an order to remove the action from the district registry to London, and the Court, Judge, or registrar may order it, if satisfied that there is sufficient reason, upon such terms, if any, as shall seem just.

By r. 17, any party to a cause or matter proceeding in London may apply to the Court or a Judge for an order to remove the cause or matter from London to any district registry, and such Court or Judge may order it, if satisfied that there is sufficient reason, upon such terms, if any, as shall seem just.

By r. 18, where a cause or matter is removed from a district registry, the Deft shall, upon such removal, give notice to the Plt of an address for service in London in all respects as if the appearance had been originally entered in London; and by r. 20, when a Deft appears in London, to a writ issued out of a district registry.

When the proceedings are commenced by originating summons, r. 16 applies: *In re Thwaites, Yerburgh v. Aston*, W. N. (90) 218; 63 L. T. N.S. 747 (in which case, an important part of the property being in Lancashire, and three of the trustees appointed by the will being Lancashire men, transfer to London was refused).

Chancery actions commenced in district registries ought to be tried in London before the Judge of the Division to whom they have been assigned: *Re Smith, Hutchinson v. Ward*, 6 Ch. D. 692; and, except under special circumstances, the costs of such actions will be taxed by the taxing master in London: *Day v. Whitaker*, *ib.* 734; *Re Wilson, W. v. Alltree*, 27 Ch. D. 242; *q. v.* at p. 244 as to the practice where an order for taxation in the district registry is made.

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## SECTION II.—CONSOLIDATION AND STAY OF PROCEEDINGS.

### 1. *Order to stay One of Two Creditors' Actions, with Leave to prove in the other, and as to Costs.*

LET all proceedings in the secondly-mentioned action be stayed; And Let the costs of the Plt A., of the said secondly-mentioned action, up to the time he had notice of the judgment in the first-mentioned action, dated &c., including his costs of this application, be taxed &c.; [*If assets not denied by affidavit*, And Let such costs when taxed be paid to the said A. by the Deft B., the exor [*or* admor] of the testator [*or* intestate] C., out of the assets of the said C. (in a due course of admon); And Let the said A. be at liberty to go in under the said judgment, and prove his claim against the assets of the said C.; *If assets denied*, And Let the said A. be at liberty to add his costs to his claim against the assets of the said C., and to go in and prove the same, and the amount of his said costs, when taxed, under the said decree, dated &c.—Deft's costs of the application to be costs

in the first-mentioned cause.—See *Canham v. Neale*, M. R., 7 July, 1858, A. 1798; *S. C.*, 13 Dec. 1858, A. 397; 26 Beav. 266; *West v. Swinburne*, V.-C. K. B., 6 Dec. 1849, B. 478; 19 L. J. Ch. 81; *Duffort v. Arrowsmith*, 7 D. M. & G. 434; and see *Re Clark*, *inf.* Form 2.

## 2. *The Like Order.*

LET all proceedings in this action be stayed; And Let the costs of the Plt W. of this action, up to and including this application, be taxed &c.; And Let the said costs when taxed be paid to the said Plt W. by the Deft C., the executrix of the testator &c., out of his assets (in a due course of admon); And Let the Plt W., be at liberty to go in under the judgment dated &c., made in &c., and prove his claim against the assets of the testator.—Costs of executrix to be costs in the action.—See *Re Clark, Cumberland v. C.*, V.-C. S., 24 Jan. 1867; *S. C.*, 4 Ch. 412.

On the appeal the words, “in a due course of admon” were treated as being expressed. See judgment of L. J. Selwyn, 4 Ch. p. 413.

## 3. *Proceedings stayed in First Action after Judgment in the Second—Carriage of Judgment given to Plt in the First.*

UPON motion &c., by counsel for the Plts in the first-mentioned action, and upon hearing counsel for the Plts in the secondly-mentioned action, and for the Defts (*executors*) in both actions, and upon reading the judgment dated &c., made in the secondly-mentioned action, and an affidavit of &c., This Court doth order that all further proceedings in the first-mentioned action be stayed; and that the Plts in that action be at liberty to attend all proceedings under the judgment in the secondly-mentioned action; and that the carriage of the said judgment and of the said secondly-mentioned action be committed to the Plts in the first-mentioned action; And it is ordered that the costs of the Plts and Defts in the first-mentioned action of that action, including their costs of this application, and the costs of the Plts in the secondly-mentioned action of this application, be costs in the secondly-mentioned action.—See *Drury v. Thorn*, V.-C. W., 26 June, 1873, A. 1669.

For order staying a creditor's admon action, and giving the conduct of the admon to the exors, who had first obtained in a subsequent action a full admon decree, with liberty for the creditor to come in and establish his claim in the exors' action, see *Re Smith's Estate, M'Murray v. Mathew*, V. C. B., 27 Jan. 1876, B. 283; 33 L. T. N.S. 804.

For order staying proceedings in an action by an equitable mortgagee, to establish a charge on testator's estate, but giving the conduct of the admon decree which had been obtained in a creditor's action (subsequent in date) to Plt in the first action, see *Matthews v. M., Willyams v. M.*, V.-C. B., 26 May, 1876, 45 L. J. Ch. 711.

For order to stay creditor's suit, after decree in suit by residuary legatees, and the exors not making affidavit of no assets to pay the creditors' costs up to notice of the decree, see *Golder v. G.*, 9 Ha. 278; *S. C.*, Note.

For order giving Plt in first action (in Palatine Court) the conduct of the second action (in the High Court), and in which a decree was first obtained for admon of the same estate, he giving an undertaking to stay proceedings in the first action, see *Re Swire, Mellor v. Swire*, 19th April, 1882, B. 895; 21 Ch. Div. 647.

4. *On Motion for Stay and Motion for Judgment—Order for Consolidation of Causes—Additional Inquiry.*

UPON motion by Defts for stay of the second-mentioned action, and that the Plt in that action might attend the proceedings in the first-mentioned action—and upon motion for judgment in the second-mentioned action.—Direction that the trusts of the testator's will be performed; And Let the judgment made in the action of H. v. C., dated &c., and the accounts and inquiries thereby directed, and the several proceedings thereunder, be carried on and prosecuted in the first-mentioned action, and in the secondly-mentioned action of G. v. C. at the same time; And Let, in addition to the inquiries directed by the said judgment, the following further inquiry be made, that is to say, An inquiry in whom the shares of the children or grandchildren of the testator, or any interest therein, are now vested.—Adjourn further consideration; And Let both actions be heard on further consideration together.—Costs of motion (to stay) to be costs in both actions.—Liberty to apply.—*Hoskins v. Campbell*, and *Gibbon v. Campbell*, V.-C. W., 9 Feb. 1864, A. 280; 2 H. & M. 43.

5. *Order upon Motion to Consolidate, with Directions as to Trial.*

UPON motion &c., that these actions might be consolidated, or that the said actions might be ordered to come on for trial together, and upon hearing &c., and the above-named A. &c., by their counsel undertaking to give notice as of to-day to the above-named W. to plead in the second-mentioned action, Let any of the parties to the above-mentioned actions be at liberty to use the evidence taken in any one of the said actions in any other of the said actions; And Let all further proceedings in the third-mentioned action be stayed, except so far as that all the said actions shall come on to be heard at the same time.—Liberty to Deft E. to amend statement of defence.—Costs to be costs in the actions.—*Debenham v. Lacey*, *Smith v. Whichcord*, *Evans v. Debenham*, V.-C. H., 29 June, 1876, A. 1297; 24 W. R. 900.

6. *Parties consenting to Add an Inquiry, Conduct of Inquiry given to Plaintiff in Second Action.*

LET the said order dated &c., be discharged; And the said S. by his counsel undertaking to procure, and the Plt and the Defts in this action by their counsel undertaking to assent to the addition of the following inquiry to the judgment in S. v. T., that is to say, an inquiry whether &c., Let the Plt in this action have the conduct of the said

inquiry; And Let all proceedings in this action be stayed.—All costs to be dealt with by the Judge of the Palatine Court.—*Townsend v. T.*, C. A., 23 Feb. 1883, B. 293; 23 Ch. Div. 100.

### 7. Test Action.

UPON motion &c., by counsel for the Plts in all the above-mentioned actions, and upon hearing counsel for the Defts in the said actions, and the Plts in all the said actions by their counsel undertaking that so far as they are respectively concerned, the above-mentioned action of A. v. B. shall be treated as a test action, and decide their rights in all the other actions respectively as against themselves, but if the Defts in any of the other actions decline to accept the judgment in the said action of A. v. B. as deciding the said other actions, or any of them, as to any other of such of the said other actions in which the said Defts shall decline to accept the judgment in the said action of A. v. B., such other actions are to go to trial respectively, and the Plts and Defts are both to be at liberty, if they think fit, to use as evidence at the trial of such actions respectively, any evidence used at the trial of the said test action, and the Plts in the said test action, and in the action of C. v. D., by their counsel undertaking that the said actions shall be prosecuted with due diligence, Let the time for the delivery of the statement of claim in the above-mentioned actions (other than the said test action and the action of C. v. D.) respectively be enlarged until fourteen days after the judgment shall have been given in the said test action on the trial thereof.—*Amos v. Chadwick*, V.-C. M., 23 Feb. 1877, A. 585; and see *Bennett v. Lord Bury*, 5 C. P. D. 339, at p. 340.

### NOTES.

#### JURISDICTION.

The effect of the Jud. Act, 1873, s. 24 (5) is to take away the right formerly exercised in Chancery of granting an injunction to stay proceedings at law, or in another Court of co-ordinate jurisdiction; see *Garbutt v. Fawcus*, 1 Ch. Div. 155; and, under the present practice, when two actions relating to the same subject-matter have been commenced in different Divisions, they will be consolidated in that Division to which the real question at issue has been assigned by Jud. Act, 1873, s. 34: *Holmes v. Hervey*, 25 W. R. 80; *Hillman v. Mayhew*, 1 Ex. D. 132; *Holloway v. York*, 2 Ex. Div. 333.

But in winding-up cases, the power given by the Cos. Act, 1862, ss. 85, 138, to stay proceedings against a co. by creditors after the presentation of a winding-up petition, or after the commencement of a voluntary winding-up, is unaffected by the prohibition contained in s. 24 (5), and falls within the subsequent proviso which gives power to stay proceedings upon some ground which is unconnected with the cause of action or counter-claim (e. g., a winding-up order): see *Garbutt v. Fawcus*, 1 Ch. Div. 159; *Needham v. Rivers Protection Co.*, 1 Ch. D. 253; *Re Stapleford Colliery Co.*, 24 W. R. 173; *United Kingdom, &c. Co.*, 24 W. R. 546, 593.

And the exercise of this power is not confined to the Chancery Division: *Rose v. Garden Lodge Co.*, 3 Q. B. D. 235; *Walker v. Banagher, &c. Co.*, 1 Q. B. D. 129; *Moore v. City and County Bank*, W. N. (75) 240.

The application for a stay of proceedings is to be made to the Division in which the action or proceeding to be restrained is pending: *Re Artistic Colour Printing Co.*, 14 Ch. D. 502; *Buckley*, 234; and this rule has not been

ordered by the Companies Winding-up Act 1869. *Re General Service Co.* 1889, 12 Q.B. 124.

As to the power of staying or restraining proceedings against the co. after the presentation of a winding-up petition, see *Re L. & C. Ltd.* 83, 197, 201. If after the commencement of a voluntary winding-up, ss. 133, 138, see *Banking Act*.

#### WINDING-UP BY ORDER.

By s. 122, 123 where an order has been made by any Judge of the Chancery Division for the winding-up of any co. or for administration of the assets of any person or of an estate, the Judge in whose Court such winding-up or administration is pending shall have power without any further consent to order the transfer to such Judge of any cause or matter pending in any Court, or to direct or to cause to be transferred by or against such co., or to or against the estate or estates of the person or estate whose assets are being so administered, as the law may be.

As to the motion effected by this rule, with a substitute "cause or matter" for "petition" in the former rule (s. 122), so as now to enable a Judge who has made an order for the winding-up to direct the transfer to his own branch of the Court of a petition pending in another branch of the Court, see *Banking Act*, 1908 (Chancery Division), 333.

Transfer or stay of an action against a liquidator personally, though in respect of the business of the co. will not be ordered: *Re Liverpool Harbour Trustees*, 51 L.J. Ch. 588; *Re T. & A. S. & Co. v. S. & P. Co.*, 27 W. R. 503; *and*, an action in respect of a rent-charge affecting land vested in liquidators in their official capacity, under an order of the Court: *Grierson v. Edge*, 20 Q. B. Div. 681.

As the rule only applies when the order "has been made," the order for transfer shall not be comprised in the judgment for admon: *Re Poole*, *P. v. P.*, 55 L. T. N. S. 56.

#### PROCEEDINGS IN CRIMINAL COURT.

Proceedings in a criminal Court would not be restrained by the Court of Chancery, unless the criminal proceeding was of the same nature, and for the same identical purpose, as the suit in Chancery: *Snell v. Broune*, 10 Ch. 64; *Kerr v. Preston Corp.*, 6 Ch. D. 463; nor proceedings before magistrates, when by the legislature they have been appointed the special tribunal for determining the matter in hand: *Stannard v. St. Giles Vestry*, 20 Ch. Div. 190.

But under the Cos. Act, 1862, s. 85, the Court has power to restrain proceedings at the police Court to recover penalties under the Cos. Act, 1862, and Life Assur. Cos. Act, 1810, pending a petition for winding up the co.: *Briton Mutual Assoc. Assoc.*, 32 Ch. D. 503.

#### PRACTICE GENERALLY.

With respect to staying and consolidating causes, the practice, which in this respect is not substantially altered, has been that where two or more suits relating to the same subject-matter are pending in different branches of the Court, proceedings in one or more of them have been stayed: see *Dan*, 1888; *Morg*, 446.

Or a suit commenced in one branch of the Court, when another relating to the same subject-matter is pending in another branch, will be transferred to the latter. And the Plt who, knowing of the first, has instituted the second suit, must pay the costs of the application to transfer; but, before moving, the Plt in the first should apply for a consent to the transfer: *Lyall v. Weldhen*, 9 Ch. 287; *Sayers v. Corrie*, *ib.* 52; *Orrell v. Busch*, 5 Ch. 467. And the application of this rule is not affected by the circumstance that a decree has been made in the second suit: *Lucas v. Siggers*, 7 Ch. 517.

So also a party who refuses on insufficient grounds to consent to the transfer from one Court to another, may be ordered to pay costs, if the notice of motion asks for them: *Cocq v. Hunasgeria Co.*, 4 Ch. 415; *Re Sharp, S. v. Bentall*, *sup.* pp. 695, 698; *Houseman v. H.*, 1 Ch. D. 535.

When by general order a cause has been transferred from one Judge (of the Chancery Division) to another, a re-transfer will not be ordered, except by consent, where it would delay the hearing: *Platt v. Walter*, 1 Ch. 471.

## ADMINISTRATION ACTIONS.

The question of consolidating concurrent actions in respect of the same subject-matter by a transfer to the same branch of the Court (Division), or by directing which action shall proceed, and of staying the others, arises most frequently, in the Chancery Division, in admon proceedings. A decree for admon of assets being in the nature of a judgment for all the creditors, under which they may all come in and obtain payment, a creditor was stayed from proceeding at law to recover his debt: *Paxton v. Douglas*, 8 Ves. 521; *Jackson v. Leaf*, 1 J. & W. 231; *Drewry v. Thacker*, 3 Swa. 541; but a creditor who has obtained judgment against the exor before judgment in an admon action cannot be restrained from enforcing his judgment: *Re Womersley, Etheridge v. W.*, 29 Ch. D. 557; but the receiver in that action was directed to pay the debt and costs, without prejudice to the question whether they were to be allowed to the exor: *S. C.*; and see *Pennell v. Roy*, 3 D. M. & G. 126; *Carron Co. v. Maclaren*, 5 H. L. C. 416, 440, for a statement of the principles on which a creditor's action after admon decree was stayed. And similarly, to prevent the estate from being wasted by a multiplicity of litigation, more than one action for admon of the same estate will not be allowed to proceed.

The practice has been to allow that action in which a decree has first been obtained to proceed, and to stay the other unless such decree has been "snapped" or unfairly obtained, or the second action has been improperly instituted: *Harris v. Gandy*, 1 D. F. & J. 13; *Frost v. Ward*, 2 D. J. & S. 70; *Rhodes v. Barret*, 12 Eq. 479; or unless more complete and beneficial relief is sought by and can be obtained in the second action: *Re McRae, Forster v. Davis*, 25 Ch. D. 16; *Budgen v. Sage*, 3 M. & Cr. 683; *Taylor v. Southgate*, 4 M. & Cr. 203; *Underwood v. Jee*, 1 Mac. & G. 276; *Pickford v. Hunter*, 5 Sim. 122 (in which case the decree in the first suit, being less beneficial than that which could be obtained in the second, was not allowed to be pleaded in bar); *Plunkett v. Lewis*, 11 Sim. 379; *Re Yates*, 3 D. J. & S. 402; *Hoskins v. Campbell*, 2 H. & M. 43; *Re Smith's Estate, M'Murray v. Mathew*, 33 L. T. N.S. 804; or unless questions other than those of simple admon, e.g., breaches of trust or charges of wilful default, are raised in the action in which a judgment has not been first obtained: see *Zambaco v. Casavetti*, 11 Eq. 439.

A second and more comprehensive suit has been stayed upon the Deft in the first (the admor) undertaking not to object to any additions to the decree thought fit to be made by the Judge in Chambers: *Guyver v. Peterson*, 26 Beav. 83; *Matthews v. Palmer*, 11 W. R. 610; and see *Vanrenen v. Piffard*, 13 W. R. 425.

And where infants are Plts, that suit will be preferred in which the mother is next friend: *Harris v. H.*, 10 W. R. 31; or that which is most for their benefit: *Virtue v. Miller*, 19 W. R. 406; and see *Frost v. Ward*, 2 D. J. & S. 70.

Two admon suits having been instituted, one in the Palatine Court in which a decree was first made, and the other in the Court of Chancery, the latter Court refused to stay the proceedings before it, as the entire property to be administered was not within the jurisdiction of the Palatine Court, though if it had been, a stay would, it seems, have been granted: *Wynne v. Hughes*, 26 Beav. 377; and see *Bradley v. Stelfox*, 1 N. B. 221.

Where an admon action and a partnership action by testator's surviving partner were in different branches of the Court, the partnership action was transferred: *Davis v. D.*, 48 L. J. Ch. 40.

An admor whose title after obtaining an admon decree has been displaced, will be liable, by not submitting to an application to stay proceedings in his suit, to the costs of such application, and will not get the costs of his own suit: *Houseman v. H.*, 1 Ch. D. 535.

## CONDUCT OF ACTION.

After consolidation of actions for the same object, and difference of opinion between the joint Plts as to the course to be adopted, the conduct was given

to those of the Plts who had not been the first to take steps for severance, though their interest in the subject-matter was smaller: *Holden v. Silkstone Co.*, 30 W. R. 98.

If the first action is stayed by reason of a decree in a second action first obtained, the conduct of the proceedings will generally be given to the Plt in the first action: *Zambaco v. Cussavetti*, 11 Eq. 439; *Kenyon v. K.*, 35 Beav. 300; *Belcher v. B.*, 2 Dr. & S. 444; *Frost v. Ward*, 2 D. J. & S. 70; and this rule applies though the first action was in the Palatine Court, and the second (in which the decree was obtained) in the Chancery Division: *Re Swire, Mellor v. S.*, 21 Ch. Div. 647, 655; and see *Townsend v. T.*, 23 Ch. Div. 100.

And the order has been made upon terms of adding to the judgment inquiries in respect of questions raised in the action stayed: see *Matthews v. M.*, 34 L. T. N.S. 718; *Townsend v. T.*, 23 Ch. Div. 100, Form 6, *sup.* p. 702; *Drury v. Thorn, sup.*, Form 3, p. 701.

In applying the rule, special circumstances will be regarded, *e.g.*, the amount of the interest of the Plt in the first action, and his object in bringing it: *Re Swire, sup.*; but the fact that the first Plt was a purchaser of reversionary interests, and that some of the purchases were disputed, was not ground for depriving him of the conduct.

Or the first suit may be partially stayed, with liberty to Plt to prove under the decree in the second for what he might eventually establish in the first: *Dryden v. Foster*, 6 Beav. 146; see also *Smith's Estate, M' Murray v. Mathew*, 33 L. T. N.S. 804; *Crowle v. Russell*, 4 C. P. D. 186.

And see, on this question, "ADMINISTRATION," Chap. XLIV., *inf.*

In the case of cross actions, there is no inflexible rule in favour of the first Plt: *Thomson v. S. E. Ry. Co.*, 9 Q. B. Div. 320, where the action by the Plts, on whom the burden of proof lay, was allowed to proceed.

#### TEST ACTION.

The practice of selecting which of several suits shall proceed, has been also adopted in patent cases; and when the patentee is suing several infringers simultaneously, one suit has been selected as a test suit, and proceedings in the others stayed upon an undertaking by the several Defts to abide the result of the selected suit: *Foxwell v. Webster*, 4 D. J. & S. 77; *Amos v. Chadwick*, 4 Ch. D. 869, *sup.* p. 703. Although the order contained no express provision to that effect, the Court has power to substitute another of the actions as the test action, where the original action has by some accident failed to be a real trial of the matters in issue therein: *S. C.*, 9 Ch. D. 459; followed in *Bennett v. Ld. Bury*, 5 C. P. D. 339, where thirty-eight actions had been brought against the Defts as directors of a co. in respect of sums deposited for investment: and see *Colledge v. Pike*, 56 L. T. N.S. 124.

Upon neglect of Deft in a test action to appeal, another Deft in another action was substituted: *Briton Medical Life Assur. Soc. v. Jones*, 60 L. T. N.S. 637. And see *Bovill v. Crate*, 1 Eq. 388.

#### PREVALENCE OF PRACTICE.

The practice of consolidating proceedings has also been adopted:

- in the Privy Council, see *Re A. G. of Victoria*, L. R. 1 P. C. 147; *Hiddingh v. Denysen*, 12 App. Ca. 107;
- in the Q. B. Division, see *Chitty's Arch.* 407;
- in the Probate and Admiralty Division, see *The Melpomene*, L. R. 4 A. & E. 129; *The Helen R. Cooper*, L. R. 3 A. & E. 339; *The Never Despair*, 9 P. D. 34;
- in the Court of Bankruptcy, see *Exp. Mackenzie*, 20 Eq. 758; and B. Act, 1883, s. 106; *Lee & Wace*, 536, 538.



SECTION III.—REMOVAL OF CAUSES AND ACTIONS FROM AND TO  
INFERIOR COURTS—CERTIORARI.1. *Order for Removal of Cause from Equity Side of Mayor's Court into Chancery, under 20 & 21 V. c. 157, ss. 20 and 52—Consolidation of Causes—Receiver continued.*

"LET the above-mentioned cause of *B. v. P.*, now pending on the Equity side of the Mayor's Court of London, and the decree made in the said cause, and all proceedings had therein, be, pursuant to the provisions in that behalf of the Mayor's Court of London Procedure Act, 1857, removed from out of the Equity side of the said Mayor's Court into the Chancery Division of this Court, and be assigned to the V.-C. —; And Let the original proceedings filed in the said Mayor's Court of London, or office copies thereof, be brought into and placed on record in this Court, and filed with the record in the said cause of *N. v. P.*, 1875, N. 49; And Let the said cause be henceforth prosecuted, and the decree therein be carried into effect in this Court, as if the same had been originally made by this Court, and been intituled in both the said causes of *B. v. P.* and *N. v. P.*; And Let the said causes be consolidated, and be henceforth carried on as if they were one cause; And Let the conduct thereof and the carriage of the said decree be committed to the Plt *N.*; And Let the costs of all parties of both the said causes, including the costs of the motion of the Plt *N.* in *B. v. P.*, in the Mayor's Court, be costs in the said consolidated causes; And Let *E.*, the receiver appointed in the said cause of *N. v. P.*, be continued as receiver in the said consolidated causes."—Directions that the receiver leave in Chambers his annual account as receiver, and pay his balances into Court to the credit of the said consolidated causes of *N. v. P.*, 1875, N. 49, and *B. v. P.*, instead of in manner directed by the order dated &c.; And that the receiver appointed in *B. v. P.* be discharged, and that he pass his accounts and pay any balance certified to be due from him into Court to the credit of the said consolidated causes of *N. v. P.* &c., and *B. v. P.*; And that upon such payment, or if no such balance is due, his recognizance be vacated.—*Nothard v. Proctor* and *Blewitt v. Proctor* (in the Mayor's Court), V.-C. B., 16 Nov. 1875, B. 2872; *Vickers v. Stevens*, V.-C. B., 29 W. R. 562.

The proceedings in *Nothard v. Proctor* were not stayed, but were consolidated in order not to disturb the continuing receiver's security already given in that suit.

2. *Order for Writ of Certiorari on Ex parte Motion to remove Proceedings from the Mayor's Court into Chancery.*

UPON motion &c., Let a writ of certiorari issue directed to the Lord Mayor of the City of London and his brethren the Aldermen of the said city, commanding them to certify and remove (the bill of complaint

in the Plt's bill mentioned), with the process and all proceedings thereon, into this Court, and to stand to, observe, and perform such order and decree therein as the circumstances of the case shall require.—*Tracy v. The Open Stock Exchange*, L. C., 12 Dec. 1870, B. 3035.

For like order, and for service of the writ, and of the bill on the Deft's solr, see *Davies v. MacHenry*, L. C., 25 Nov. 1867, A. 2258; 3 Ch. 200.

For further order on *ex parte* motion that the writ and proceedings returned therewith be filed on the record; and that an inquiry be made whether the Plt is able to prove the suggestions made in the bill in Chancery, see *Davies v. MacHenry*, V.-C. W., 11 Jan. 1868, A. 41; 3 Ch. 202.

And for the final order, on summons to vary the certificate and *ex parte* motion to retain the bill, that the certificate be considered as varied by stating that the Plt has proved the suggestion made in her bill that neither the Plt nor the Deft were resident within the jurisdiction of the Mayor's Court; and that the said suit be retained, see *Davies v. MacHenry*, V.-C. W., 31 Jan. 1868, A. 202; 3 Ch. 202.

### 3. *Further Order to retain Suit in Chancery, on return of Writ, without Inquiry.*

UPON motion &c., Let the said writ and the proceedings returned therewith from the Mayor's Court of the City of London in a suit of *Billing and others v. Tracy and others*, instituted in that Court by the Defts F. B., G. H., and C. H., and the Open Stock Exchange, Limited, against the Plts &c., be filed on the record of this Court; and it appearing by the bill filed in the said Mayor's Court that the Plts (in that suit) are resident out of the jurisdiction of that Court, Let the said suit of *Billing and others v. Tracy and others* be retained in this Court.—*Tracy v. Open Stock Exchange*, V.-C. M., 22 Dec. 1870, B. 3129; 11 Eq. 556.

For the like order, see *Jones v. Hay*, V.-C. J., 20 July, 1869, A. 1964; S. C., 17 W. R. 996.

For a further order by consent after the removal, for transfer of a fund in Court in the cause in the Mayor's Court, into Chancery, see *Billing v. Tracy*, V.-C. M., 11 Jan. 1871, A. 73; 11 Eq. 557.

### 4. *Transfer from High Court to County Court.*

UPON motion by counsel for the Deft, and upon hearing counsel for the Plt, Let, pursuant to the 51 & 52 V. c. 43, s. 65, this action, which has been assigned to the V.-C. Sir J. Bacon, be transferred to the County Court of &c., holden &c.; and for that purpose Let the Plt, on or before &c., lodge with the registrar the documents necessary under the County Court Rules, O. xxxiii. 1, to complete such transfer; And Let all original documents filed herein be transmitted to the said County Court.—Costs of application at discretion of County Court Judge.—See *David v. Howe*, V.-C. B., 27 June, 1884, A. 904.

### 5. *Re-transfer from High Court to County Court.*

LET this cause (or action), which was instituted in the County Court of —, holden at —, and which was transferred to this Court by the

order dated the — day of —, be re-transferred to the said County Court of —, holden at —, and be carried on and prosecuted in the said County Court [(if so) notwithstanding the subject-matter thereof exceeds the limit in point of amount to which the jurisdiction of the County Courts is limited by the 28 & 29 V. c. 99].

For like order by consent, see *Evans v. Hicks*, Field, J., in Chambers, 22 Aug. 1876, A. 1627.

It is not necessary to add a direction to the masters to return the papers: *Hartley v. Barber*, V.-C. M., 23 Jan. 1873, A. 61.

*6. Certiorari Nisi to remove Action from County Court to High Court.*

UPON the appeal of P. and L., this day made unto this Court from the order dated &c., and upon hearing counsel for the appellants, Let, unless the Plt S. do on the — day of —, 188—, or so soon thereafter as counsel can be heard, show sufficient cause to the contrary before the Court of Appeal, a writ of certiorari issue to remove this action into the Chancery Division of the High Court of Justice, on the ground that the said action raises a question of the validity of a certain contract for sale of real estate, and that an action is pending in the said Chancery Division, in which the appellants are Plts and the said S. is a Deft, for specific performance of the same contract.—*Simons v. Pearce*, C. A., 12 March, 1885, B. 343.

*7. Certiorari to remove Complaint from County Court to the High Court.*

UPON the application by originating summons of the Deft A., and upon hearing solrs for the applicant and for the respondents B. and C.; And the Judge being of opinion that it is desirable that the said matter should be tried in the High Court, doth, pursuant to 51 & 52 V. c. 43, s. 126, order that a writ of certiorari issue to remove the said complaint, No. &c., between &c., from the County Court of &c., holden at &c., into the Chancery Division of this Court; And the masters of the Supreme Court of Judicature are to receive and file the same; And Let the said complaint when removed be assigned to Mr. Justice Chitty, and be continued and prosecuted in this Court in the same manner as if it had been originally commenced therein and assigned to the said Judge.—*Haymen v. Cooper*, Chitty, J., 20 May, 1890, A. 758.

*8. Certiorari Absolute in the First Instance to remove Action after Judgment from County Court to High Court.*

UPON the application of C. and B., and upon hearing the solr for the applicant, and upon reading &c., Let a writ of certiorari issue to remove the complaint between the said C. and B. as Plts against R. as Deft, from the County Court of Sussex, holden at Brighton, together with the record of the judgment thereon obtained in the said Court, into the Chancery Division of this Court, and the masters of the

Supreme Court of Judicature are to receive and file the same.—*Chipperfield v. Rust*, M. R. at Chambers, 18 November, 1879, A. 2174.

9. *Cause to proceed in County Court notwithstanding Subject-matter exceeds Limit.*

By consent, Let this suit be carried on and prosecuted in the County Court of &c., holden at —, notwithstanding the subject-matter thereof exceeds the limit in point of amount to which the jurisdiction of the County Courts is limited by the 28 & 29 V. c. 99.—*Tiffin v. Mains*, V.-C. M., at Chambers, 7 March, 1876, B. 566.

10. *Further Proceedings to be taken in County Court.*

USUAL admon decree.—Liberty to apply.—“And all further proceedings in this matter and cause are to be taken in the County Court of —, holden at —.”—*Re Lesler, Ward v. L.*, M. R., 11 Dec. 1871, B. 3163.

11. *The Like, in Winding-up.*

“AND Let all subsequent proceedings in such winding-up be had in the County Court of —, holden at —.”—*Re Birkenhead Building Society*, V.-C. B., 16 March, 1872, A. 620.

NOTES.

REMOVING PROCEEDINGS FROM INFERIOR COURT—CERTIORARI.

For the practice as to bills of *certiorari* in Chancery where an equitable right was sued for in an inferior Court, and by reason of the limited jurisdiction the Deft could not have complete justice, or the cause was not within such jurisdiction, see Dan. Pr. 1909; L. Red. p. 60 (ed. 1847).

And as to the bond to be entered into, and where the facts do not appear, the inquiry whether the suggestions of the bill were proved, see Dan., 5th ed., p. 1431; and as to obtaining the certificate enlarging the time, and applying to vary it, see *Ib.* 1432, and *Davies v. MacHenry*, 3 Ch. 200, and cases there cited; and see Lord Bacon's Orders, r. 19; 1 Sanders, 112.

Under the Jud. Acts the proceeding by bill of *certiorari* is abolished by O. 1. 1; and the practice as to issuing this writ in Chancery is now similar to that of the other Divisions of the High Court: see *Re Royal Liver Friendly Soc.*, 35 Ch. D. 332.

For the practice hitherto followed as to issuing this writ, the effect of which is instantly to suspend the power of the inferior Court in the cause which it removes; and the proceedings under it in the Superior Courts of Common Law at Westminster; and for the form of the writ, and in what cases bail is required, and when leave to issue the writ is necessary, see *Ib.* Chit. Arch. 1557, &c.

As to quashing the writ of *certiorari* and awarding a *procedendo*, which is a judicial writ issuing from the superior Court commanding the Judge of the County Court to proceed with the cause, see Chit. Arch. 1560.

As to the removal of complaints from the County Courts by *certiorari* or otherwise, see Chit. Arch. 1562; Pollock & Nicol's County Court Practice, 230.

And as to removing causes from inferior Courts after judgment for the purpose of obtaining execution only, see Chit. Arch. 1569; 51 & 52 V. c. 43, s. 151, *inf.* p. 713.

When so removed, the superior Court has no jurisdiction to inquire into the merits or the regularity of the proceedings below: *Williams v. Bolland*, 1 C. P. D. 227.

For the forms of the affidavit to obtain a *certiorari* from a superior to an inferior Court, and of the writ, and other proceedings thereunder, see Chitty's Forms, 798—817.

As to the removal of a cause from an inferior Court by writ of *habeas corpus*, where the Deft is in custody, see Chit. Arch. p. 1555.

Proceedings in an action commenced against a friendly society in the County Court by members for a declaration that a payment was *ultra vires* were removed by *certiorari*, the provisions in the Friendly Societies Act, 1875, ss. 22 (d) and 30, sub-s. 10, as to reference of disputes to the County Court, being held to be permissive only: *Re Royal Liver Friendly Society*, 35 Ch. D. 332.

#### AS TO THE MAYOR'S COURT.

By the Mayor's Court of London Procedure Act, 1857 (20 & 21 V. c. clvii.), s. 16, no cause in which the debt or damages shall not exceed £50 is to be removed by Deft before judgment into any of the superior Courts, except by a Judge's order, or on giving security; but the Judge may direct a *certiorari* to issue without security; and as to such removal, see sects. 17, 18, 19.

By sect. 54, "superior Courts" mean any of Her Majesty's Superior Courts of Common Law at Westminster; but by the Jud. Act, 1873, s. 16, this jurisdiction is transferred to the High Court of Justice, and may be exercised by any Division thereof.

By the 20 & 21 V. c. clvii. s. 20, no suit on the Equity side of the Mayor's Court is to be removed into Chancery without the special order of the L. C., M. R., or one of the V.-C.'s, on application for that purpose; nor then, if the Judge considers the question fit to be tried in the Mayor's Court. By the same section the M. R. is empowered to make rules regulating the removal of such suits. No such rules have been issued: *Candy*, 62.

By sect. 52, no cause is removable from the Court otherwise than by *certiorari*, or by the order of a Judge of a superior Court, or by special order of the L. C., M. R., or one of the V.-C.'s; and every writ of *certiorari* is to be returnable immediately. For the practice as to the removal of causes from, and generally as to proceedings in, the Mayor's Court, see *Candy's Practice*, 63.

The Plt, upon obtaining the writ of *certiorari*, was put upon an undertaking to justify the issuing the writ; and an inquiry was directed whether Plt had proved the suggestions in his bill: *Davies v. MacHenry*, 3 Ch. 202. But if the want of jurisdiction as to parties or subject-matter appears on the face of the proceedings in the inferior Court, the writ of *certiorari* will, it seems, be granted, and an order made *ex parte*, without further evidence or any reference to Chambers, that the suit in the Mayor's Court be retained in Chancery: *Tracy v. Open Stock Exchange*, 11 Eq. 556; *Jones v. Hey*, 17 W. R. 996. The more convenient course, however, under the above Act is to move at once for the removal of the cause, as in *Nothard v. Proctor*, *sup.* p. 707, and the motion should, as in that case, be on notice.

Under the old practice, and also in *Davies v. MacHenry*, *sup.*, the writ of *certiorari* issued from the Petty Bag Office (now merged in the Central Office: R. S. C., Jan. 1889), the proceedings in which were regulated by the 12 & 13 V. c. 109; but in *Jones v. Hey*, and *Tracy v. Open Stock Exchange*, *sup.*, the writ issued from the Record and Writ Office.

As to removal of a judgment in the Mayor's Court, whether under or over £20, into the superior Court for the purposes of execution, see sect. 48 of the 20 & 21 V. c. clvii.; *Paine v. Slater*, 11 Q. B. Div. 120.

And see Dan. Ch. Pr. 1919 *et seq.*

#### COUNTY COURT—TRANSFER FROM HIGH COURT TO COUNTY COURT.

By County Courts Act, 1888 (51 & 52 V. c. 43), s. 69, any action or matter pending in the Chancery Division which might have been commenced in a County Court, may, on the application of any of the parties in Chambers to the Judge to whom the action or matter is attached, be transferred to the

County Court in which the same might have been commenced, and the proceedings are thereupon to be carried on in the County Court, with the usual right of appeal.

After an order for transfer has been made the High Court retains jurisdiction until the transfer has been completed by all necessary steps: *David v. Howe*, 27 Ch. Div. 533.

Where, in any action of contract brought in the High Court, the claim indorsed on the writ does not exceed £100, or where such claim, "though it originally exceeded £100, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding £100," either party may at any time, on application in Chambers, obtain an order that such action be tried in the County Court, unless there is good cause to the contrary (51 & 52 V. c. 43, s. 65).

The "payment" reducing the claim must be payment before action brought: *Hodgson v. Bell*, 24 Q. B. Div. 525; and see *Fisher v. Underwood*, 3 Ex. D. 1; *secus*, under the repealed Act (19 & 20 V. c. 108), where the words were "payment, payment into Court, admitted set-off, or otherwise": *Gray v. Hopper*, 21 Q. B. Div. 246.

Any action of tort, upon affidavit by any person sued, "that the Plt has no visible means of paying the costs of the Deft should a verdict be not found for the Plt," may be sent to the County Court, unless the Plt gives full security for costs, or satisfies the Judge that he has a cause of action fit to be prosecuted in the High Court: 51 & 52 V. c. 43, s. 68.

For a transfer under 30 & 31 V. c. 142, s. 8, of a cause from Chancery to the County Court, see *Linford v. Gudgeon*, 6 Ch. 359.

The jurisdiction of the County Court is only concurrent, and not exclusive: *Scotto v. Heritage*, 3 Eq. 212; *Brown v. Rye*, 17 Eq. 343; and therefore, in the absence of some special reason, a transfer will not be directed: *Picard v. Hine*, 18 L. T. N.S. 705; and see *Maulesley v. M.*, *Ib.* 51; *Simons v. McAdam*, 6 Eq. 324; *Crozier v. Dowsett*, 31 Ch. D. 67.

By the Jud. Act, 1873, s. 67 (and the County Courts Act, 1888, s. 187), sects. 65, 66 and 69 of the County Courts Act, 1888, are rendered applicable to "all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a County Court."

The enactment is to be construed so as to extend, rather than limit, the powers of the Court: see *Stokes v. S.*, 19 Q. B. Div. 419, where it was held that an action of slander, though it could not be commenced in the County Court, might be remitted there.

And see Dan. Ch. Pr. 1913 *et seq.*

#### TRANSFER FROM COUNTY COURT TO HIGH COURT.

By the County Courts Act, 1888 (51 & 52 V. c. 43), s. 67, the jurisdiction of the County Court in actions or matters for admon of estates, execution of trusts, foreclosure, redemption, or enforcement of charges, specific performance, or reformation, delivery up, or cancellation of agreements for sale, purchase or lease, under the Trustee Relief Acts or Trustee Acts, as to the maintenance or advancement of infants, as to partnership, or relief against fraud or mistake, extends to cases in which the subject-matter as defined by the Act does not exceed £500 in amount or value, as the case may be.

By sect. 68, if, during the progress of any such action or matter, it is made to appear to the Judge that the subject-matter exceeds the prescribed limit, the validity of any order already made is not to be affected, but it becomes the duty of the Judge to direct the action or matter to be transferred to the Chancery Division; and the whole of the procedure in the action or matter when so transferred is to be regulated by the rules of the Supreme Court. But any party may apply to a Judge of the Chancery Division at Chambers for an order authorizing and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in amount, and the Judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or on default of appearance of all or any of them, shall have full power to make such order.

By the County Courts Act, 1888, s. 124, no judgment or order of a County Court Judge, nor action or matter in his Court, is to be removed by *certiorari* or otherwise into any other Court whatever, except in the manner in the Act mentioned. By sect. 126, the High Court or a Judge thereof is empowered to order the removal into the High Court, by writ of *certiorari* or otherwise, of any action or matter commenced in the County Court, if it is deemed desirable that the action or matter should be tried in the High Court, and any terms may be imposed as to payment of costs, giving security or otherwise. By sect. 129, the grant of an order or summons to show cause why a writ of *certiorari* should not issue, is, if the High Court or Judge so directs, to operate as a stay of proceedings, until determination of such order or summons or further order. By sect. 132, when the grant of a writ of *certiorari* has been refused by the High Court or Judge, no other Court or Judge may grant such writ, but this does not affect the right of appealing, or of making application for the writ on different grounds.

By Jud. Act, 1873, s. 90, it is provided that where in any proceeding before any inferior Court any defence or counter-claim of the Deft involves matter beyond the jurisdiction of such Court, it shall be lawful for the High Court, or any Division or Judge thereof, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the registrar or other proper officer of the inferior Court to the High Court; and the same shall thenceforth be continued and prosecuted in the High Court as if it had been originally commenced therein. Accordingly, in an action commenced by plaintiff in the County Court and transferred to the Chancery Division, the Plt is not entitled to discovery and production except according to the rules and practice of the High Court: *Davies v. Williams*, 13 Ch. D. 550.

The practice as to the transfer of proceedings from the County Court to the High Court under these provisions is now regulated by County Court Rules, 1889, O. xxxiii.

For instances of a transfer from the County Court to the Court of Chancery, under 28 & 29 V. c. 99, s. 3, see *Baker v. Wait*, 9 Eq. 103; *Birks v. Silverwood*, 14 Eq. 101; *Thomson v. Flinn*, 17 Eq. 415.

The effect of the order of transfer is to put an end to the jurisdiction of the County Court Judge, who cannot, after directing a transfer, go on to give directions as to the costs: *Hares v. Lea*, 10 Eq. 683.

So, also, when a testamentary cause had been transferred from the Probate to the County Court, the Probate Court had no power to make an order as to costs incurred before the transfer: *Macleur v. M.*, L. R. 1 P. & M. 604.

By the County Courts Act, 1888, s. 151, if a Judge of the High Court is satisfied that a party against whom a County Court judgment for more than £20 has been obtained has no goods or chattels which can be conveniently taken in satisfaction, he may order a writ of *certiorari* to issue to remove the judgment into the High Court, and when so removed it is to have the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of the High Court.

## CHAPTER XXXV.

CASE SENT FOR THE OPINION OF A FOREIGN COURT—  
22 & 23 V. c. 63, OR 24 & 25 V. c. 11.

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1. *Where directed to be settled in Chambers.*

LET a case be prepared setting forth the facts; And Let such case and the questions of Scotch law arising out of the same be settled by the Judge, for the purpose of ascertaining whether &c.; And Let such case and questions, when so approved and settled, be remitted to the Court of &c.; And the said Court is hereby desired to give its opinion on such questions upon the law administered by the said Court as applicable to the facts to be set forth in such case.—Adjourn &c.

For order directing case on questions of Scotch law to be settled, and remitted to the Court of Session, being the Superior Court of Scotland, see *Lord v. Colvin*, V.-C. K., 12 June, 1860, B. 1237, 1 Dr. & S. 24; 8 W. R. 201.

And for similar order as to further questions, without prejudice to the former order, see *Lord v. Colvin*, V.-C. K., 3 March, 1865, B. 463.

For like order as to the validity of a deed of appointment according to Scotch law, see *Topham v. D. of Portland*, 1 D. J. & S. 578; and further order, *Ib.* 580.

2. *Where Questions under Order arose in Chambers.*

UPON application adjourned from Chambers [Form 4, p. 272], This Court doth order that the case and questions of (Hindoo) law arising out of the same which have been approved and settled by the Judge, and are set forth in the schedule to this order, be remitted to (Her Majesty's Supreme Court of Judicature in Bengal); And the said Court is hereby desired to pronounce its opinion on the questions contained in the said schedule upon the law administered by the said Court as applicable to the facts set forth in the said case.

For order directing case for opinion of High Court of Judicature, Bengal, see *Login v. Princess of Coorg*, 30 Beav. 632, 15 Feb. 1862.

The above forms apply also to foreign Courts.

3. *The Like—where Order made in Chambers.*

LET the case and questions of Scotch law arising out of the same, which have been approved and settled by the Judge, and are identified by the signature of the chief clerk, together with a print of the



pleadings, the judgment, dated &c., and copies of the contract of marriage dated &c., and of the will of B., and two codicils thereto referred to in such case, and respectively identified by the initials of the chief clerk, and by the signature of the solrs to the parties, be remitted to the Court of Session in Scotland; And the said Court (acting by either of its divisions), is hereby desired to pronounce its opinion on such questions upon the law administered by the said Court as applicable to the facts set forth in the said case.—*Heron-Maxwell v. Stopford-Blair*, 13 Nov. 1871, B. 2884.

For similar order on petition, and the further hearing to stand over till after the return, with liberty to apply, see *Cooper v. Benn*, V.-C. Hall, 19 Nov. 1875, A. 1998; *Dykes v. Jamieson*, M. R., 10 Nov. 1875, A. 1680.

#### 4. Order remitting Case back for Error.

THIS action coming on for further consideration &c., and upon hearing the judgment &c., and the opinion of the High Court of &c., in &c., upon the case and questions of (Hindoo) law submitted to the said Court pursuant to the said order dated &c., read; And it being suggested that an error has by accident crept into the answer contained in such opinion to the 8th of such questions, and that the words "her heirs" have, by a clerical error, been substituted for "his heirs"; Let the hearing of this action on further consideration stand over: And Let the said case and opinion be remitted back to the said Court of &c., in &c.; And the said Court is hereby requested to pronounce a further opinion on the 8th of such questions upon the law administered by the said Court as applicable to the facts contained in the said case.—*Login v. Princess of Coorg*, M. R., 29 April, 1864, B. 1086.

#### 5. Order on Case sent from Scotland—22 & 23 V. c. 63, s. 1.

UPON the petition of A. B., C. D. &c., and upon hearing counsel for the Petr and for the respondents, and upon reading the said petition, the case approved by the Lord Ordinary in an action of multiple pointing and exoneration, in the first division of the Court of Sessions at the instance of A. B., pursuer and real raiser, and E. F., defender, and an interlocutor dated &c. in the same action, remitting the same to the Chancery Division of the High Court of Justice in order that an opinion of the Court might be obtained upon the questions of law stated in the case.—Declare &c.—*Re Sprot*, Chitty, J., 30 March, 1887, B. 505.

#### NOTES.

By the 22 & 23 V. c. 63, s. 1, in any action within H. M.'s dominions, the Court may have a case prepared setting forth the facts, and settle the questions of law, and make an order remitting the same to a superior Court in any other part of H. M.'s dominions for its opinion; and any party may by petition obtain the opinion of such Court; by sect. 2, copies of such opinion are to be certified by its officer; by sect. 3, any party may lodge such copy with the Court sending the case, and give notice of motion to act upon

it; and such Court may act on it, as on a case reserved or special verdict, or, if before trial, submit it, as there mentioned, to a jury; by sect. 4, if such action is appealed to H. M. in Council, or the House of Lords, such opinion may be reviewed, if a judgment of the Court may be; sect. 5 defines "action" and "superior Courts."

Under this Act the Court has declined to decide on a case sent from Scotland on a point on which the Scotch law was the same: *Brodie v. Johnson*, 30 Beav. 129.

The 24 & 25 V. c. 11, is a similar Act, for better ascertaining the law of any foreign State or country with whom H. M.'s Government may have made a convention for that purpose, when pleaded in Courts within H. M.'s dominions.

## CHAPTER XXXVI.

## APPEALS.

1. *Order on Appeal.*

UPON the appeal of &c., this day [*or, if standing for judgment, on the — day of —*] made unto this Court by counsel for &c., from the judgment [*or order*], dated &c. [*or if from part only—that the judgment [*or order*], dated &c., or so much of the judgment &c., as directs &c., might be varied by &c.*]; And upon hearing counsel for the appellant and for &c., And upon reading &c., This Court [*if standing for judgment*]—did order that the said appeal should stand for judgment; And the same standing this day in the paper for judgment in the presence of counsel on both sides, This Court] doth order—

*If the judgment &c. is affirmed*—that the said judgment [*or order*], dated &c., be affirmed.

*If the judgment &c. is discharged*—that the said judgment [*or order*], dated &c., be discharged; And it is ordered &c. [*add consequent directions, if any*].

*If the judgment &c. is materially varied in form*—that the said judgment [*or order*], dated &c., be varied, and, as varied, be as follows, that is to say &c.

*If the judgment &c. is partially varied*—that the said judgment [*or order*], dated &c., be varied so far as the same directs &c.; And it is ordered that instead thereof &c. [*or be varied by omitting the (declaration) that &c.*]; And it is ordered that &c. [*add any consequent directions*]; And it is ordered that with this variation the said judgment [*or order*], dated &c., be affirmed.

*If accounts or inquiries are varied*—that the said judgment [*or order*], be varied; And instead of the accounts and inquiries thereby directed [*or specify any account or inquiry to be omitted*], it is ordered that the following accounts and inquiries be taken and made, that is to say &c.

*If accounts or inquiries are added*—that the said judgment [*or order*], dated &c., be varied; And it is ordered that, in addition to the directions therein contained, the following further accounts and inquiries be taken and made, that is to say &c. And the further consideration &c. is adjourned.

*Costs.*—And it is ordered that (the Deft) B. do pay to (the Plt) A.

his costs [*if so of this action and*] occasioned by this appeal, such costs to be taxed by the taxing master.

*If deposit made by way of security.*—And it is ordered that the sum of £— in Court to the credit &c., “Security for costs of the (Plt’s) appeal,” be paid to (the Plt) A. [*or to (the Deft) B. on account of his costs of this appeal; And it is ordered that the costs of (the Deft) B. of this appeal be taxed &c., and that the (Plt) A. do pay to (the Deft) B. the balance of his said costs after deducting the sum of £— mentioned in the schedule hereto.*—*[Add Payment Schedule, Form 44.]*

### 2. *Appeal dismissed, Appellant not appearing.*

THE appeal of (the Plt) from the judgment [*or order*], dated &c., standing this day in the paper to be heard before this Court in presence of counsel for (the Deft), And no one appearing for (the Plt) in support of the said appeal, And upon hearing counsel for the said Deft, This Court doth order that the said appeal do stand dismissed out of this Court with costs, to be taxed by the Taxing Master, and that (the Plt) A. do pay to (the Deft) B. the amount of his costs when taxed.

### 3. *Appeal from an Order made in the Chancery of the County Palatine of Lancaster.*

UPON the appeal of H. this day made unto this Court from the order dated &c., made in the Chancery of the County Palatine of Lancaster (Manchester District), And upon hearing &c., This Court doth order &c. [Form 1, p. 717.]—*Re Manchester Corp. Waterworks Act*, C. A., 16 Feb. 1878, A. 321.

The costs of the hearing in the County Palatine Court are taxed by the district registrar of that Court; but the costs of an appeal are taxed by the taxing master of the Supreme Court: see *Kevan v. Crawford*, Form 5, *inf.*; and the practice on such an appeal is in all respects regulated by O. LVIII.: *Lee v. Nuttall*, 12 Ch. Div. 61.

### 4. *Appeal from an Order of the Vice-Warden of the Stannaries.*

UPON the appeal of A., this day made unto this Court from the order of the Vice-Warden of the Stannaries of Cornwall and Devon, dated &c.; And upon hearing &c., This Court doth order that the said order dated &c., be affirmed; And it is ordered that the said A. do pay to B. (*official liquidator*) his costs of this appeal, such costs to be taxed by the Taxing Master.—See *Re West Jewell Mining Co.*, C. A., 4 Feb. 1879, B. 252.

### 5. *Order on Cross-Appeal—O. LVIII. 6—Costs in County Palatine of Lancaster.*

UPON the appeal of the Plt this day made unto this Court that the judgment dated &c., made on the hearing of this cause by the Vice-

Chancellor of the County Palatine of Lancaster might be varied by &c., And upon hearing &c., And the Defts C. and E., his wife, having given notice to the said Plt and to the Defts F. and H., pursuant to the 6th rule of O. LVIII. of the Rules of the Supreme Court, of their intention to contend that the said judgment should be varied by &c., This Court doth order that the said judgment, except such part &c. (*directions for taxation by the District Registrar of the costs of C. and E. of the original hearing as between solr and client*), be discharged, and that the Plt's action do stand dismissed out of this Court as against all the Defts, and as respects the Defts C. and E., his wife, and the Defts F. and H., with costs; And it is ordered that the Appellant, the Plt K., do pay to the Deft E. the amount of his costs when taxed, together with their further costs occasioned by this appeal and by the said Deft having given the said notice pursuant to the said 6th rule of O. LVIII., such last-mentioned costs to be taxed by the Taxing Master.—Plt K. to pay to Defts F. and H. their costs of the hearing and of the appeal.—*Kewan v. Crawford*, C. A., 22 June, 1877, A. 1625; 6 Ch. Div. 29.

For an order on appeal, with direction to tax the Plt (appellant) his costs of suit and of the appeal, including therein the costs of transcribing the shorthand writer's notes, and of printing such notes and the evidence for the purposes of the appeal, the Deft to pay such costs when taxed, see *Biggsby v. Dickinson*, C. A., 20 Nov. 1876, A. 2033; 4 Ch. Div. 24.

Where costs of shorthand notes are given by the Court of Appeal, the order should extend to "costs of the appeal and of shorthand notes of the evidence and judgment": *Singer, &c. Co. v. Loog*, 31 W. R. 392.

#### 6. Order extending Time for appealing.

UPON motion this day made &c., by counsel for (the Plt); And upon hearing &c., And upon reading the judgment [*or order*], dated &c., an affidavit &c., This Court doth, notwithstanding that the time limited by the 15th rule of O. LVIII. of the Rules of the Supreme Court for giving notice of appeal from the said judgment [*or order*] has expired, order that (the Plt) be at liberty within — days from this time to give such notice of appeal.—[*Add directions as to costs, if any.*]

For order where the time for appealing was extended at the hearing, formal notice of a motion for that purpose being waived, see *Re Baillie's Trusts*, C. A., 10 Feb. 1877, A. 599; 4 Ch. Div. 785.

For order refusing a motion for special leave to appeal after the proper time, see *Craig v. Phillips*, C. A., 19 Dec. 1877, A. 2280; 7 Ch. Div. 249; *Edaile v. Payne*, 40 Ch. Div. 52.

For order dismissing an appeal not set down in due time, see *Re Mansel, Rhodes v. Jenkins*, C. A., 20 Feb. 1878, B. 379; 7 Ch. Div. 711.

And for subsequent order refusing a motion to extend the time for bringing a fresh appeal, see *S. C.*, C. A., 27 Feb. 1878, B. 399; 7 Ch. Div. 712.

For order dismissing an appeal which had been set down after the proper time by special leave, and without prejudice to any objection, see *Re National Funds Assurance Co.*, C. A., 6 Dec. 1876, B. 1988; 4 Ch. Div. 305.

And for order refusing a motion to advance the hearing of a fresh appeal, and to stay proceedings in the meantime, the second appeal having been set down by a similar order, and the objection of time being taken on the hearing of the motion, see *S. C.*, C. A., 13 Dec. 1876, B. 1988; 4 Ch. Div. 308.

7. *Appeal—Leave to amend on Terms.*

UPON motion &c. by counsel for the Plts, and upon hearing counsel for the Defts, Let the Plts be at liberty on or before &c., to introduce by amendment into their statement of claim the words "And the said Spence's Patent is invalid on the grounds stated in the particulars of objections to be delivered with their amendment"; and the Plts by their counsel undertake, if they so amend, to allow the Defts on the question of the validity of the patent, to begin and have a reply; And Let the Plts, if they so amend, pay to the Defts their costs occasioned by this appeal to be taxed &c. as between solr and client, and also all costs incurred by the Defts and thrown away in consequence of the amendment hereby authorized not having been made on the day after the date of the order dated &c., including the costs (if any) caused by any adjournment of the action rendered necessary by reason of the said amendment being made or authorized, such costs to be taxed &c., as between solr and client; And if the Plts do not amend their statement of claim as hereinbefore authorized, Let the Plts pay to the Defts their costs occasioned by this appeal.—*Kurtz v. Spence*, C. A., 5 August, 1887, A. 1385.

## NOTES.

## JURISDICTION OF THE COURT OF APPEAL.

By the Jud. Act, 1873, s. 4, the Court of Appeal is to have and exercise appellate jurisdiction, with such original jurisdiction as after mentioned as may be incident to the determination of any appeal. By sect. 18, there is transferred to this Court all jurisdiction and powers of the L. C. and Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy; of the Court of Appeal in Chancery of the County Palatine of Lancaster; of the Court of the Lord Warden of the Stannaries and his assessors; of the Court of Exchequer Chamber; and of the Privy Council on appeal from any judgment of the High Court of Admiralty; or from any order in Lunacy.

And by sect. 19, the Court has jurisdiction to hear and determine appeals from any judgment or order of the High Court, or any Judge or Judges of it, subject to the provisions of the Act and Rules of Court, and for the purposes of the hearing and determination of any appeal, and of the amendment, execution, and enforcement of any judgment or order made on any such appeal, has all the power, authority and jurisdiction vested by the Act in the High Court of Justice.

As to the meaning and effect of the section, and the jurisdiction conferred by it in cases of *habeas corpus*, see *Cox v. Hakes*, 15 App. Cas. 506, 528, 529; *Reg. v. Barnardo, Jones' case*, (1891) 1 Q. B. (C. A.) 194.

Where a person has been discharged from custody under an order for a *habeas corpus*, there can be no appeal: *Cox v. Hakes*, *sup.*; but an appeal lies from an order of the Q. B. Division for *habeas corpus* to bring an infant before the Court, in order to the determination of the right to custody: *Reg. v. Barnardo, Jones' case*, *sup.*

The original jurisdiction of the Court of Appeal is purely incidental to its appellate jurisdiction: *Flower v. Lloyd*, 6 Ch. Div. 297, 301; *Glover v. Greenbank, &c. Co.*, W. N. (76) 157; *Falcke v. Scottish Imperial Ins. Co.*, 57 L. T. N.S. 39; 35 W. R. 794 (where the question was considered whether the jurisdiction of the old Court of Chancery to entertain an application for leave to institute proceedings by way of bill of review has been taken away); and accordingly, on an appeal from a winding-up order, the Court of Appeal

cannot hear an original winding-up petition by another creditor together with the appeal: *Re Dunraven, &c. Co.*, 24 W. R. 37; and see *Brown v. Collins*, 25 Ch. D. 57.

The appellate jurisdiction conferred by these sections is wholly unaffected by the enrolment of any judgment or order, as enrolment no longer affects the right of appeal: *Hastie v. H.*, 2 Ch. Div. 304; and the Court of Appeal has no jurisdiction to order an enrolment to be vacated, this power now belonging to the L. C. alone: *Allan v. El. Telegraph Co.*, 24 W. R. 898.

By O. LVIII. 1, all appeals are to be by way of rehearing. The power of rehearing is now part of the appellate jurisdiction, and no Judge of the High Court has any power to rehear an order: *Re St. Nazaire Co.*, 12 Ch. Div. 88.

And the Court of Appeal grants relief according to the law in force at the time of the hearing of the appeal: *Quilter v. Mapleson*, 9 Q. B. Div. 672.

Appeals from judgments by default will not in general be entertained, as the party against whom judgment has been given in his absence can apply to the Court of first instance: *Vint v. Hudspeth*, 29 Ch. Div. 322.

The Court of Appeal does not regard itself as bound by a previous decision as to which the Judges of appeal were equally divided: *The Vera Cruz*, 9 P. Div. 96.

By the Arbitration Act, 1889, s. 17, the Court of Appeal has all the powers conferred by the Act on the Court or a Judge as to references under orders of the Court.

By the Chancery of Lancaster Act, 1890, s. 3, the jurisdiction of the Lancaster Chancery Court is assimilated to that of the High Court, and by sect. 4, the Court of Appeal is, as to all judgments and orders of the Lancaster Chancery Court, to have the like appellate and original jurisdiction as the Court of Appeal now has or may have under any future Act of Parliament not enacting to the contrary with respect to judgments and orders of the High Court or any Judge thereof.

As to appeals from the Court of Chancery of the County Palatine of Durham, see Palatine Court of Durham Act, 1889, and as to appeals from the Railway Commissioners, Railway and Canal Traffic Act, 1888, and R. S. C., 10th April, 1889.

Section 19 of the Jud. Act gives an appeal from every judgment or order of the High Court, with the following exceptions (see *R. v. Walsall*, 3 Q. B. Div. 457, 460):—

**1. Jurisdictions final by Statute.**—By the Appellate Jurisdiction Act, 1876 (39 & 40 V. c. 59), s. 20, no appeal is to lie from the High Court or any Judge thereof to the Court of Appeal in cases where it is provided by Act of Parliament that the decision of any Court or Judge, whose jurisdiction is transferred to the High Court, shall be final.

By Jud. Act, 1881 (44 & 45 V. c. 68), s. 9, appeals under the Divorce Act (20 & 21 V. c. 85), s. 55, are to be brought to the Court of Appeal (thereby substituted for the full Court of Divorce), whose decision is to be final, except when the decision is upon the grant or refusal of a decree on petition for dissolution or nullity, or for a declaration of legitimacy, or upon a question of law on which the Court of Appeal gives leave to appeal.

**2. Appeals from Inferior Courts.**—By the Jud. Act, 1873, s. 45, the determination of appeals from inferior Courts by a Divisional Court is to be final, unless special leave to appeal is given by the Divisional Court.

The provisions of this section are not affected by the Appellate Jurisdiction Act, 1876, s. 20: *Crush v. Turner*, 3 Ex. Div. 303; *Thomas v. Kelly*, H. L. 37 W. R. 353.

The Mayor's Court being an inferior Court (*Mayor, &c. of London v. Cox*, L. R. 2 H. L. 239), no appeal lies from the decision of a Divisional Court on an appeal from the Mayor's Court, unless by special leave: *Appleford v. Judkins*, 3 C. P. Div. 489.

As to appeals from the Mayor's Court on demurrers, see *Mors le Blanche v. Reuter's Telegram Co.*, 34 L. T. N.S. 691.

An appeal will lie with the leave of the Q. B. Division from an order of that Division upon a writ of *certiorari*, affirming an order of quarter sessions as to the validity of a rate: *Walsall Overseers v. L. & N. W. Ry. Co.*, 4 App. Ca. 30, reversing *R. v. Walsall*, 3 Q. B. Div. 457.

An appeal will not lie from an order of the Divisional Court refusing leave to appeal from a County Court: *Kay v. Briggs*, 22 Q. B. Div. 343.

By O. LIX. 4, "every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine appeals from inferior Courts, under sect. 45 of the principal Act. All such appeals (except Probate and Admiralty appeals from inferior Courts, and from justices, which shall be to a Divisional Court of the Probate, Divorce, and Admiralty Division) shall be entered in one list by the officers of the Crown Office Department of the Central Office, and shall be heard by such Divisional Court of the Queen's Bench Division as the Lord Chief Justice of England shall from time to time direct."

**3. Criminal Matters.**—By the Jud. Act, 1873, s. 47, no appeal lies from any judgment of the High Court in any criminal cause or matter, except for some error of law apparent on the record, as to which no question shall have been reserved.

The provision has reference not to the criminality of the act which originates the proceedings, but to the fact of the cause or matter in which the order is made being in the nature of a criminal proceeding: *Reg. v. Barnardo*, 23 Q. B. Div. 305.

"The intention of the Judicature Act was that the Court of Appeal should not interfere with the criminal procedure of the country:" *Ex parte Schofield*, 39 W. R. 581, *per* Bowen, L. J.

This section is not confined to appeals from the High Court when sitting as a Court for the consideration of Crown cases reserved, but extends to all criminal cases; and therefore it has been held that there is no appeal from an order of the Q. B. Division, discharging a rule to review a taxation of the costs of the Defts upon a criminal information: *R. v. Steel*, 2 Q. B. Div. 37; or discharging a rule for a *certiorari* to bring up to be quashed a summary conviction for trespass in pursuit of game: *R. v. Fletcher*, 2 Q. B. Div. 43; or from a decision of the Divisional Court, reversing a conviction for keeping a common gaming-house, even though the Divisional Court has granted leave to appeal in accordance with sect. 45: *Blake v. Beech*, 2 Ex. Div. 335; or refusing to grant a mandamus to compel a magistrate to state a case in proceedings as to a nuisance under the Public Health Act, 1875: *Ex parte Schofield*, (1891) 2 Q. B. (C. A.) 428; or from an order of justices under the Public Health Act, 1875, directing works to be done for the abatement of a nuisance: *Reg. v. Whitchurch*, 7 Q. B. Div. 534; or an information for contravening the bye-laws of a school constituted under the Elementary Education Act, 1870 (33 & 34 V. c. 75): *Mellor v. Denham*, 5 Q. B. Div. 467.

But informations in the nature of *quo warranto* (*R. v. Collins*, 2 Q. B. D. 30), or an information under the Parliamentary Oaths Act, 1866 (29 V. c. 19), s. 5, to recover penalties (*A. G. v. Bradlaugh*, 14 Q. B. Div. 667); an order for attachment for disobedience to a writ of *habeas corpus* (*Reg. v. Barnardo*, 23 Q. B. Div. 305); or an order striking a solr off the roll made under the disciplinary jurisdiction of the Court (*Re Hardwick*, 12 Q. B. Div. 148); or under 6 & 7 Vict. c. 73, s. 32, for permitting his name to be used on account of an unqualified person (*Re Eade*, 25 Q. B. Div. 228); or an order discharging a rule for *certiorari* to remove an order of justices for maintenance of a pauper into the High Court (*Reg. v. Pemberton*, 5 Q. B. Div. 95); or an order discharging a person from custody under a writ *de contumace capiendo* issued in a suit against a clerk for ecclesiastical offences under the Church Discipline Act (*Cox v. Hakes*, 15 App. Cas. 506), are not in criminal matters, within the exemption; and an appeal has been entertained from a decision of the Divisional Court, on a conviction in a penalty, at the instance of the Inland Revenue Board, for breach of the excise laws: *Houes v. Inland Revenue Board*, 1 Ex. Div. 385.

As to the right of a bankrupt to appeal under the Bankruptcy Act, 1883, ss. 24, 103, 104, from an order committing him for contempt, see *Geness v. Lascelles*, 13 Q. B. D. 901; *Re Ashwin*, 25 Q. B. Div. 271.

**4. Order as to Costs.**—By the Jud. Act, 1873, s. 49, no order of the High Court or any Judge of it made by consent, or as to costs only, which by law are left to the discretion of the Court, is subject to appeal except by leave of the Court or Judge making it.

As to appeals from orders made by consent, *v. sup.* pp. 111—113.



The rule against appeals for costs only applies especially to the dismissal of an action without costs: *Harris v. Aaron*, 4 Ch. Div. 749; even though, by reason of a cross appeal or other matter, the whole case has been heard before the Court of Appeal: *Graham v. Campbell*, 7 Ch. Div. 490; and to orders in interpleader proceedings: *Hartmont v. Foster*, 8 Q. B. Div. 82; where an action is dismissed for want of prosecution: *Snelling v. Pulling*, 29 Ch. Div. 85; to an order for inspection of Deft's property, with costs to be paid by Plt: *Mitchell v. Darley Main Colliery Co.*, 10 Q. B. D. 457; or giving out of a fund in Court the costs of an unsuccessful application reasonably made for the purpose of ascertaining the fund: *Butcher v. Pooler*, 24 Ch. Div. 273; or ordering a third party to pay the costs of an unsuccessful Deft: *Hornby v. Cardwell*, 8 Q. B. Div. 329.

But where the appeal is for substantial relief, the Court of Appeal may make any such order as might have been made by the Court below, including an order as to the costs of the original hearing: see *Powell v. Jewesbury*, 9 Ch. Div. 34, and Form 1, *sup.* p. 718; *Davy v. Garrett*, 7 Ch. Div. 472, 490; *Kevan v. Crawford*, 6 Ch. Div. 29, 40, Form 5, *sup.* p. 718; O. LVIII. 5.

And an order allowing costs, charges, and expenses to a trustee is not within the rule, inasmuch as it deals with distinct claims between trustees and *c. q. tr.*, not merely with costs necessarily incident to proceedings in the High Court, and therefore in its discretion: *Re Chennell, Jones v. Chennell*, 8 Ch. Div. 500; nor an order directing Deft executor to pay costs on the ground that he has caused litigation by refusing accounts: *Re Pugh, Lewis v. Pritchard*, 57 L. T. N.S. 858; or depriving a Plt residuary legatee of his right (prior to Rules of 1883) to costs of admon action out of the estate: *Farrow v. Austin*, 18 Ch. Div. 58; *Re Mclellan, M. v. M.*, 29 Ch. Div. 495; *secus*, in the case of a hostile action seeking to charge Deft with costs, on the ground of misconduct: *Williams v. Jones*, 34 Ch. Div. 120; and that a trustee is entitled *ex debito justitiae* to his costs out of the trust fund, unless some special ground is shown for depriving him of them, see *Turner v. Hancock*, 20 Ch. Div. 303; disapproving *Re Hoskins' Trusts*, 6 Ch. Div. 283; and see *Re Knight's Trusts*, 32 W. R. 336, 417.

So also costs properly incurred by a mortgagee in enforcing or in relation to his security, are not within the rule: *Re Rio Grande del Sul Co.*, 5 Ch. Div. 282; *Cotterell v. Stratton*, 8 Ch. 295; *Johnstone v. Cox*, 19 Ch. Div. 17; *Pooley's Trustee v. Whetham*, 33 Ch. Div. 76; but if the Court allows them there can be no appeal by the mortgagor: *S. C.*; and an appeal lay from an order against Deft mortgagees to pay the costs of beneficiaries improperly made parties by the Plts: *Re Cooper, C. v. Vesey*, 20 Ch. Div. 611; and from an order determining priorities of incumbrancers, but directing costs of all parties to be first paid out of the fund: *Johnstone v. Cox*, 19 Ch. Div. 17; and see *Butcher v. Pooler*, 24 Ch. Div. 273.

And where persons are made parties to an action in a purely representative character, and no relief is claimed against them personally, they may maintain an appeal for costs: *Etherington v. Wilson*, 1 Ch. Div. 160, 167.

An order, on a motion to commit for contempt, that the person alleged to be in contempt pay the costs of the motion may be appealed against by him as involving a decision that he is in contempt: *Witt v. Corcoran*, 2 Ch. Div. 69; and as being "an appeal against the finding by which the Judge clothes himself with jurisdiction to inflict costs": *Stevens v. Met. Dist. Ry. Co.*, 29 Ch. Div. 60; and see *Re Milton*, 53 L. J. Q. B. 65; *Re Bradford, Thursby and Farish*, 15 Q. B. Div. 635; but not by the applicant, when costs are to be costs in the action, as this is not an appeal against a decision, but is either an appeal for costs only, or an appeal against the Judge's discretion: *Ashworth v. Outram* (No. 2), 5 Ch. Div. 943; *et v. sup.* p. 297.

An appeal will lie from an order making Deft pay the whole costs of an action, although the Plt has no right to sue: *Dicks v. Yates*, 18 Ch. Div. 76; or imposing payment of costs as the condition of a new trial: *Met. Asylum District v. Hill*, 5 App. Cas. 581; or ordering costs of application to be paid by the solr personally: *Re Bradford, &c.*, *sup.*; or exor to pay costs of admon action, as having been caused by his refusal to furnish accounts: *Re Pugh, Lewis v. Pritchard*, 57 L. T. N.S. 858; or an order of a master in interpleader proceedings dealing *extra jur.* with costs of action: *Hansen v. Maddox*, 12 Q. B. D. 100.

And an appeal will lie upon the question whether special grounds exist,

arising out of the nature and importance, or out of the difficulty or urgency of a case, to justify the allowance of costs on the higher scale under O. LX. 9: *Paine v. Chisholm*, (1891) 1 Q. B. (C. A.) 531.

Where the Judge gives leave to appeal, the Court of Appeal will still regard his discretion, and not overrule it, except for disregard of principle and misapprehension of facts: *Re Gilbert, G. v. Hudleston*, 28 Ch. Div. 549.

**5. Orders in Chambers.**—By Jud. Act, 1873, s. 50, every order made by a Judge in Chambers (except in exercise of such discretion as is mentioned in s. 49, *sup.*) may be set aside or discharged upon notice by any Divisional Court, or by the Judge in Court, according to the course and practice of the particular Division, and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal.

In the Q. B. Division an appeal from a Judge in Chambers is to be to a Divisional Court (O. LIV. 23) by motion within eight days after the decision appealed against; or if no Court to which such appeal can be made shall sit within such eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days.

If the Divisional Court sits within the eight days, but not for the purpose of hearing motions on the eighth day, the motion must be made within the eight days: *Stirling v. Du Barry*, 5 Q. B. Div. 66; the last clause of the rule being only intended to give relief where no Court is sitting to which an application can be made for extension of time (under O. LXIV. 7): *S. C.*

When no Court is sitting within the eight days, the extension of time should be almost as of course: *Wallingford v. Mutual Society*, 5 App. Cas. 685.

Two clear days' notice of motion being required by O. LII. 5, the notice must be given within five days after the decision; and it must be for a day within the eight days, although no Divisional Court sits within such days: *Steedman v. Hakim*, 22 Q. B. Div. 16, 21.

Notice for a day out of sittings is good: *Re Coulton, Hamling v. Elliott*, 34 Ch. Div. 22; *Maullin v. Rogers*, 55 L. T. N.S. 121; 55 L. J. Q. B. 377; 34 W. R. 592; overruling *Daubney v. Shuttleworth*, 1 Ex. D. 53; and see *Williams v. De Boinville*, 17 Q. B. D. 180, where amendment of such a notice was allowed.

Sect. 50 does not give a right to appeal from an order in Chambers under an Act which provides that there shall be no appeal: *Dodds v. Shepherd*, 1 Ex. D. 75.

If a party appealing to a Divisional Court does not appear, he cannot afterwards appeal to the Court of Appeal against the judgment given in his absence: *Walker v. Budden*, 5 Q. B. Div. 267.

As to appeals in interpleader proceedings, *v. sup.* Chap. XXIX. p. 443.

In the Chancery Division the motion to discharge should be made within twenty-one days after the order was pronounced, or the moving party first had notice of it, by analogy to O. LVIII. 15, as to appeals from interlocutory orders: *Heatley v. Newton*, 19 Ch. Div. 326; *Re Lewis, L. v. Williams*, 31 Ch. Div. 623; *Re Norwich Equitable Co., Brasnett's Case*, 33 W. R. 270; *Re Hardwidge*, W. N. (84) 204; 52 L. T. N.S. 40; *Re Elham Valley Ry. Co., Dickson's Case*, 12 Ch. D. 298; *Dickson v. Harrison*, 9 Ch. Div. 243; and this whether such order was interlocutory or final: *Re Giles, Real and Personal Advance Co. v. Mitchell*, 43 Ch. Div. 391; *Re Johnson, Manchester Bank v. Beales*, 42 Ch. D. 505.

Following the same analogy, the twenty-one days are to be computed from the date of refusal, when no order is made, or from the date of signing and entering or otherwise perfecting the order: *Heatley v. Newton*, 19 Ch. D. 326.

After a summons has been fully heard by the Judge personally in Chambers, further evidence will not be received on motion to discharge: *Re Munns and Longden*, 50 L. T. N.S. 356; 32 W. R. 675.

Where the only objection to an order is as to whether it can be made on summons under a particular rule, its validity must be questioned at the time when it is made: *Dyott v. Neville*, W. N. (87) 35.

Under the old practice an appeal could be brought direct from an order made by the Judge in Chambers: *Saunders v. Druce*, 3 Drew. 139; if an order had been drawn up: *Vyse v. Foster*, 10 Ch. 236; or if the Judge certified that the case had been sufficiently argued before him in Chambers: *Warrant Finance Co.'s case*, 5 Ch. 88; *Stroughill v. Gulliver*, 1 D. & J. 113; or declined to adjourn it: *Ridgway v. Newstead*, 4 D. & J. 15; *Snowdon v. Metropolitan Railway*, 1 D. J. & S. 408 (*sed v. McVeagh v. Croall*, 11 W. R. 385; 1 D. J. & S. 399); and leave to appeal direct from an order made in Chambers without counsel was obtained from the Court of Appeal, and not from the Judge in whose Chambers the order was made: *Allen v. Jarvis*, 4 Ch. 616; *Warrant Finance Co.'s case*, 5 Ch. 88.

In order to save expense in the Chancery Division it has been the practice to entertain appeals from orders made in Chambers without any formal application for leave, if it appears by a certificate of the chief clerk or by the order (*Murr v. Cooke*, 24 W. R. 756), or otherwise, that the matter has been fully argued before the Judge: *Re Elsom*, *Thomas v. E.*, 6 Ch. D. 346; *Dickson v. Harrison*, 9 Ch. Div. 243; or if the order relates to a mere point of practice, and is *ex debito justitiæ*: *Northampton, &c. Co. v. Midland Waggon Co.*, 7 Ch. Div. 500; but now an appeal from an order made in Chambers in the Chancery Division or Probate Division will not be entertained by the Court of Appeal unless the Judge gives leave to appeal direct, or a certificate that he does not wish to hear the case further argued: *Re Smith*, *Rigg v. Hughes*, 50 L. T. N.S. 293.

Where all parties have been heard by counsel in Chambers, the chief clerk will give the certificate, and upon it the parties may go direct to the Court of Appeal: *A. G. v. Llewellyn*, 58 L. T. N.S. 367; W. N. (88) 88; and in such a case it is not necessary or proper to move to discharge the order: *S. C.*; but where an order had been made in Chambers by way of final judgment against an exor on originating summons, and all parties had not been represented by counsel, the proper course was to move to discharge such order: *Re Somerville*, *Downes v. S.*, 56 L. T. N.S. 424; W. N. (87) 79; and see *Re Butler's Wharf Co.*, 21 Ch. D. 131 (where it was said that application should be made to the Judge in Chambers to adjourn the summons into Court), not following *Holloway v. Cheston*, 19 Ch. D. 516 (where it was said that the proper course was to give notice of motion to discharge the order, so as to enable the Judge to give his reasons).

There cannot be any appeal direct from a certificate merely approved by the Judge: *Rhodes v. Ibbetson*, 4 D. M. & G. 787; *Briggs v. Wilson*, 5 D. M. & G. 12; 2 Eq. Rep. 153.

Appeals from an exercise of discretion by a Judge in Chambers will not be entertained by the Court of Appeal: *Golding v. Wharton, &c. Co.*, 24 W. R. 423.

In *Rhodes v. R.*, 1 Ch. 483, an appeal as to the rejection of evidence on an inquiry in Chambers was ordered to stand over to come on with any motion to vary the certificate.

By O. LVIII. 15, no appeal from an interlocutory order is, except by special leave of the Court of Appeal, to be brought after the expiration of twenty-one days, to be calculated from the time at which it is signed, entered, or otherwise perfected, or in case of the refusal of an application, from the date of such refusal.

Whether a Judge can rehear in Chambers an order previously made there, but not drawn up, *quære*: *Re Eyton*, *Exp. Charlesworth*, 36 Ch. Div. 299; and see *A. G. v. Llewellyn*, W. N. (88) 88; 58 L. T. N.S. 367.

The order on motion to discharge is in all Divisions subject to appeal like any other interlocutory order: *Dickson v. Harrison*, 9 Ch. Div. 243, 245; and see *Fox v. Wallis*, 2 C. P. Div. 45.

**6. Judgments obtained by Fraud.**—Where a decision of the Court of Appeal is impeached as having been obtained by fraud, the proper course is, not to apply for a rehearing, but to commence an original action in the High Court to set aside the judgment on the ground of fraud: *Flower v. Lloyd*, 6 Ch. Div. 297; and it seems that a judgment will not be set aside merely on the ground of perjury or falsification of evidence: *S. C.*, 10 Ch. Div. 327.

**7. Orders within the Discretion of the Judge.**—In matters within the discretion of the Judge of the Court below, the Court of Appeal has complete jurisdiction, but declines to interfere except in extreme cases, or where the Judge has clearly proceeded on a wrong principle: *Watson v. Rodwell*, 3 Ch. D. 380, 383; *Re Martin, Hunt v. Chambers*, 20 Ch. Div. 365; *Wallingford v. Mutual Society*, 5 App. Cas. 685; and therefore appeals will not, in general, be entertained from orders on applications to strike out pleadings: *Exp. E. & W. India Dock Co., Re Clarke*, 17 Ch. Div. 759; *Golding v. Wharton Co.*, 1 Q. B. Div. 374; *Watson v. Rodwell*, 3 Ch. Div. 380; and see *Cashin v. Cradock*, 3 Ch. Div. 376; unless the pleading is embarrassing, so that the order is *ex debito justitiæ*: *Davy v. Garrett*, 7 Ch. Div. 473; nor from an order that the question at issue be stated in the form of a special case: *Met. Bd. of Works v. New River Co.*, 2 Q. B. Div. 67; or tried in a particular manner: *Ruston v. Tobin*, 10 Ch. Div. 558; *Re Martin, Hunt v. Chambers, sup.*; *Mangan v. Metropolitan Electric Supply Co.*, (1891) 2 Ch. (C. A.) 551; explaining *Jenkins v. Bushby*, (1891) 1 Ch. (C. A.) 484; or referred to an official or special referee: *Ormerod v. Todmorden Mill Co.*, 8 Q. B. Div. 664; nor from an order for security on a debtor's summons: *Exp. Marshall*, 5 Ch. Div. 873; nor from a refusal to commit for contempt: *Ashworth v. Outram* (No. 2), 5 Ch. Div. 943; nor an order for examination of persons deemed to be capable of giving information under sect. 115 of the Companies Act, 1862: *Re Gold Co.*, 12 Ch. Div. 77; nor an order refusing to displace debenture holders' receiver by the liquidator of the co.: *Re Stubbs, Barney v. S.*, (1891) 1 Ch. (C. A.) 475; nor an order reviewing the decision of a taxing master, where no principle is involved: *Real and Personal Advance Co. v. McCarthy*, 18 Ch. Div. 362; nor an order allowing taxation of a bill after payment on the ground of "special circumstances," where the amount involved is small: *Re Cheesman*, 39 W. R. 497; and see *Re Harrison*, 33 Ch. Div. 52.

As to the competency of appeals from committals for contempt, see *Reg. v. Jordan*, W. N. (88) 152; *Jarmain v. Chatterton*, 20 Ch. Div. 493; *Ashworth v. Outram*, 5 Ch. Div. 943.

On a question of privilege for documents, no appeal will be allowed from a decision of the Judge at Chambers to whom the documents have by consent been submitted: *Bustros v. White*, 1 Q. B. Div. 423.

Notwithstanding the great weight due in cases of conflict of *vivâ voce* evidence to the decision of a Judge of first instance who has seen the manner and demeanour of the witnesses, the Court of Appeal will draw its own inferences and conclusions in such cases, making due allowance for the absence of the witnesses: *Bigsby v. Dickinson*, 4 Ch. Div. 24; *The Glannibanta*, 1 P. Div. 287.

On the question whether an appeal will lie from the opinion of the Q. B. Division on a case stated by an arbitrator under the C. L. P. Act, 1854, s. 5 (now sect. 7 of the Arbitration Act, 1889), see *Jones v. Victoria Dock Co.*, 2 Q. B. Div. 314.

Leave to appeal to the House of Lords on a question of discretion will not be granted: *Re Clark, Exp. E. and W. India Dock Co.*, 17 Ch. Div. 759.

**8. Order in exercise of consultative jurisdiction.**—No appeal lies from a decision of the High Court of Justice upon questions submitted to it under sect. 29 of the Local Government Act, 1888 (51 & 52 V. c. 41), the jurisdiction under that section being consultative only, and not judicial: *Ex parte County Council of Kent*, (1891) 1 Q. B. (C. A.) 725.

#### WHO MAY APPEAL.

In the absence of any special provisions in the Jud. Acts and Rules of Court the former practice remains unaltered on this point.

In the case of suits in the Court of Chancery, all persons parties to the suit, or served with or bound by the decree, might appeal from it: *Bruff v. Cobbold*, 7 Ch. 217; *Ellison v. Thomas*, 2 D. J. & S. 18; *Giffard v. Hort*, 1 Sch. & L. 386, 409; *Crawcour v. Salter*, 30 W. R. 329; and see *Osborne v. Usher*, 2 Bro. P. C. 314; Dan. 1270.

One of several Plts can appeal against his co-Plts: *Jopp v. Wood*, 2 D. J. & S. 323; and alone without his co-Plts: *Beckett v. Attwood*, 18 Ch. Div. 54.

In a representative action, a dissentient member of a class represented by the Plt cannot appeal from an order in favour of the class, but, *semble*, should apply in the Court below to be made a Deft: *Watson v. Cave*, 17 Ch. Div. 19.

Where the appellant was not a party to the record, he could only appeal by leave to be obtained on petition or motion *ex parte* from the Court of Appeal: *Parmeter v. P.*, 2 D. F. & J. 526; *Hodgson v. Clarke*, 1 D. F. & J. 394; 2 D. F. & J. 526; and see *Bruff v. Cobbold*, 7 Ch. 217; Dan. 1270; and in this case the leave of the Court of Appeal is still to be obtained on *ex parte* motion: see *Re Markham, M. v. M.*, 16 Ch. Div. 1. An executor of a deceased party who has given notice of appeal may prosecute the appeal under the common order of revivor: *Ranson v. Patton*, 17 Ch. Div. 766.

Leave to appeal will not be given to a person not a party, unless his interest is such that he might have been made a party: *Crawcour v. Salter*, 30 W.R. 329; *Re Madras Irrigation Co.*, 23 Ch. Div. 248; *Re Youngs, Doggett v. Revett*, 30 Ch. Div. 421.

A Deft who has since the trial become bankrupt may appeal from an order for an injunction without the trustee: *Deuce v. Mason*, 41 L. T. N.S. 573.

Where a trustee had not been appointed, a notice of appeal by the receiver in bankruptcy was ordered to be amended by adding the petitioning creditor, and the debtor: *Exp. Chalmers*, 11 Ch. Div. 911.

As to the principles upon which leave to appeal has been granted to liquidators under the winding-up of cos., see *Re Silver Valley Mines*, 21 Ch. Div. 381; *Re City and County Investment Co.*, 13 Ch. Div. 475; Buckley, 275.

Under the present practice an uncertificated bankrupt cannot appeal against an order establishing a money demand which had been proved against his estate: *Vale v. Oppert*, 5 Ch. Div. 969.

An appeal involving a question of status was allowed to proceed notwithstanding the appellant's bankruptcy: *Gordon v. Merricks*, 10 App. Cas. 171 (Sc.).

A person summoned as a witness under s. 115 of the Companies Act, 1862, has (*semble*) no *locus standi* to appeal against the order directing his attendance: *Re Gold Co.*, 12 Ch. Div. 77.

In a test action on neglect of Deft to appeal, a Deft in one of the other actions may be substituted: *Briton Medical and General Life Assoc. Soc. v. Jones*, 60 L. T. N.S. 637.

#### MODE OF APPEALING—MOTIONS BEFORE THE COURT OF APPEAL.

1. *Appeal Motions.*—By O. LVIII. 1, all appeals are to be by way of rehearing, and are to be brought by motion in a summary way, and no formal proceeding is necessary other than notice of the motion, thus substituting a uniform mode of appeal for the several modes by which appeals were brought before the Jud. Acts—*i.e.*, petition of rehearing in the case of a decree or decretal order, appeal petition in the case of an order on petition, and appeal motion on a two days' notice in the case of an order on motion or in Chambers.

Appeal motions under the new practice are perfectly distinct from appeal motions before the Jud. Acts and from original motions, and are solely regulated by the subsequent rules of O. LVIII.

As to cross appeals under the new practice, *v. inf.* p. 737.

2. *Original Motions in Pending Appeals.*—Applications in pending appeals are to be made by original motion under O. LVIII. 17, 18.

By r. 17, every application which under these rules may be made either to the Court below or a Judge thereof, or to the Court of Appeal or a Judge thereof, is to be made in the first instance to the Court or Judge below; and by r. 18, every application to a Judge of the Court of Appeal is to be by motion under the provisions of O. LII.

Motions under these rules which are to be made before the Court of Appeal in the first instance, and in respect of which the Court therefore has original jurisdiction, have been distinguished from applications which are to be made first before the Court or Judge below, in respect of which the Court of Appeal has an appellate jurisdiction; but in both cases the practice in the Court of Appeal is the same as that on original motion: see *A. G. v. Swansea Co.*, 9 Ch. Div. 46; *Cooper v. C.*, 2 Ch. Div. 492, Form 12, *inf.* p. 742.

3. *Ex parte Applications*.—By O. LVIII. 10, it is provided that when any *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the refusal, or such extended time as a Judge of the Court below or of the Appeal Court may allow.

#### NOTICE OF APPEAL.

By O. LVIII. 1, the appellant may, by notice of motion, appeal from the whole or part only of any judgment or order, and the notice of appeal is to state whether the whole or part of the judgment or order is complained of, and if part only, is to specify such part.

Under this rule service of the notice constitutes the appeal: *Exp. Vinay*, 4 Ch. D. 794.

Mere communication of an intention to appeal is not a sufficient notice of appeal: *Re New Callao Co.*, 22 Ch. Div. 484; *Re Blyth and Young*, 13 Ch. Div. 416; and see *Re Manchester Economic Building Soc.*, 24 Ch. Div. 488.

A notice otherwise regular is not bad because the solrs are inaccurately described, and whether the notice should be signed by solrs, *qu.*: *Kettlewell v. Watson*, 52 L. J. Ch. 818.

The rule applies only in cases of original appeals, cross appeals being provided for by rr. 6, 7: *v. inf.* p. 737.

A notice of appeal may be withdrawn and a fresh notice given if within time: *Norton v. L. & N. W. Ry. Co.*, 13 Ch. Div. 268; and see *Watson v. Cave*, 17 Ch. Div. 19.

Notice of discontinuance of an action *ipso facto* vacates an appeal by the Plt: *Conybeare v. Lewis*, 13 Ch. Div. 469.

Where a four days' notice of appeal was given instead of a fourteen days' notice, the time for appealing was extended, the applicant having given in proper time a distinct notice of appeal: *Re Crosley, Munns v. Burn*, 34 Ch. Div. 664.

By r. 2, the notice is to be served on all parties directly affected by the appeal, and it is not necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing upon such terms as may seem just, and give such judgment or make such order as might have been given or made, if the persons served had been originally parties.

A third party who has been served by a Deft, and has obtained leave to appear at the trial, is not a person directly affected: *Re Salmon, Priest v. Uppleby*, 42 Ch. Div. 351; *diss. Cotton, L. J.*

Under this rule it was held that where a Deft appealed against an order discharging a rule for a new trial after a verdict against him and in favour of his co-Deft, the Court could not entertain the appeal in the absence of the co-Deft, and had jurisdiction to order service on him: *Purnell v. G. W. Ry. Co.*, 24 W. R. 720, 909.

So, too, where any one of three persons might, according to the construction to be put on a will, be entitled to a fund, the notice of appeal of one of them was ordered to be served on the others: *Hunter v. H.*, 24 W. R. 504.

The usual practice in these cases is not to draw up any order; when service has been effected the appeal is replaced in the paper by the proper officer, or, if necessary, on application to the Court.

Notice of appeal from a refusal to annul an adjudication must be served on the trustee in bankruptcy as well as the petitioning creditor: *Exp. Ward*, *Re Ward*, 15 Ch. Div. 292.

An order for substituted service of a notice of appeal may be made in a proper case: *Exp. Warburg, Re Whalley*, 24 Ch. Div. 364.

A party affected, but not served with notice, may appear gratis on the appeal, and obtain his costs if the appeal is dismissed, though for irregularity: *Re New Callao Co.*, 22 Ch. Div. 484.

By r. 2, any notice of appeal may be amended at any time as to the Court of Appeal may seem fit; and, accordingly, where a four days' notice of appeal had been given, instead of fourteen days, which the Court held to be

required under r. 3, the notice was amended at the hearing: *Re Stockton Iron Furnace Co.*, 10 Ch. Div. 335.

By r. 3, notice of appeal from any judgment, whether final or interlocutory, or from a final order, is to be a fourteen days' notice, and notice of appeal from an interlocutory order is to be a four days' notice.

#### FINAL OR INTERLOCUTORY JUDGMENTS OR ORDERS.

Every decision of the High Court is, for the purpose of appeal, either final or interlocutory: *Standard Discount Co. v. Lagrange*, 3 C. P. Div. 67, 69.

The distinction between "final" and "interlocutory" judgments and orders is important, under O. LVIII., with reference (1) to the time for appealing (r. 15); (2) to the length of the notice of appeal (r. 3); (3) to the composition of the tribunal before which the appeal is heard (Jud. Act, 1873, s. 12); and (4) to the admissibility of further evidence on the appeal (r. 4).

A precise definition of the meaning of these terms cannot be given (see *Re Lewis, L. v. Williams*, 31 Ch. Div. 623, *per* Chitty, J., at p. 627); but, in general, a judgment may be said to be final when it is necessarily conclusive as to the matter in dispute, whether given in favour of Plt or Deft: see *Standard Discount Co. v. Lagrange*, 3 C. P. Div. 67, 69; *Salaman v. Warner*, (1891) 1 Q. B. (C. A.) 734; *Jones v. Insole*, 64 L. T. N.S. 703.

But orders which do not determine rights (*Re Stockton Iron Furnace Co.*, 10 Ch. Div. 349), or which merely direct how declarations of right already given are to be worked out (*Blakey v. Latham*, 43 Ch. Div. 23), or which, though in fact finally determining the action, would, if a contrary decision had been given, have not determined it (*Salaman v. Warner, sup.*), are interlocutory.

And a judgment or order may be final within r. 3 or r. 4 as to the length of notice of appeal required or the admissibility of further evidence, but not so within r. 15 as respects the time for appealing; *ex. gr.*, an order adjudicating on a claim against the estate in an admon action: *Re Crosley, Munns v. Burn*, 34 Ch. Div. 664; *Re Compton, Norton v. C.*, 27 Ch. Div. 392; *Re Lewis, L. v. Williams*, 31 Ch. Div. 623; *Pheysey v. P.*, 12 Ch. Div. 305.

Orders on demurrer, under the former practice: *Trowell v. Shenton*, 8 Ch. Div. 318, 321; *Fitzgerald v. Dawson*, 24 W. R. 129; an order striking out a statement of claim on the ground that it discloses no cause of action: *Jones v. Insole, sup.*; judgments at the hearing: *Internat. Society v. City of Moscow Gas Co.*, 7 Ch. Div. 241; judgments in default of pleading under O. XXVII.: *Whistler v. Hancock*, 3 Q. B. D. 83; *Wallis v. Hepburn*, 3 Q. B. D. 84, n.; but see *Gossett v. Campbell*, W. N. (77) 134; or on admissions in the pleadings under O. XXXII. 6: *A. G. v. G. E. Ry. Co.*, 48 L. J. Ch. 428; *Re Emmet, E. v. E.*, 13 Ch. D. 484, 489; and see *Jenkins v. Davies*, 1 Ch. D. 696; *Gilbert v. Smith*, 2 Ch. Div. 686, 689; and orders on further consideration: *Cummins v. Herron*, 4 Ch. Div. 787; but see *Re Johnson, inf.*; an order under O. xv. in form of a foreclosure judgment: *Smith v. Davies*, 31 Ch. Div. 595; on special case stated by an arbitrator, where the decision necessitated the entering of final judgment: *Shubbrook v. Tufnell*, 9 Q. B. Div. 621; an order confirming chief clerk's certificate as to damages by trespass: *A. G. v. Tomline*, 15 Ch. Div. 152; an order at a trial by jury depriving a successful party of costs: *Marsden v. Lancashire and Yorkshire Ry. Co.*, 7 Q. B. Div. 641; are final.

The decision of a Divisional Court on a case stated by the Inland Revenue Commissioners, under sect. 19 of the Stamp Act, 1870, is not a "judgment," but an "order," and therefore to be appealed from within twenty-one days: *Onslow v. Inland Revenue*, 25 Q. B. Div. 465.

But as an originating summons is an action, an order on such a summons, equivalent to judgment in the action, is appealable within a year: *Re Fawcitt, Galland v. Burton*, 30 Ch. Div. 231.

Orders on applications for leave to sign judgment under O. XIV. 1: *Standard Discount Co. v. La Grange*, 3 C. P. Div. 67; dismissing an action upon the hearing of a point of law under O. XXV. 2, 3, before trial: *Salaman v. Warner*, (1891) 1 Q. B. (C. A.) 734; findings on interpleader issues: *M'Andrew v. Barker*, 7 Ch. Div. 701; orders on creditors' claims in admon actions: *Trail v. Jackson*, 4 Ch. Div. 7; allowing set-off of costs consequent upon the dismissal of an appeal with costs: *Blakey v. Latham*,

43 Ch. Div. 23; in a creditor's action directing distribution of funds, but made on application of Deft administratrix with a view to payment of her costs: *Re Lewis, L. v. Williams*, 31 Ch. Div. 623; upon a special case stated by an arbitrator preliminary to his making an award: *Collins v. Vestry of Paddington*, 5 Q. B. Div. 368; upon case stated under sect. 19 of the Stamp Act, 1870: *Onslow v. Inland Revenue*, 25 Q. B. Div. 465; in a winding-up, and an action, *quâd* a person having no such interest in the action as that he could have been made a party to it: *Wood v. Madras Canal Co.*, 23 Ch. Div. 248; in Chambers, on further consideration, leaving part of the fund to be subsequently dealt with, and reserving liberty to apply: *Re Johnson, Manchester Bank v. Beales*, 42 Ch. D. 505; on motion to vary special referee's report: *Dunkirk Colliery v. Lever*, 26 W. R. 841; directing review of taxation: *Exp. Phillips*, 19 Q. B. Div. 234; are interlocutory.

An order made under the L. C. Act declaring the construction of a will and directing inquiries, was held to be a final order for the purposes of appeal, but as the parties were out of the jurisdiction, the time to appeal was enlarged, to give time to communicate with them: *Re Leonard Jacques*, 18 Ch. Div. 392.

Orders on motion for trial by jury: *Swindell v. Birm. Syndicate*, 3 Ch. Div. 127; or on motion for new trial after trial by jury in a Common Law Division: *Rooth v. M. S. & L. Ry. Co.*, 39 L. T. N.S. 412, n.; *Highton v. Treherne*, 27 W. R. 245; 48 L. J. Exch. 167; even though the action be pending in the Chancery Division; or findings on a trial by a Judge of the Common Law Division without a jury: *Krehl v. Burrell*, 10 Ch. Div. 420; or on interpleader issues: *McAndrew v. Barker*, 7 Ch. Div. 701; or an order empowering Plt to sign judgment on writ specially endorsed: *Standard Discount Co. v. La Grange*, 3 C. P. Div. 67, are interlocutory; and see *Oastler v. Henderson*, 2 Q. B. Div. 575; *Hunt v. London Real Property Co.*, 3 Q. B. Div. 19.

A finding of fact by a Judge of the Chancery Division, if prior to his judgment, even though only one order is drawn up, is interlocutory: *Krehl v. Burrell*, 10 Ch. Div. 420; but this only applies where at the commencement of the trial it is arranged that distinct issues of fact be tried: *Lowe v. L.*, 10 Ch. Div. 432; *Sugden v. St. Leonards*, 1 P. Div. 154, 212.

An appeal from a refusal to set aside or remit an award is analogous to an application for a new trial, and is therefore an interlocutory appeal: *Re Delagoa Bay Ry. Co. and Tancred*, 37 W. R. 578.

Orders in bankruptcy, or in any proceeding under the Cos. Acts, including the original winding-up order: *Re National Funds Assurance Co.*, 4 Ch. Div. 305; or in any other matter not being an action, including orders under the statutory jurisdiction of the Chancery Division: *Re Baillie's Trusts*, 4 Ch. Div. 785; *Re National Funds Assurance Co.*, 4 Ch. Div. 305, 314; are treated as interlocutory with reference to the leave for appealing: O. LVIII. 9; and *inf.* p. 731.

But an appeal from a winding-up order must be entered in the final list: *Re Globe, &c. Co.*, 29 S. J. 66.

Interlocutory decisions are either interlocutory judgments or interlocutory orders: see O. LVIII. 3, *sup.* p. 729.

Under r. 3, orders upon appeal from a judgment of a County Court on an interpleader issue: *Hughes v. Little*, 18 Q. B. Div. 32; and under r. 4, an order on summons by a creditor in an admon action: *In re Compton, Norton v. C.*, 27 Ch. Div. 392, were held final; *secus*, under r. 4, a refusal by a Judge to order a writ of sequestration to issue against Deft co. for breach of injunction: *Spencer v. Ancoats Vale Rubber Co.*, 58 L. T. N.S. 363; W. N. (88) 86.

An order in a matter, and therefore treated as interlocutory under O. LVIII. 9, which is final as to the rights of the parties to it, is an interlocutory judgment within O. LVIII. 3, so as to require fourteen days' notice of appeal: *Re Stockton Iron Furnace Co.*, 10 Ch. Div. 335, 342; and see Memorandum, 1 Ch. D. 41; which, however, is not to be regarded as defining what is meant by an interlocutory order: see *Phesey v. P.*, 12 Ch. Div. 305.

Orders on points of practice, or procedure, or interim injunctions, or orders for receivers, not finally deciding questions of right, are interlocutory orders.



The following table may be of use as indicating broadly the chief points of difference between the several classes of decisions with respect to the practice on appeals under O. LVIII. :—

1. In the case of a *final judgment or order*—
  - (a) one year is allowed for appealing, if in an action; if not, twenty-one days: r. 15;
  - (b) fourteen days' notice of the appeal is required: r. 3;
  - (c) not less than three Judges must sit to hear the appeal: Jud. Act, 1875, s. 12;
  - (d) further evidence is admissible only as to subsequent matter or by special leave: r. 4.
2. In the case of an *interlocutory judgment*—
  - (a) twenty-one days are allowed for appealing: r. 15;
  - (b) fourteen days' notice of the appeal is required: r. 3;
  - (c) in some, if not in all, cases three Judges must sit to hear the appeal: Jud. Act, 1875, s. 12;
  - (d) further evidence is apparently admissible only as to subsequent matter or by special leave: r. 4.
3. In the case of an *interlocutory order*—
  - (a) twenty-one days are allowed for appealing: r. 15;
  - (b) four days' notice of the appeal motion is required: r. 3;
  - (c) not less than two Judges must sit to hear the appeal: Jud. Act, 1875, s. 12;
  - (d) further evidence is admissible: r. 4.

On the history and meaning of the term "interlocutory" under the former practice of the Court of Chancery, see Seton, 4th edition, p. 2.

#### TIME FOR APPEALING.

By O. LVIII. 9, the time for appealing from any order or decision in the matter of the winding-up of a co., or in the matter of any bankruptcy, or in any other matter not being an action, is to be the same as that limited for appeal from an interlocutory order under r. 15.

This includes original winding-up orders, and any order under the statutory jurisdiction of the Court: *Re National Funds Assurance Co.*, 4 Ch. Div. 305, 314; *Re Baillie's Trusts*, 4 Ch. Div. 785.

By r. 15, no appeal to the Court of Appeal from any interlocutory order or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year.

In all cases the material date is the date of service of the notice of appeal, and in calculating the time, Sundays, and days when the offices are closed, are to be reckoned: *Exp. Viney*, 4 Ch. Div. 794; *Exp. Saffery*, *Re Lambert*, 5 Ch. Div. 365; *Christopher v. Croll*, 16 Q. B. Div. 66; and see O. LXIV. 2.

Every decision, not being a final judgment or order in an action, is, or under r. 9, is to be treated as, an interlocutory order within the meaning of r. 15, so as to be subject to appeal during the shorter period only, though it is combined with a final order, or though it may decide a question of right, or even the substantial question at issue between the parties: *Standard Co. v. La Grange*, 3 C. P. Div. 67; *McAndrew v. Barker*, 7 Ch. Div. 701; *White v. Witt*, 5 Ch. Div. 589; *Cummins v. Herron*, 4 Ch. Div. 787; *McNair v. Audenshaw Paint Co.*, (1891) 2 Q. B. (C. A.) 502; so as to be an interlocutory judgment within r. 3; but under O. LVIII. 15a, the time of appealing against an order made on further consideration of a cause, and on the hearing of a summons to vary the certificate on which such order is made, is to be the same as the time for appealing against the order on further consideration; and this rule applies although two orders are drawn up instead of one: *Marsland v. Hole*, 40 Ch. Div. 110; *Blakey v. Latham*, 43 Ch. Div. 23.

An appeal from an order or summons under the Vendor and Purchaser Act, 1874, must be brought within the twenty-one days: *Re Ricketts and Aven*, W. N. (90) 16.

## COMPUTATION OF TIME.

By O. LVIII. 15, the respective periods of twenty-one days and one year are to be calculated, in the case of an appeal from an order made in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal.

The time runs from the refusal of an application, even though there is an order as to costs, which must be drawn up and entered; for this makes no difference in the refusal of the application, whereas the exact terms of the order when an application is granted may be very material: *Swindell v. Birm. Syndicate*, 3 Ch. Div. 127, 133; and see *Berdan v. Birm. Small Arms Co.*, 7 Ch. Div. 24, 25; *Re Smith, Hooper v. S.*, 26 Ch. Div. 614; but an order containing an expression of opinion binding the rights of the parties is not a simple refusal: *Re Clay and Tetley*, 16 Ch. Div. 3.

If the appeal is from the refusal of part of an application, or from an order which is silent as to that part in respect of which the appeal is brought, the time runs from the date of the refusal: *Berdan v. Birm. Small Arms Co.*, 7 Ch. Div. 24; *Trail v. Jackson*, 4 Ch. Div. 7; *secus*, where the part refused is not clearly separable from the rest, *e.g.*, application for unsealing twelve classes of documents refused as to nine: *Jones v. Andrews*, 58 L. T. N.S. 601.

Where the order appealed against directed payment of a fund in moieties to the appellant and respondent, and the appellant's title to his moiety was not disputed, it was held that the appeal was not from the refusal of an order, but from an order with which the appellant was dissatisfied: *Re Michell's Trusts*, 9 Ch. Div. 5.

The dismissal of a suit at the hearing is the "refusal of an application" within the rule: *Internat. Society v. City of Moscow Gas Co.*, 7 Ch. Div. 241.

A refusal of leave to amend at the trial forms part of the judgment, and it is unnecessary to appeal separately from it: *Laird v. Briggs*, 16 Ch. Div. 663.

A disallowance of a creditor's claim in answer to advertisements is a refusal: *Re Claggett, Fordham v. C.*, 20 Ch. Div. 134.

The order of a Judge settling the form of a conveyance is subject to appeal: *Pollock v. Rabbit*, 21 Ch. Div. 466.

Appeals from the County Palatine are subject to the limitations of time provided by O. LVIII. 15: *Lee v. Nuttall*, 12 Ch. Div. 61; from divorce cases appeals to the House of Lords under Jud. Act, 1881 (44 & 45 V. c. 68), s. 9, are to be brought within one month after the decision appealed from has been pronounced by the Court of Appeal, if the House of Lords is then sitting, or within fourteen days after it next sits.

Where the time has expired, leave to appeal must be obtained on motion after notice: *Re Lawrence, Evennett v. L.*, 4 Ch. Div. 139.

## EXTENSION OF TIME.

On the expiration of the time limited for appealing, the successful litigant acquires a right to his judgment: *Collins v. Paddington Vestry*, 5 Q. B. Div. 368; and special circumstances must be shown in order to induce the Court to extend the time: *S. C.*; but it is not essential that such circumstances should arise out of the conduct of the respondent: *Re Crosley, Munns v. Burn*, 34 Ch. Div. 664; *Re Manchester Economic Building Society*, 24 Ch. Div. 448; *Re Blyth and Young*, 13 Ch. Div. 416 (disapproving *McAndrew v. Barker*, 7 Ch. Div. 701, 705); *Re New Callao Co.*, 22 Ch. Div. 484; and the matter is one of judicial discretion: *Re Manchester Economic Soc., sup.*; *Cusack v. L. & N. W. Rail. Co.*, (1891) 1 Q. B. (C. A.) 347.

The mere fact that the intention to appeal has been communicated is not a ground for extension of time: *Re New Callao Co.*, 22 Ch. Div. 484; *Re Blyth and Young*, 13 Ch. Div. 416; nor that a declaration was made as to future rights, all parties interested being adult and before the Court: *Curtis v. Sheffield*, 21 Ch. Div. 1; and see *Fussell v. Dowding*, 27 Ch. D. 237, 241; nor that the appeal was dismissed through non-appearance of the appellant: *Re Lamb*, 23 Q. B. Div. 477; nor a mistake as to the construction of the rules of Court: *International Society v. Moscow Gas Co.*, 7 Ch. Div. 241, 247;

*Highton v. Treherne*, 48 L. J. Exch. 176; 27 W. R. 245; nor that of a registrar's clerk misleading the solicitor as to the time allowed: *Exp. Viney*, 7 Ch. D. 794; nor when an order deciding rights has been acted on for many years: *Peareth v. Marriott*, 22 Ch. D. 182.

But the leave has been granted where there was a *bonâ fide* mistake as to the validity of a resolution for a voluntary winding-up: *Re Manchester Economic Building Soc.*, *sup.*; where a notice of appeal was withdrawn by mistake and immediately renewed: *Taylor's case*, 8 Ch. Div. 643; where a final order made on petition was within the letter but not within the spirit of r. 15: *Re Leonard Jacques*, 18 Ch. Div. 392; where a person not a party but affected by the order, applied as soon as he became aware of it: *Re Padstow Total Loss Assoc., Exp. Bryant*, 20 Ch. Div. 137; where the decision which had been followed was overruled and the fund in question was still under the control of the Court: *Re Normanton Iron and Steel Co.*, 29 W. R. 300; and where, several persons having been held liable, those who *primâ facie* were primarily liable appealed on the very last day without the knowledge of the others: *Re Clayton Mills Co.*, 37 Ch. Div. 28.

So, too, the fact that the decision appealed from has been overruled by a subsequent decision of the Court of Appeal is not in itself sufficient ground for extending the time for appeal, unless the subsequent decision is clear, and special circumstances are shown: *Craig v. Phillips*, 7 Ch. Div. 249; and see *Re Lawrence, Evennett v. L.*, 4 Ch. Div. 139; and though a judgment of the Court of Appeal determining the applicants' rights was subsequently reversed by the House of Lords on an appeal by another litigant, yet, under the circumstances (a compromise having been carried out by Act of Parliament), an extension was refused: *Esdaile v. Payne*, 40 Ch. Div. 520.

But where a fund still remains in Court undistributed, or otherwise the rights of the parties are unaffected, an extension of time may be granted on less cause, at least in cases where the shorter period only is allowed: *M. R.*, in *Craig v. Phillips*, 7 Ch. Div. 251; *Re Baillie's Trusts*, 4 Ch. Div. 785; *Re Normanton Iron Co.*, 29 W. R. 300.

And that clients ought not to be allowed to suffer through a *bonâ fide* mistake of their legal advisers, where the other side can be replaced in their former position, see *Highton v. Treherne*, 27 W. R. 245; 48 L. J. Exch. 176; and observations of Bramwell, L. J., in *Collins v. Paddington Vestry*, 5 Q. B. D. 368, 378.

#### SETTING DOWN APPEALS.

When the notice of appeal has been duly served the appellant must proceed to set down the appeal for hearing.

This must be done before the day named for the hearing in the notice, and in default the appeal will be dismissed as an abandoned motion; and such dismissal is not a ground for extending the time for bringing a fresh appeal: *Re Mansel, Rhodes v. Jenkins*, 7 Ch. Div. 711; *Re National Funds Assurance Co.*, 4 Ch. Div. 305, 308; *Donovan v. Brown*, 4 Ex. D. 148; but the respondents having the carriage of the order appealed from cannot under this rule take advantage of their own delay in drawing up the order: *Re Harker, Goodbarne v. Fothergill*, 10 Ch. D. 613.

If after service the appeal is not set down, the respondent must make an original motion for his costs, there being no appeal before the Court: *Webb v. Mansel*, 2 Q. B. Div. 117; *Re Oakwell Collieries*, 7 Ch. Div. 706; and see *Rep. of Costa Rica v. Strousberg*, 21 March, 1879, Reg. Min. fo. 261; but the costs of such a motion will not be allowed unless it has been preceded by a demand for the costs of an abandoned appeal: *Griffin v. Allen*, 11 Ch. Div. 913.

If the notice of appeal was not served in due time, and leave has not been obtained to appeal after the time, the appeal may still be set down without prejudice to any right of the respondents to raise the objection; and if necessary an order for this purpose may be obtained on an *ex parte* application: *Re National Funds Assurance Co.*, *sup.*; *Norton v. L. & N. W. Ry. Co.*, 11 Ch. Div. 118.

By O. LVIII. 8, the party appealing from a judgment or order is to produce to the proper officer the judgment or order, or the office copy of it (except in the case of an appeal from the refusal of an application, when this direction

does not apply, though the order provide for the costs of the application: *Smith v. Grindley*, 3 Ch. Div. 80; and is also to leave with him a copy of the notice of appeal to be filed, and the officer is thereupon to set down the appeal by entering it in the proper list of appeals; and it is to come on to be heard according to its order in such list, unless the Court of Appeal or a Judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

Three copies of all material documents, the construction of which is involved in the appeal, must be supplied for the use of the Court: *Canot v. Morgan*, 38 W. R. 1.

Where the continuance of an injunction which may cause irreparable damage, or the dissolution of an injunction restraining such damage is involved, the hearing of an appeal will be advanced: *Lazenby v. White*, 6 Ch. 89; *L. C. & D. Ry. Co. v. Imp. Merc. Credit Association*, 3 Ch. 231.

And as to a stay of proceedings on similar grounds, *v. inf.* p. 744.

#### HEARING OF APPEALS.

By the Jud. Act, 1875, s. 12, every appeal is, when the subject-matter is a final order, decree, or judgment, to be heard before not less than three Judges of the Court sitting together, and when the subject-matter is an interlocutory order, decree, or judgment, is to be heard before not less than two Judges of the Court sitting together.

By the Judges' Memorandum, 1 Ch. D. 41, "all summonses finally settling the rights of parties, such as summonses in winding-up orders, or in admon suits, are to be heard before the full Court of Appeal."

The distinction here taken appears to approximate very closely to that made in O. LVIII. 3, between interlocutory judgments and interlocutory orders: *v. sup.* p. 729.

If, when the appeal is called on, the appellant does not appear, the respondent is entitled to have the appeal dismissed with costs, without proving service of the notice of appeal upon him: *Exp. Lows*, 7 Ch. D. 160; and see *James v. Crow*, 7 Ch. Div. 410.

But if the respondent does not appear, it is presumed that the appellant must prove service upon him, as in the case of non-appearance of a Deft at the trial of an action: see *Cockshott v. London Cab Co.*, 26 W. R. 31.

A party affected, but not served with notice, may appear gratis on the appeal, and obtain his costs if the appeal is dismissed, though for irregularity: *Re New Callao Co.*, 22 Ch. Div. 484.

Postponement of an appeal set down will not be granted as of course because all parties agree: *Bird v. Andrew*, W. N. (87) 181.

#### EVIDENCE ON APPEAL.

By O. LVIII. 11, the evidence taken in the Court below bearing on any question of fact involved in an appeal, is to be brought before the Court of Appeal, as to printed affidavits, by the production of printed copies, as to affidavits not printed, by the production of office copies, and as to oral evidence, by production of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

By r. 12, where evidence has not been printed in the Court below, the Court, or a Judge below, or the Court or a Judge of Appeal, may order the whole, or any part of it, to be printed, for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order is to bear the costs of it, unless the Court or a Judge of Appeal shall otherwise order.

Costs of shorthand notes of the judgment of the Court below are allowed by the Court of Appeal in every case, and are only referred to in the order when disallowed: *Re Medland, Eland v. M.*, 41 Ch. Div. 476; *Humphrey v. Sumner*, W. N. (86) 182; 55 L. T. N.S. 649; *Ashworth v. Outram*, 9 Ch. Div. 483; *The Swallow*, 36 L. T. N.S. 231; and on deciding the construction of a will, the Court, not being furnished with any information as to the reasons given by the Judge in the Court below, declined to make any

order as to the costs of the appeal: *Re M'Connell, Saunders v. M.*, 29 Ch. Div. 76.

But costs of shorthand notes of evidence in the Court below are not allowed, except in very special cases: *Kelly v. Byles*, 13 Ch. Div. 682; *Glazier v. Rolls*, 38 W. R. 116; 58 L. J. Ch. 820; 62 L. T. N.S. 305; and application for such allowance should be made at the hearing, and a special direction inserted in the order: *Earl de la Warr v. Miles*, 19 Ch. Div. 80; *Glazier v. Rolls, sup.*; *Ashworth v. Outram*, 9 Ch. Div. 483.

Shorthand notes of evidence have been allowed in solr and client taxation, as extra costs on appeal: *Re Nation, N. v. Hamilton*, 57 L. T. N.S. 648; and see *Bidder v. Bridges*, W. N. (87) 208.

A shorthand note of evidence taken by a clerk to the solr of one of the parties cannot be used: *Ellington v. Clark*, 38 Ch. Div. 332.

The costs of transcribing and printing, but not of taking the notes, were allowed by the Court of Appeal: *Bigsby v. Dickinson*, 4 Ch. Div. 24, 32.

In ordinary cases the Judge's notes, supplemented by those of counsel, are sufficient for the use of the Court of Appeal: *Walker's Case*, C. A., 16 Dec. 1878, Reg. Min. fo. 233; *Krehl v. Burrell*, C. A., 21 Mar. 1879, Reg. Min. fo. 263; *Earl De la Warr v. Miles, sup.*; and see *Re Gee, Laming v. G.*, 28 W. R. 217.

As to the duty of the appellant to procure such notes, see *Ellington v. Clark*, 38 Ch. Div. 332; and see *Lumb v. Teal*, 22 Q. B. D. 675.

As to the power of the Court of Appeal to admit any evidence which has been improperly rejected, see *Dollman v. Jones*, 12 Ch. Div. 553.

By r. 13, on any question as to a Judge's ruling or direction to a jury or assessors, the Court of Appeal is to have regard to verified notes, or other evidence, and to such other materials as the Court may deem expedient.

By r. 4, the Court of Appeal has full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision appealed from. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) is to be admitted on special grounds only, and not without special leave of the Court.

Further evidence means any evidence whatever not used at the hearing in the Court below: *Re Chennell, Jones v. Chennell*, 8 Ch. Div. 492, 505.

Special grounds for admitting evidence on appeals are afforded by the rejection of the evidence in the Court below on purely technical grounds: *Re Chennell, sup.*; or where the judgment of the Court below is founded on mistake, misapprehension, or surprise: *Bigsby v. Dickinson*, 4 Ch. Div. 24.

But such further evidence is not by any means to be admitted without strong reason: *Re Chennell, sup.*; and see *Sanders v. S.*, 19 Ch. Div. 373; *Pooley's Trustee v. Whetham*, 28 Ch. Div. 38; *Evans v. Benyon*, 37 Ch. Div. 345; and will not be admitted where there has been no surprise, and the evidence has not been discovered since the hearing: *Exp. Carnforth Co.*, 4 Ch. Div. 115; *Weston's Case*, 10 Ch. Div. 579.

Where the proposed further evidence is documentary, the proper course is to give notice to the other side that the Court will be moved at the hearing of the appeal to give special leave to adduce further evidence: *Hastie v. II.*, 1 Ch. Div. 562; *Justice v. Mersey Co.*, 24 W. R. 199; and see *Re Chennell, sup.*; but where it is proposed to examine fresh witnesses, the application for leave must be by motion before the hearing: *Dicks v. Brooks*, 13 Ch. Div. 652.

Where it was proposed to adduce affidavit evidence which the witness declined to swear, the Court gave leave on motion to serve him with a subpoena to attend at the hearing of the appeal without prejudice to any question as to the admissibility of the evidence, and intimated that the applicant must explain why it was not sooner adduced: *Gover's Case*, 24 W. R. 36.

The words "judgment after trial or hearing of the cause or matter upon the merits," appear to include not only final judgments, but also inter-

locutory judgments, as distinct from interlocutory orders: *v. sup.* p. 730; and that applications for such judgments are not within O. XXXVIII. 3, as to evidence on information and belief, see *Gilbert v. Endeau*, 9 Ch. Div. 259.

An order on summons by a creditor in an admon action is final as regards reception of further evidence: *Re Compton, Norton v. C.*, 27 Ch. Div. 392; *secus*, a refusal by the Judge to order sequestration against Deft co. for breach of injunction: *Spencer v. Ancoats Vale Rubber Co.*, 58 L. T. N.S. 363.

And where at the trial witnesses have been examined orally, further affidavit evidence by them will not, in general, be admitted on appeal: *Taylor v. Grange*, 15 Ch. Div. 165.

A respondent who objects to a further affidavit being used on appeal should not file affidavits in reply, but wait till the hearing and then apply for time: *Mitchell v. Condry*, W. N. (81) 83.

Whether the rule applies where the party seeking to adduce further evidence adduced none in the Court below, *quære*: *Arnison v. Smith*, 41 Ch. Div. 98.

If a note of oral evidence has been lost, the Court may allow the evidence to be re-taken: *Exp. Firth, Re Cowburn*, 19 Ch. Div. 419.

For case in which further evidence was adduced by consent, and the hearing of the appeal treated as the trial of the action, see *Harris v. De Pinna*, 33 Ch. Div. 255.

#### POWERS OF THE COURT OF APPEAL.

By O. LVIII. 4, the Court of Appeal is to have all the powers and duties, as to amendment and otherwise, of the Court of first instance, and is to have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require—including (r. 5) the power of setting aside the verdict and judgment, and directing a new trial on the hearing of an appeal from a judgment on the verdict or finding of a jury, or of a Judge without a jury, varying the practice as stated in *Yetts v. Foster*, 3 C. P. Div. 437; *Etty v. Wilson*, 3 Ex. Div. 359; *Davies v. Felix*, 4 Ex. Div. 32).—and may exercise these powers notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, or in favour of all or any of the respondents or parties, although they may not have appealed from or complained of the decision.

Although the Court has the full powers of the Court below as to amendment, they will not be exercised so as to allow an appellant to raise upon appeal a case totally inconsistent with his original case: *Exp. Reddish*, 5 Ch. Div. 883; *Cropper v. Smith*, 26 Ch. Div. 700; *Hipgrave v. Case*, 28 Ch. Div. 356, 361; or a point not taken in the Court below, and as to which contradictory evidence might have been adduced: *Exp. Firth, Re Cowburn*, 19 Ch. Div. 419; and see *The Tasmania*, 15 App. Cas. 223, 225; nor where some of numerous Plts were unavoidably absent at the trial, but it did not appear why they did not instruct their solr to give such evidence as he could, or as would enable him to apply for adjournment: *Arnison v. Smith*, 41 Ch. Div. 98; and after judgment on appeal the Court refused leave to amend so as to give relief against third parties, which had not been asked for at the trial: *Edison and Swan, &c. Co. v. Holland*, 41 Ch. Div. 28; and *quære* whether the Court of Appeal has jurisdiction to give judgment for an injunction and damages against third parties as if they were Defts: *S. C.*

Where an application at the trial for leave to amend pleadings is refused, the Court of Appeal has power to give leave to amend: *Laird v. Briggs*, 16 Ch. Div. 663.

Liberty to amend after the time for appealing had long expired was granted under special circumstances on special terms: *Kurtz v. Spence*, 36 Ch. Div. 770.

Where a jury found issues in favour of the Plt, for whom a general verdict was given, and judgment was afterwards given for the Deft, the Court of Appeal, on affirming the judgment, amended the record by entering the verdict for the Plt on the issues only: *Clack v. Wood*, 9 Q. B. Div. 276.

As to rectification of accidental slip, whereby evidence really before the

Court on the hearing of the appeal was omitted from the order, see *Exp. Banco de Portugal, Re Hooper*, 14 Ch. Div. 1.

The Court will not readily allow an appellant whose notice of appeal affects part of an order only, to ask that the whole may be discharged; and in cases where such an application is allowed, the omission to give a proper notice in the first instance will usually be a ground for a special order as to costs: *per James, L. J.*, in *Cracknall v. Janson*, 4 March. 1879.

Under this rule a respondent served by direction of the Court of Appeal was held entitled to ask at the hearing of the appeal to have the decree varied in his favour: *Hunter v. H.*, 24 W. R. 527.

#### CROSS APPEALS.

By O. LVIII. 6, a respondent need not give notice of motion by way of cross appeal, but if he intends upon the hearing of an appeal to contend that the decision of the Court below be varied, he is to give notice (which is, subject to special order, to be an eight days' notice in the case of an appeal from a final judgment, and a two days' notice in the case of an appeal from an interlocutory order: r. 7) of his intention to any parties who may be affected by his contention. The omission to give such notice is not to diminish the powers conferred by the Jud. Acts upon the Court of Appeal, but may, in the discretion of the Court, be a ground for an adjournment of the appeal, or for a special order as to costs.

A notice by a respondent under r. 6 need not be given within the time limited by r. 15: *Exp. Bishop, Re Fox, Walker & Co.*, 15 Ch. Div. 400.

A respondent seeking a variation of the order on a point in which the appellant has no interest, must give a separate notice of appeal: *Re Carander's Trusts*, 16 Ch. Div. 270.

A respondent may give notice under r. 6 to a co-respondent: *Exp. Payne, Re Cross*, 11 Ch. Div. 539.

Where an appellant withdraws his appeal, a respondent who has given such notice is entitled to elect whether he will continue or withdraw his cross appeal: *The Beeswing*, 10 P. Div. 18; if he continues, the appellant may give a notice renewing his original contention: *S. C.*

#### COSTS OF APPEAL.

By O. LVIII. 5, the Court of Appeal shall have power to make such order as to the whole or any part of the costs of an appeal as may seem just.

By the Judge's memorandum, 1 Ch. D. 41, the rule of the Court of Chancery that a successful appellant is not entitled to costs, is no longer to be acted upon; and in all cases of appeals commenced under the new practice, the successful appellant is to be entitled to costs, unless in the particular case the Court shall otherwise direct.

This rule is one of general application: *The Batavier*, 15 P. Div. 37; *Olivant v. Wright*, 45 L. J. Ch. 1; and includes salvage cases: *The City of Berlin*, 2 P. D. 187; and has been adopted in the case of appeals to the Chief Judge in bankruptcy: *Exp. Masters*, 1 Ch. D. 113.

But the Court has a discretion (see O. LXV. 1; Jud. Act, 1890, s. 5), and a successful appellant may be refused costs where he fails to prove allegations of fraud: *Exp. Cooper*, 10 Ch. Div. 313; or succeeds on a point not raised in the Court below: *Hussey v. Payne*, 8 Ch. Div. 670; *Chard v. Jervis*, 9 Q. B. Div. 178; *Dye v. D.*, 13 Q. B. Div. 147; or one point only out of many: *Elliot v. Lord Rokeby*, 7 App. Cas. 43; or on fresh evidence: *Exp. Hauxwell*, 23 Ch. Div. 643; *Arnot's Case*, 36 Ch. Div. 702; and respondents whose conduct had justified the appeal were refused costs: *Paterson v. Provost of St. Andrews*, 6 App. Ca. 833 (Sc.); and a respondent who, having a preliminary objection, knowingly allows appellant to incur costs in preparing for an appeal, may be deprived of his costs: *Re Blyth and Young*, 13 Ch. Div. 416; *Re Speight, Exp. Brooks*, 13 Q. B. D. 42; but see *Exp. Stead, Re Mundy*, 15 Q. B. Div. 331.

An order as to costs was refused where the Court was not furnished with information as to the reasons of the Judge below: *Re McConnell, Saunders v. M.*, 29 Ch. Div. 76.

Where a trustee in bankruptcy adopts the action and abandons an appeal, it will be dismissed with costs: *Borneman v. Wilson*, 28 Ch. Div. 53.

Where two Defts appealed jointly and one succeeded, both appellants were allowed their costs of appeal, a cross appeal having failed, and the costs not having been increased by the joint appeal: *Graham v. Campbell*, 7 Ch. Div. 490, 495.

And a wife, party to an appeal in respect of her separate estate, was entitled to her costs though joined with her husband in the appeal, in a case where the husband was bankrupt: *Kevan v. Crawford*, 6 Ch. Div. 29; but see *Wright v. Chard*, 4 Drew. 702.

Cost of an unsuccessful appeal out of a fund in Court will only be allowed under very special circumstances: *Re Barlow*, *Barton v. Spencer*, 36 Ch. D. 387.

Where an appeal has been abandoned, it will be dismissed with costs though not set down: *Charlton v. C.*, 16 Ch. Div. 273; but before application for costs of an abandoned appeal is made, there should be a previous demand for payment of them: *Griffin v. Allen*, 11 Ch. Div. 913.

An abandoned appeal will not be dismissed with costs on the *ex parte* application of the appellant: *Ormerod v. Bleasdale*, 54 L. T. N.S. 343.

Where an appeal is dismissed on the objection of the respondent that the notice of appeal is too late, the appellant will not be made to pay costs of his affidavits filed after the appeal was set down: *Exp. Fardon's Vinegar Co.*, *Re Jones*, 14 Ch. Div. 285.

Where an appeal is simply dismissed after a cross appeal by the respondent, the costs occasioned by the cross appeal are to be deducted: *The Lauretta*, 4 P. Div. 25.

Where one of two respondents gave a cross notice affecting his co-respondent, the appeal failing and cross appeal succeeding, costs were apportioned: *Harrison v. Cornwall Minerals Ry. Co.*, 18 Ch. Div. 334; but where the costs have not been materially increased by the cross appeal, there will be no apportionment: *Robinson v. Drakes*, 23 Ch. Div. 98.

Third parties, who in reality fought the Plts and failed, were ordered, together with the Defts, to pay the costs both of appeal and in Court below: *Edison and Swan, &c. Co. v. Holland*, 41 Ch. Div. 28.

The common law practice to have only one taxation in an action does not apply where costs are given to a party on appeal, and if there is no direction postponing taxation and payment, the party is entitled to taxation and payment forthwith: *Phillips v. P.*, 5 Q. B. Div. 60.

#### 8. Security for Costs by Deposit—O. LVIII. 15.

UPON motion this day made &c.; This Court doth order that the Plt H. do lodge the sum of £— in Court to the credit of this action [or matter] &c., "Security for the costs of the Plt's appeal," as directed in the schedule hereto to answer costs in case any shall be awarded to be paid by the Plt on his appeal against the order dated &c.; And it is ordered that in the meantime, and until such lodgment is made, and notice thereof given to the solr of the Dft, all proceedings in this appeal be stayed.—[Add Lodgment Schedule, Form 1.]—See *Re Ivory*, *Hankin v. Turner*, C. A., 2 Nov. 1878, A. 3243; 10 Ch. D. 372; and see Form 11, *inf.*

It is not the practice to fix a time in the order, but if the security is not given within a reasonable time an immediate order of dismissal is made: see *Washburn and Moen Manufacturing Co. v. Patterson*, 29 Ch. Div. 48; *Polini v. Gray*, 11 Ch. Div. 741.

#### 9. The Like, by Bond, with Option to deposit a Sum in Court.

UPON motion this day made &c., And upon reading &c., This Court doth order that the Plt J. do procure some sufficient person in his



behalf to give security, according to the course of this Court, by bond to the appellant, in the penal sum of £—, conditioned to answer any costs occasioned by the Plt's appeal against the judgment &c., in case any costs shall be awarded to be paid by the Plt; And it is ordered that in lieu of such security the Plt J. be at liberty to lodge the sum of £— in Court to the credit of &c., "Security for the costs of the Plt's appeal" as directed in the schedule hereto; And the Plt's appeal is not to be placed in the paper for hearing until — days after such security has been given, and notice thereof given to the Defts; [or And in the meantime all proceedings in this appeal are to be stayed;] And the costs of the Plts and Defts of this application are to be included in the costs of the appeal.—[Add Lodgment Schedule, Form 1.]—See *Judd v. Green*, C. A., 25 April, 1876, A. 1017; S. C., 4 Ch. Div. 784; *Nantyglo and Blaina Ironworks Co. v. Grave*, C. A., 22 May, 1878, B. 1524.

For like order, see *Phosphate Sewage Co. v. Hartmont*, C. A., 31 May, 1876, B. 1700; 2 Ch. Div. 811.

For order directing a Plt to pay to the Deft his costs of an abandoned appeal, and to give security by bond for the costs of a fresh appeal in the same action, and staying the prosecution of the appeal in the meantime, see *Waddell v. Blockey*, C. A., 18 Dec. 1878, B. 2273; 10 Ch. Div. 416.

#### 10. *Appeal dismissed for want of Prosecution in Default of Security.*

WHEREAS by an order dated &c., it was ordered that &c. (*Recite order in Form 9, sup., verbatim*); Now upon motion this day made unto this Court by counsel for the Deft, who alleged that the Plt hath not lodged the said sum of £— in Court as directed by the said order, and therefore prayed that the appeal of the Plt might be dismissed with costs; And no one appearing for the Plt [or And upon hearing &c.]; And upon reading &c. [*if so*, and an affidavit of &c., filed &c., of service of notice of this motion on the Plt]; This Court doth order that the said appeal of the Plt do stand dismissed; And it is ordered that the Plt H. do pay to the Deft T. his costs occasioned by the Plt's notice of appeal, including the costs of the said order dated the 2nd day of November, 1878, and of this application, such costs to be taxed by the Taxing Master.—See *Re Ivory, Hankin v. Turner*, C. A., 27 Nov. 1878, A. 2075; 10 Ch. Div. 377.

For like order, see *Judd v. Green*, C. A., 2 Feb. 1877, A. 234; 4 Ch. Div. 784; and see *Harris v. Fleming*, 30 W. R. 555; *Polini v. Gray*, 11 Ch. Div. 741.

#### SECURITY FOR COSTS OF APPEAL.

By O. LVIII. 15, such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

In all cases where the Court of Appeal directs security for costs to the

11. *Stay of Execution pending an Appeal on Payment into Court—*  
O. LVIII. 16.

UPON the application &c., And the Applicant A. by his solr undertaking to lodge in Court the sum of £—, it is ordered that the said A. do on or before &c., lodge in Court to the credit of &c., the said sum of £—, as directed in the schedule hereto; And it is ordered that upon such lodgment in Court being made, no proceedings be taken to enforce the order dated &c., as to the said sum of £— pending the appeal of the said A.—[Add Lodgment Schedule, Form 1.]

12. *Stay of Execution for Costs on payment into Court, after refusal of the Application in the Court below.*

UPON motion this day made &c., This Court doth order that the Deft C. do within (twenty-one days) after the Taxing Master shall have made his certificate pursuant to the judgment dated &c., lodge the amount of the costs thereby directed to be taxed, including the costs of the Deft H., in Court to the credit of this cause &c., to an account to be entitled, "The taxed costs of the Plt and the Deft H.," as directed in the schedule hereto, instead of paying the same as directed by the said judgment; And it is ordered that upon such lodgment being made, all proceedings under the said judgment to enforce payment of such costs be stayed until after the appeal of the said Deft C. from the said judgment has been disposed of.—Deft to pay to the next friend of the Plt the Plt's costs of the application, to be taxed &c.—[Add Lodgment Schedule, Form 1.]—See *Cooper v. C.*, C. A., 12 April, 1876, A. 1049; 2 Ch. Div. 492.

13. *Appeal to the House of Lords—Stay of Execution for Costs refused on Personal Undertaking of Solicitor to refund.*

UPON motion this day made &c., And upon hearing &c., And N., of the firm of B. & Co., the solr for the Defts other than the W. & R. Ry. Co., personally undertaking, in the event of the order dated &c., being reversed on appeal to the House of Lords, to abide by any order which this Court may make as to their refunding to the Plts the costs by the said order directed to be paid to them by the Plts, This Court doth not think fit to make any order on this motion, but doth order that the Plts B. &c., pay to the Defts E. &c., their costs of this application, to be taxed by the Taxing Master.—See *Beattie v. Lord Ebury*, L.JJ., 24 Feb. 1873, A. 442; 28 L. T. N.S. 458.

For order on like motion that the Deft should pay into Court a sum certified to be due in respect of the Plt's liability in respect of — shares in the G. Co., and that the same should be invested in Cons. £3 p. c. Anns, and the dividends as they accrued invested in like anns; and that all further proceedings under the order appealed from should be stayed until after the hearing of the petition of appeal to be presented to the House of Lords pursuant to a notice served by the Deft on the Plt, and that the Deft should

pay the costs of the application, see *Merry v. Nickalls*, L. C. and L. JJ., 29 Jan. 1873, B. 334; 8 Ch. 205.

And for subsequent order on summons, after dismissal of the appeal by the House of Lords, directing the stock and accumulations to be sold, and the proceeds paid to the Plt or his nominee, see *S. C.*, V.-C. B., at Chambers, 5 Aug. 1875, B. 2013.

#### STAY OF PROCEEDINGS PENDING APPEAL GENERALLY.

Applications to stay proceedings on appeal must be founded on two points, which are essential; first, that a serious injury will result to the party applying if the application is not granted; secondly, that he has come promptly to make it: *Nawab Khan v. Rajah Oojoodhyaram Khan*, L. R. 1 P. C. 8, 12.

The principles on which such applications will be granted vary according to the nature of the proceedings to be stayed, but as a general rule the Court will stay all such proceedings as would render a successful appeal nugatory: *Wilson v. Church*, 12 Ch. Div. 454; *Polini v. Gray*, 12 Ch. Div. 438.

*Stay of Execution for Costs.*—Where the order appealed from directs the appellant to pay costs, the costs must be paid according to the order, on the personal undertaking of the respondent's solr to refund if the appeal is successful: *Grant v. Banque Franco-Egyptienne*, 3 C. P. Div. 202; *Morgan v. Elford*, 4 Ch. Div. 352; *Merry v. Nickalls*, 8 Ch. 205; *Beattie v. Lord Ebury*, 28 L. T. N.S. 458, Form 13, *sup.*; *Gibbs v. Daniel*, 4 Giff. 41, n.; *Polini v. Gray*, 28 W. R. 360.

Under special circumstances, *e.g.*, where the respondents are resident abroad, so that the solr would be the only person liable to refund, his personal undertaking has been held insufficient without satisfactory security: *Burdick v. Garrick*, 5 Ch. 453.

If the undertaking is not given, or the security is not found, execution will be stayed on payment of the amount into Court: see *Cooper v. C.*, 2 Ch. D. 492, Form 12, *sup.*; *Burdick v. Garrick*, 5 Ch. 453, 455; and if the undertaking is refused, it is not of course to stay proceedings as to costs: *A. G. v. Emerson*, 24 Q. B. Div. 56.

And payment of costs will not be stayed with a view to a possible set-off as the result of pending proceedings in the same action: *Grant v. Banque Franco-Egyptienne*, 3 C. P. Div. 202; or after an order of the Court of Appeal has given the opposite party a present right to receive costs: *Automatic Weighing Co. v. Combined, &c. Weighing Co.*, 58 L. J. Ch. 647; 61 L. T. N.S. 536; 37 W. R. 636.

The application of these rules is not affected by a possibility of future costs becoming payable by the respondent to the appellant at some subsequent stage of the case: *Grant v. Banque Franco-Egyptienne*, 3 C. P. Div. 202.

An application for a stay, unless made immediately after judgment, must be supported by an affidavit showing special circumstances: *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471.

*Stay of Execution for payment of Money.*—The practice in error, or on appeal, as between the Court of Appeal and the House of Lords, remains unaffected by the Jud. Acts and Rules: *Justice v. Mersey, &c. Co.*, 1 C. P. D. 576.

Therefore, in the case of an action pending in the Q. B. Division, a stay of execution, pending an appeal to the House of Lords, is, on bail being given under the C. L. P. Act, 1852 (15 & 16 V. c. 76), s. 151, a matter of right: *S. C.*

In the case of an action pending in the Chancery Division, the converse practice on appeal from the Court of Chancery is still in force, whether the appeal be to the Court of Appeal or to the House of Lords: *Cooper v. C.*, 2 Ch. Div. 492, Form 12, *sup.*; *Morgan v. Elford*, 4 Ch. Div. 352. The amount is to be paid to the respondent on his giving security to refund in case of the success of the appeal, or in default of security execution will be stayed on payment of the amount into Court: *Merry v. Nickalls*, 8 Ch. 205; *Burdick v. Garrick*, 5 Ch. 453; *Barrs v. Fewkes*, 1 Eq. 392; *Topham v. D. of Portland*, 1 D. J. & S. 603; *Mackintosh v. G. W. Ry. Co.*, 13 W. R. 1029;

*Mayor, &c. of Gloucester v. Wood*, 1 Ph. 493; 3 Ha. 150; *Touche v. Metn. Ry. Warehouse Co.*, 40 L. J. Ch. 496; *O'Reilly v. Walsh*, I. R. 7 Eq. 253.

But where an amount ordered to be paid by a judgment had been paid into Court pending an appeal, and on appeal the judgment was reversed, the fund was not retained in Court pending an appeal to the House of Lords against the order reversing the judgment: *Atherton v. British Nation Co.*, 5 Ch. 720.

*Stay of Proceedings in Chambers.*—Generally speaking the Court never stays the taking of an account, and does not direct security for the result of an account, either on appeals to the Court of Appeal, or to the House of Lords: *Gwynn v. Lethbridge*, 14 Ves. 506; *Nerot v. Burnand*, 2 Russ. 55, 58; *Murray v. Clayton*, 15 Eq. 117, 121; unless irreparable injury would be caused, as by disclosing the names of customers: *Adair v. Young*, 11 Ch. Div. 136.

But a sale will be suspended: *Rowley v. Adams*, 9 Beav. 348; *Nerot v. Burnand*, 2 Russ. 55, 58; Dan. 1278.

Distribution of a fund in Court, or payment of a fund out of Court, will not be stayed, pending appeal in the absence of special circumstances: *Bradford v. Young, Re Falconar's Trusts*, 28 Ch. Div. 23; but the persons to receive the money must, if required, give security to restore it if the order is reversed, and in default of such security the money will be retained in Court: *Lord v. Colvin*, 1 Dr. & Sm. 475; *Swift v. Grazebrook*, 3 Mac. & G. 6; *Way v. Foy*, 18 Ves. 452; *Waldo v. Cayley*, 16 Ves. 213; *Bourne v. Buckton*, 35 L. J. Ch. 851.

A sale of consols in Court was stayed on the undertaking of the appellant, in case his appeal was unsuccessful, to make good the difference between the income actually produced and interest at £4 p. c.; and to pay the costs of the sale and re-investment: *Brewer v. Yorke*, 20 Ch. Div. 669; and where a Plt to whom a fund had been ordered to be paid out had been abroad for two years, and his address was not known, the fund was retained in Court on the applicants giving a similar undertaking: *Bradford v. Young, sup.*

Where the order appealed from is for leave to do an act, *e.g.*, for a trustee in bankruptcy to disclaim a lease, application for a stay of proceedings must be made immediately, as after the act is done there can be no withdrawal of the leave: *Exp. Sadler, Re Hawes*, 19 Ch. Div. 122.

*Suspension of Injunctions and other Orders.*—In these cases the usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury (not mere inconvenience or annoyance), as by destroying the goodwill of a business: *Walford v. W.*, 3 Ch. 812; *Story v. Lord Lennox*, 1 My. & Cr. 685; and see *Flower v. Lloyd*, W. N. (77) 81; *Hyam v. Terry*, 29 W. R. 32.

The same principle applies in the case of dissolving or postponing injunctions: *Walburn v. Ingilby*, 1 My. & K. 84; *Penn v. Bibby*, 3 Eq. 308.

A decree for specific performance will be enforced with the exception of the directions to execute the conveyance: *Gwynn v. Lethbridge*, 14 Ves. 185; or if the conveyance is to be executed, notice of the pending appeal will be indorsed on the deed: *Wilson v. West Hartlepool Co.*, 34 Beav. 414; and for a case in which the execution of the decree was suspended, see *Price v. Salisbury*, 11 W. R. 1014; and see Dan. 1278.

An order for specific delivery of chattels will be enforced, pending an appeal, on the undertaking of the respondent to restore them if the order should be reversed: *Harrington v. H.*, 3 Ch. 575, 576.

On the question when discovery or production of documents under the practice of the Court of Chancery would be stayed, see *Walburn v. Ingilby*, 1 My. & K. 84; Dan. 1278; *Drake v. D.*, 3 Ha. 528.

#### STAY OF PROCEEDINGS PENDING APPEALS TO THE COURT OF APPEAL.

By O. LVIII. 16, an appeal is not to operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court or a Judge below or the Court of Appeal may order; and no intermediate act or proceeding is to be invalidated except so far as the Court appealed from may direct.

Applications for a stay of proceedings under the rule are to be made, in

the first instance, to the Court below: *A. G. v. Swansea Co.*, 9 Ch. Div. 46; *Goddard v. Thompson*, 47 L. J. Q. B. 382; 26 W. R. 362; by summons or motion on notice: see Form 11, *sup.* p. 742; *Rep. of Peru v. Weguelin*, 24 W. R. 297; even though the action has been dismissed, if the application is for stay of proceedings under the order of dismissal, *e.g.*, for payment of costs: *Otto v. Lindford*, 18 Ch. Div. 394; but an application which the Court below, having dismissed the action, cannot grant, as for an injunction to restrain interim dealings with property, will be entertained by the Court of Appeal: *Wilson v. Church*, 11 Ch. Div. 576; 12 Ch. Div. 454; *Polini v. Gray*, 12 Ch. Div. 438.

If this application is refused in the Court below it may be renewed by motion in the Court of Appeal; and in such cases the practice and the form of the order is the same as on original motions, though the jurisdiction of the Court is properly appellate: *Cooper v. C.*, 2 Ch. Div. 492, Form 12, *sup.* p. 742; *A. G. v. Swansea Co.*, 9 Ch. Div. 46.

The application must be supported by special circumstances where a stay has been refused by the Judge at the trial: *Monk v. Bartram*, (1891) 1 Q. B. (C. A.) 346.

The rule gives full discretion to the Court against whose decision an appeal is pending to refuse a stay of proceedings: *A. G. v. Emerson*, 24 Q. B. Div. 56. The jurisdiction under the rule is concurrent, and an application to the Court of Appeal for a stay refused by the Court below is an original application to be brought within a reasonable time, but not necessarily within twenty-one days from the refusal: *Cropper v. Smith*, 24 Ch. Div. 305.

A master has jurisdiction to stay execution on a judgment pending an appeal to the Court of Appeal: *Oppert v. Beaumont*, 18 Q. B. Div. 435.

The Court of Appeal will not grant a stay of proceedings on reversing an order refusing a rule for a new trial, in which case the stay of proceedings should be obtained on summons in Chambers from the Judge of the Court below: *Goddard v. Thompson*, 26 W. R. 362; 47 L. J. Q. B. 382.

The costs of such an application are, as a rule, to be paid by the applicant: *Cooper v. C.*, *sup.*; but the Court has a discretion: *Adair v. Young*, 11 Ch. Div. 136, 139; and the costs may be made costs in the appeal or action.

A similar rule was followed under the practice before the Jud. Acts: *Richardson v. Bank of England*, 1 Beav. 153; *Topham v. D. of Portland*, 1 D. J. & S. 603; *Merry v. Nickalls*, 8 Ch. 205; but not invariably: *E. Shrewsbury v. Trappes*, 2 D. F. & J. 172; *Walford v. W.*, 3 Ch. 812; *Burdick v. Garrick*, 5 Ch. 453.

#### STAY OF PROCEEDINGS PENDING APPEALS TO THE HOUSE OF LORDS.

The mode of application for a stay of proceedings pending an appeal to the House of Lords is, in the case of a stay on bail in error under the C. L. P. Act, 1852 (15 & 16 V. c. 76), s. 151, by summons in Chambers: *Justice v. Mersey, &c. Co.*, 1 C. P. Div. 575.

In the case of stay of execution for costs the application is to be made by motion to the Court of Appeal: *Grant v. Banque Franco-Egyptienne*, 3 C. P. Div. 202; *Morgan v. Elford*, 4 Ch. Div. 388; *Gibbs v. Daniel*, 4 Giff. 41, n.

In the case of stay of execution or of proceedings under any order on appeal from the Chancery Division, the application is to be made by motion to the Court of Appeal: *Merry v. Nickalls*, 8 Ch. 205; *Burdick v. Garrick*, 5 Ch. 453; *Walford v. W.*, 3 Ch. 812; *Harrington v. H.*, 3 Ch. 575; *Topham v. D. of Portland*, 1 D. J. & S. 603; *Mackintosh v. G. W. R. Co.*, 13 W. R. 1029; *The Khedive*, 28 W. R. 364; *Hamill v. Lilley*, 19 Q. B. Div. 83.

For cases in which similar motions were made to a Court of first instance, see *Price v. Salusbury*, 11 W. R. 1014; *Rowley v. Adams*, 9 Beav. 348.

The appeal must be actually pending, or the applicants must give an undertaking to present an appeal within a limited time: *Grant v. Banque Franco-Egyptienne*, 3 C. P. Div. 202.

The appeal must include the order under which the proceedings to be stayed are being carried on: *Rowley v. Adams*, 9 Beav. 348.

If the application is refused, it seems that it may be renewed to the House of Lords, and that the House will in that case exercise its jurisdiction to order a stay of proceedings until the appeal is heard: see *Gwynne v. Lethbridge*, 14 Ves. 585, 586; *Denison & Scott*, pp. 77, 78.



Where the order appealed from dismisses an action, and it is sought to preserve the benefit of the relief sought by the action, not merely to stay execution for the costs of action pending the appeal, the order must be drawn up so as to maintain the jurisdiction of the Court for this purpose, notwithstanding the termination of the action by dismissal: *Galloway v. Mayor, &c. of London* (No. 2), 3 D. J. & S. 59; *Oddie v. Woodford*, 3 My. & Cr. 625; this may now be done by the Court of Appeal under Jud. Act, 1873, s. 25 (8), and O. LII. 3, on an application, made before the order of dismissal is passed and entered, to frame the order accordingly: *Polini v. Gray*, C. A., 23 July, 1879; the decision in *Price v. Salusbury*, 11 W. R. 1014, not being followed.

In the absence of special circumstances, the applicant must pay the costs of the application, inasmuch as he asks for an indulgence: *Grant v. Banque Franco-Egyptienne*, 3 C. P. Div. 202, 205; *Merry v. Nickalls*, 8 Ch. 205; *Topham v. D. of Portland*, 1 D. J. & S. 603.

But there is a discretion in the Court to order, under special circumstances, the costs to abide the result of the appeal: *Burdick v. Garrick*, 5 Ch. 455; *Walford v. W.*, 3 Ch. 812, 815; 5 Ch. 455, n.; and see *E. Shrewsbury v. Trappes*, 2 D. F. & J. 172.

Where success on an appeal would be useless if *interim* protection were not given, an injunction will be granted or proceedings stayed: *Polini v. Gray*, 12 Ch. Div. 438; *Wilson v. Church*, 12 Ch. Div. 454; but the appellants will be put on terms to speed the appeal, and the Court will not interfere if the appeal appears to be not *bonâ fide*: *Wilson v. Church*, *sup.*

Trial of issues of fact will not be stayed pending appeal to the House of Lords on a question of law: *Re Palmer*, 22 Ch. Div. 88.

Execution for costs pending appeal to the House of Lords will not be stayed unless it is shown that the respondent would be unable to repay: *Barker v. Lavery*, 14 Q. B. Div. 769.

A stay of execution will not be granted to enable a party dissatisfied with the damages assessed by a jury to decide whether he shall appeal to the House of Lords: *Webber v. L. B. & S. C. Ry. Co.*, 51 L. J. Q. B. 154.

#### 14. *Order of the House of Lords made an Order of the Court.*

WHEREAS by an order, dated &c., made by the Rt. Hon. the Lords Spiritual and Temporal in Parliament assembled, after hearing counsel on the — day of — (and also on the — day of —), upon the petition and appeal of &c., from the order dated &c., made on the hearing of the appeal of the (Plt) in this action from the judgment &c., It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that &c. [*Recite order of the House of Lords*]; Now upon motion &c., by counsel for &c., and upon producing the said order of the House of Lords, This Court doth order, that the said order be made an order of this Court; [*If the order of the House directs accounts or inquiries, add*, And it is ordered, that the following accounts (and inquiries) be taken (and made) &c.; *And if costs are to be taxed here*, And it is ordered, that the costs of &c. be taxed by the Taxing Master, and be paid by &c., to &c.].—See *Man v. Ricketts*, V.-C. K. B., 22 May, 1849, B. 1553; 3 D. & S. 446; *affd.* L. C., 26 Feb. 1852, B. 556; *Blakemore v. L. & S. W. Ry. Co.*, V.-C. S., 5 Dec. 1870, A. 2955; *V. Holmesdale v. Sackville-West*, V.-C. J., 16 June, 1870, A. 1651.

If the order of the House of Lords reverses or varies the order appealed from, it should be made an order of the Court, so that the order appealed from may not remain as unrepealed on the records of the Court: see *L., alias H. v. H.*, L. R. 1 P. & M. 294.

And if anything is ordered to be done under the direction of the Court below, the order of the House must be made an order of Court before it can be carried into effect.

But where a judgment is simply affirmed, it is not necessary to make the order an order of the Court: *A. G. v. Scott*, 1 Vez. 419.

The order is to be obtained on motion as of course from the Court or the Judge where the action is pending, or to which or to whom it has been transferred: *Man v. Ricketts*, 3 D. & S. 446.

The motion may be *ex parte*: *Wentworth v. Lloyd*, 13 W. R. 146; *British Dynamite Co. v. Krebs*, 27 W. R. 575; 11 Ch. D. 448; on production of an office copy of an order of the House signed by the clerk of Parliament: but see *L., alias H. v. H.*, L. R. 1 P. & M. 293.

An order of the House annulling a bankruptcy may be made an order of the Court in its appellate jurisdiction in bankruptcy; and the successful appellant was allowed his costs of an application for this purpose: *Exp. Harding*, 14 W. R. 825.

Where the order of the House directs payment of costs, the order may be enforced by the House, if sitting: see *Denison & Scott*, 172; *Wentworth v. Lloyd*, 13 W. R. 146.

If the order has been made an order of Court, it may be enforced by the process of the Court: *Man v. Ricketts*, 3 D. & S. 446; *Wentworth v. Lloyd*, *sup.*

And an action may be brought on the order of the House for the costs awarded by it without making it an order of the Court: *Marbella Co. v. Allen*, 38 L. T. N.S. 815.

And where the costs are payable by an appellant who has entered into recognizances for payment of the respondent's costs, the recognizance may be estreated, and, notwithstanding the Debtors Act, 1869 (32 & 33 V. c. 62), the appellant may be imprisoned on process issued by the Q. B. Division: *Re Smith*, 2 Ex. D. 47.

Where no order as to the costs of the proceedings was made by the House, the Court below could not subsequently make any such order: *L., alias H. v. H.*, L. R. 1 P. & M. 293; and see *Gann v. Johnson*, L. R. 6 C. P. 461.

And the Court below has no jurisdiction to make any order as to interest upon the costs of an appeal to the House: *Lanc. & Yorks. Ry. Co. v. Gidlow*, L. R. 9 Ex. 35; 7 H. L. 517.

No appeal lies to the House of Lords from an order of the Court of Appeal refusing leave to appeal: *Lane v. Esdaile*, 64 L. T. N.S. 666.





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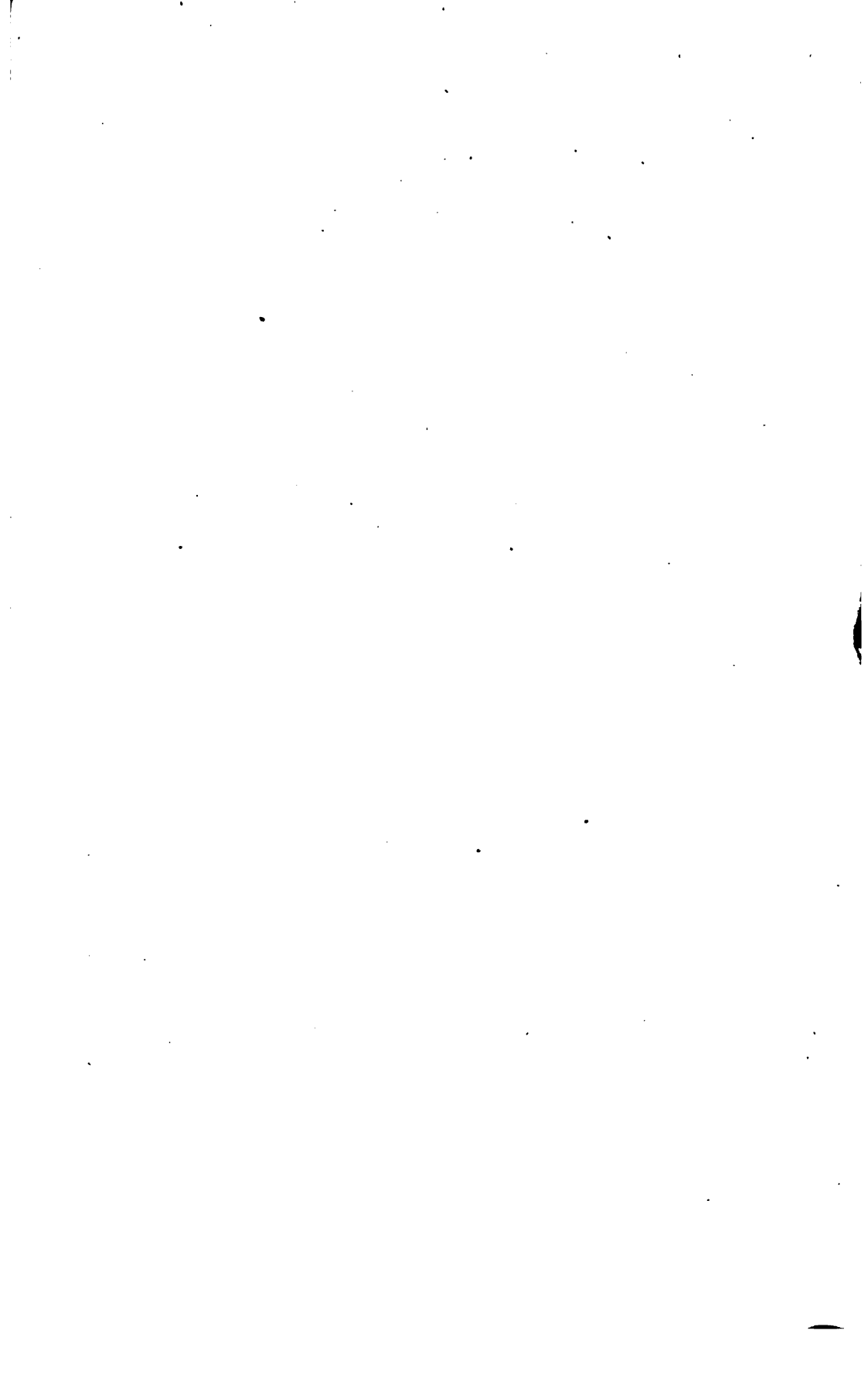
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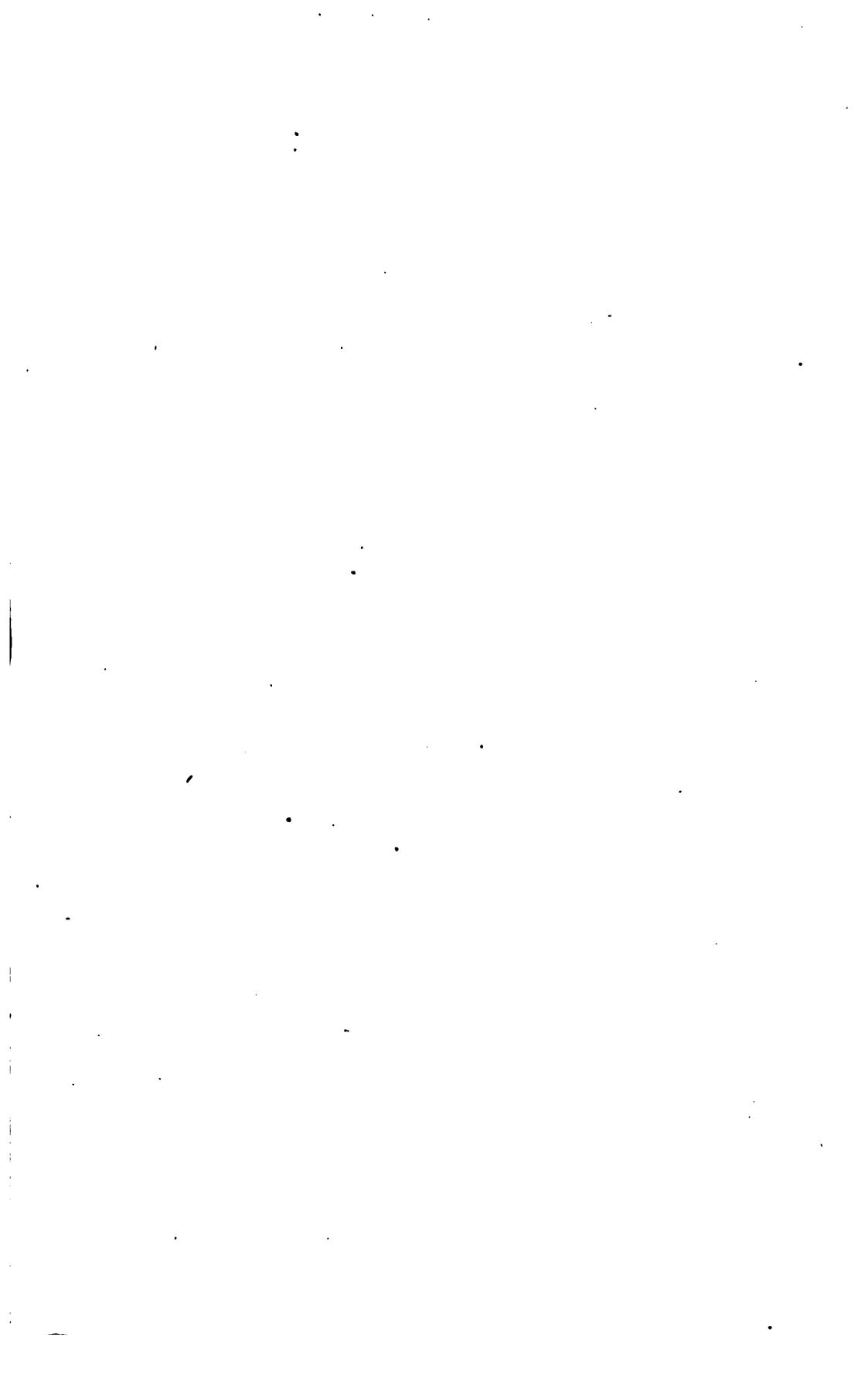
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